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The FCC's Proposed Forfeiture Against Telnyx Raises Serious Rule of Law Concerns

by

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I. Introduction and Summary

On February 4, the Federal Communications Commission issued a [Notice of Apparent Liability for Forfeiture](#) (NAL) of \$4.5 million against voice provider Telnyx after an admittedly bad actor called "MarioCop" made 1,800 illegal calls over a 17-hour period using Telnyx's one-way VoIP service. While there is no doubt now – after the fact – that MarioCop was engaged in deliberate malicious conduct, Telnyx itself should not be penalized for MarioCop's flagrant actions. Based on the circumstances of this case, the Commission's proposal to fine Telnyx for failure to satisfy the agency's "Effective Measures" rule for blocking illegal calls raises serious rule of law concerns implicating fundamental due process and fair notice constraints. This is because it appears Telnyx, and other providers for that matter, could not have known in advance the requirements of the rule Telnyx is charged with violating.

In a decision just issued on March 7, 2025, in [Gray Television, Inc. v. FCC](#), a case in which the Free State Foundation participated as an [amicus curiae](#) based on its long-standing concern regarding sometimes abusive FCC enforcement actions, the Court of Appeals for the Eleventh Circuit vacated a final forfeiture order against Gray Television. The Court's action was based on

lack of fair notice and due process concerns similar to those implicated by the proposed Telnix forfeiture. Indeed, the court's action offers an opportunity for the Commission, under new proven leadership, not only to reconsider the proposed Telnix forfeiture, but, more broadly, the need for rules that clearly state what is required of regulated parties before initiating enforcement actions.

If the NAL is not rescinded, the Commission's action would be an example of "regulation by enforcement," an abuse of power that occurs when an agency imposes new requirements on regulated entities in enforcement proceedings rather than establishing those requirements in generally applicable rulemakings with public participation. "Regulation by enforcement" deprives regulated entities of the ability to know and follow the law, so it is contrary to the requirement of fair notice and the prohibition of unfair surprise that are recognized in Supreme Court's Fifth Amendment Due Process Clause jurisprudence.

These due process concerns are at the core of President Trump's newly reinstated [Executive Order 13892](#) – "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication." The very first sentence reads: "Regulated parties must know in advance the rules by which the Federal Government will judge their actions." The EO goes on to declare that regulated entities should not be subjected to a civil administrative enforcement action or adjudication absent prior public notice of "the legal standards applicable to that conduct." Indeed, the EO directs that agencies "shall afford regulated parties the safeguards described in this order, *above and beyond* those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose."

Pursuant to the Commission's [Fourth Call Blocking Order](#) (2020), the "Effective Measures" rule incorporates "flexibility" by voice providers in preventing significant volumes of illegal calls – rather than rigid requirements and a demand for stopping all illegal calls. In its order, the Commission stated: "We make clear that we do not expect perfection; particularly clever bad actors may, for a time, evade detection" and "[i]f the voice service provider takes [contractual remedy or additional mitigation] steps and does not originate a significant amount of illegal traffic, it satisfies the rules we adopt today." In its other related orders, the Commission has expressly declined to require specific measures or certifications that a voice provider knows the true identity of all its customers to satisfy the rule.

If not rescinded, the NAL would significantly transform the "Effective Measures" rule by imposing more stringent yet unspecified requirements and a higher liability standard than that which the Commission previously established through notice-and-comment rulemakings. Under the NAL, the Commission seemingly would now require Telnix to know the true identity of all of its customers and to prevent all illegal calls – in other words, be subject to strict liability – or at least subject to the agency's power arbitrarily to impose strict liability on an *ad hoc* basis.

Arbitrariness is further shown by the Commission taking inconsistent positions by previously recognizing that bad actors may "for a time" evade detection without triggering a rule violation and subsequently finding an apparent violation in the NAL despite Telnix's fast action terminating both MarioCop's accounts within 17 hours and self-reporting MarioCop within 24 hours.

The NAL also raises due process concerns regarding agency impartiality, or the appearance of impartiality, because MarioCop's illegal prerecorded artificial calls, which impersonated a non-existent FCC anti-fraud unit, targeted Commission officials, their staffs, and families – making at least some FCC personnel "interested" parties in the proceeding. MarioCop's actions reportedly were enabled by an FCC-related data security breach that is not discussed in any detail in the NAL, but which should be disclosed as a matter of public transparency.

Moreover, the Commission likely is prohibited from issuing the fines proposed in the NAL under the Supreme Court's decision in *SEC v. Jarkesy* (2024). In *Jarkesy*, the Court held that the Securities and Exchange Commission (SEC) was barred from bringing an administrative enforcement action on SEC antifraud claims. According to the Court, those administrative claims were "legal in nature" and replicated the common law of fraud, triggering the Seventh Amendment right to a jury trial. FCC enforcement actions against fraud, such as illegal prerecorded scam calls, similarly seemingly would require a jury trial.

By definition, NALs are proposals, not final forfeiture orders. Under Section 503(b)(4) of the Communications Act, an affected part is "granted an opportunity to show, in writing... why no such forfeiture penalty should be imposed." Commission procedures are intended to provide the agency feedback and factual context before the agency takes final action. In making its final decision, the Commission ought to take seriously the rule of law concerns regarding lack of fair notice, the Commission's partiality in the matter, and the lack of legal authority to issue fines under the Seventh Amendment and *Jarkesy*. Those concerns constitute strong reasons why the proposed penalty against Telnix should not be imposed.

Additional circumstances surrounding the Telnix NAL proceeding provide other reasons for not imposing the proposed forfeiture, including the fact that the NAL was contrived primarily during the twilight of the Biden Administration FCC and during the necessarily challenging transition to a new FCC administration under new leadership. The reinstatement of [Executive Order 13892](#) by President Trump on January 20, 2025, only a handful of days before the NAL's adoption on February 3, and too close in time reasonably to have been assimilated by the agency in preparing the NAL provides another reason for the Commission to reconsider its proposed fine.

The FCC should rescind its NAL against Telnix, and direct its efforts to apprehending bad actors like MarioCop and addressing the apparent data breach at the FCC. Any needed refinements to the Commission's call blocking rules should be made through agency proceedings with general applicability, not individualized enforcements, and after public participation. Consistent with Executive Order 13892, the Commission should recommit to avoiding the problem of "regulation by enforcement" to ensure that all service providers subject to the agency's jurisdiction have fair notice of the specific actions required of them. And, as Commissioner Nathan Simington has stated, the Commission should refrain from assessing further fines unless or until courts provide clarity or Congress makes changes that would allow the Commission to impose monetary penalties consistent with the Seventh Amendment.

I. Factual Background

Over a dozen FCC employees and their family were among the hundreds who "were targeted with calls containing artificial and prerecorded voice messages that purported to be from a fictitious FCC 'Fraud Prevention Team' as part of a government imposter scam aimed at fraudulently extracting payments of large amounts of money by intimidating recipients of the calls." The calls were originated by Telnyx, a voice services provider that operates in several countries, and whose offerings in the U.S. include the one-way VoIP service at issue in the NAL.

On February 6, 2024, Telnyx accepted two new customer accounts – known as the First MarioCop Account and the Second MarioCop Account – after collecting names, email addresses with the domain name mariocop123.com, IP addresses (one in London, England and the other in Scotland), and an identical physical address for both at a hotel in Toronto, Canada – all of which later proved to be false. The two MarioCop accounts were responsible for making nearly 1,800 calls on February 6 and 7, 2024. Pursuant to its new customer exam process, Telnyx terminated the MarioCop accounts within 17 hours and notified the Commission of MarioCop's calls within 24 hours.

The Commission released its Telnyx [Notice of Apparent Liability for Forfeiture](#) (NAL) on February 4, 2025. In it, the Commission found that Telnyx "apparently willfully and repeatedly" violated the Commission's "Effective Measures" rule for preventing malicious actors from using voice service networks to originate illegal traffic by failing to know MarioCop's true identity when it allowed the two MarioCop accounts to access outbound traffic calling services. The Commission proposed a forfeiture fine of \$2,500 for the nearly 1,800 calls that were made by MarioCop over that two-day span in February 2024, totaling \$4,492,500.

II. The FCC's Action Against Telnyx Raises "Regulation by Enforcement" Concerns

The Telnyx NAL poses the problem of "regulation by enforcement" because the agency is proposing to sanction Telnyx for failing to comply with what amount to new requirements that were not contained in the agency's rules. "[Regulation by enforcement](#)" – sometimes called "rulemaking by enforcement" – occurs when an agency creates new substantive requirements through individualized enforcement proceedings – including through consent decrees and NALs – rather than through general rulemaking processes that include public participation.

In its 2020 [Fourth Blocking Order](#), the Commission agency adopted the "Effective Measures" rule through a notice-and-comment rulemaking. The agency stressed that "[v]oice providers can comply in a number of ways, so long as they know their customers and take measures that have the effect of actually restricting the ability of new and renewing customers to originate illegal traffic. Flexibility reduces the burden on voice service providers." As the Commission elaborated: "For example, voice service providers may extensively investigate new customers seeking access to high-volume origination services. Voice service providers may modify contracts to allow termination in the instance that such services are abused by new or renewing

customers." Neither example was a requirement; rather, they are examples meant to be tailored to particular situations, while incorporating flexibility for the voice provider.

The Commission's 2023 [*Seventh Blocking Order*](#) reiterated that "[f]lexibility to adapt to changing calling patterns is necessary to avoid giving the 'playbook' to bad actor callers, thus an outcomes-based standard is most appropriate." The agency expressly declined to "clarify" its "Effective Measures" requirements or "be more prescriptive on the steps" voice providers must take to block calls under its rule.

Furthermore, the Commission stressed that it was not requiring perfection or a requirement that there be zero illegal calls. The agency stated in its 2020 *Fourth Blocking Order*:

Some commenters raise concerns that if steps are not universally or completely effective, voice service providers could face liability despite best efforts or that, if extensive measures are required, small voice service providers may be unable to satisfy this requirement. We make clear that we do not expect perfection; particularly clever bad actors may, for a time, evade detection. In these cases, a voice service provider could exercise its contractual remedies or take additional mitigation steps. If the voice service provider takes these steps and does not originate a significant amount of illegal traffic, it satisfies the rules we adopt today.

In other words, because the "Effective Measures" rule is premised on the recognition that bad actors may sometimes succeed in evading measures intended to block illegal calls and that perfection is not required for a voice providers' measures to be effective, it follows that a providers' measure for knowing its customers should not have to be perfect to comply with the rule.

Although the NAL includes the concession that "the Commission does not mandate specific measures to comply with this rule," the agency effectively reinterpreted the flexibility and industry best practices orientation of the "Effective Measures" rule in criticizing the measures Telnix employed. It found "Telnix failed to conduct a sufficient inquiry into the MarioCop Account holders" before allowing them to make calls," because Telnix "collected very limited information about the MarioCop Account holders and no phone number and because it used "insufficient" measures to verify the identity of MarioCop customers and to verify information. In other words, the NAL imposes stricter measures that must be taken by voice providers without specifying what measures suffice. Moreover, the agency's statement in the NAL that "[o]ur rules require Telnix to know its customers. Yet it did not know who the MarioCop Account holders were," indicates that not knowing one customer constitutes a failure to comply with the rule. This appears to equate to a strict liability standard for illegal calls – or at least potentially amounting to strict liability according to the *ad hoc* determination of the Commission.

Under the NAL, it appears that the Commission assumes the power, at least sometimes, to treat voice providers as strictly liable for originating illegal calls made by bad actor customers despite having expressly declined to prescribe specific measures that would satisfy its "Effective Measures" rule, including its KYC – know your client – component. This opens the door to

arbitrary enforcement. That arbitrariness is magnified by the glaring inconsistency between the Commission's prior recognition that bad actors may "for a time" evade detection by a voice provider without triggering a rule violation and the agency's finding of a violation in the NAL when MarioCop went undetected for only a short duration and Telnyx took prompt action. Telnyx terminated both MarioCop's accounts within 17 hours and self-reported MarioCop within 24 hours.

III. Telnyx NAL Poses Due Process Problems Requiring Recision

By proposing to sanction Telnyx in enforcement action without a clear predictable rule, the NAL raises significant concerns under the Fifth Amendment Due Process Clause for lack of fair notice and unfair surprise. As the Supreme Court recognized in *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." In *Fox*, the Court explained that "[t]his requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox*, at 253 (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)). As its other precedents establish, "[a] law fails to provide notice when it does not 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (quoted in *Sistersong Women of Color Reproductive Justice Collective v. Governor of Georgia*, 40 F.4th 1320, 1326 (11th Cir. 2022)). As the Court explained in *Christopher v. SmithKline Beecham Corp.*, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." Also, as the Court emphasized in *Kisor v. Wilkie* (2019), a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties.

The Commission's recasting of the "Effective Measures" rule based on flexibility (and not perfection) into a more rigid strict liability standard in the Telnyx NAL certainly came about without fair notice. More than that, the NAL constituted an unfair surprise because it constituted a reversal of course compared to additional agency actions, including the 2024 [RMD Cure Order](#), in which the Commission did not list Telnyx among 2,400 entities identified as having deficient robocall mitigation plans on file with the Robocall Mitigation Database (RMD), and the agency's 2023 [Numbering Policies Order](#) in which the it expressly declined to adopt an "Effective Measures" certification requirement for VoIP providers.

Rescinding the Telnyx NAL would be consonant with Supreme Court Fifth Amendment Due Process Clause jurisprudence. Indeed, fair notice and no unfair surprise imperatives ought to be of heightened concern to the Commission following President Donald Trump's [restoration of Executive Order 13892](#), "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication."

Under Executive Order 13892, agencies are directed to adhere to basic due process concerns, including those expressed in Supreme Court Due Process Clause precedents regarding fair notice

such as *Christopher v. SmithKline Beecham Corporation*. As the order states: "Regulated parties must know in advance the rules by which the Federal Government will judge their actions." The Executive Order encourages agencies to cooperate with the private sector and to "establish predictable outcomes for private conduct." Also, it requires that "[a]n agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law." Indeed, the order provides that "agencies shall afford regulated parties the safeguards described in this order, *above and beyond* those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose."

IV. Agency Impartiality Implicated by MarioCop's Targeting of FCC Officials, Staff, and Families

The Telnix NAL also raises due process concerns about impartiality – or the appearance of it – because MarioCop's illegal calls targeted FCC officials, their staffs, and families – making at least some FCC personnel "interested" parties in the proceeding. In its [response to the NAL](#), Telnix states that "the Commission was the *intentional* target of an extensive campaign," based on the determination of its hired expert, fraud manager and investigator Tom Walker, who found that "MarioCop placed calls to at least 365 unique phone numbers associated with Commission offices, staff, and former staff."

In *Federalist No. 10*, James Madison expressed an ancient maxim that "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." Regard for an agency's impartiality – and the appearance of impartiality – typically should compel any agency official or staff member with a direct interest in an enforcement to recuse from participation. For the Telnix NAL, adherence to that fundamental rule of law maxim should mean recusal by any interested FCC official or staff member. Any such involvement by interested officials or staff in the NAL constitutes reason for rescinding it.

V. The Commission's Proposed Fines Are Legally Suspect

The proposed forfeiture of nearly \$4.5 million in the Telnix NAL raises legal issues, the most significant being that the Commission likely is prohibited from issuing the fines under by the Seventh Amendment as expounded by the Supreme Court's decision in *SEC v. Jarkesy* (2024). *Jarkesy* held that the Seventh Amendment right to a trial by jury involving claims that are "legal in nature" precluded the Securities and Exchange Commission from bringing antifraud claims in an administrative enforcement because they replicated common law fraud claims.

Legal commentary on *Jarkesy* suggests that the Supreme Court's Seventh Amendment holding in the case imposes similar constraints on the FCC. For instance, in a July 2024 [white paper](#), DLA Piper attorney Peter Karanjia concluded that "[t]he FCC's current regime of administratively adjudicating forfeiture orders that impose civil penalties without a jury is incompatible with *Jarkesy* and the Seventh Amendment right to a civil jury trial." A January 2024 [white paper](#) by former FCC General Counsel Thomas Johnson, written in advance of the Court's decision in *Jarkesy*, similarly foresaw the *Jarkesy* decision as likely rendering "at least some FCC

enforcement actions seeking civil monetary penalties vulnerable because they have obvious common-law private-right analogues."

Cases challenging \$200 million in civil penalties [imposed](#) on four mobile carriers in April 2024 are now being challenged in cases pending before the Second, Fifth, and D.C. Circuit Courts of Appeal based on *Jarkesy*. Notably, Commissioner Nathan Simington dissented from the Telnix NAL, stating "that the Supreme Court's decision in *Jarkesy* prevents me from voting, at this time, to approve this or any item purporting to impose a fine."

VI. Rule of Law Concerns and Other Circumstances Constitute Strong Reasons for Rescinding the Telnix NAL

NALs are proposals and not final forfeiture orders. Section 503(b)(4) of the Communications Act provides that an affected party is "granted an opportunity to show, in writing... why no such forfeiture penalty should be imposed." The Commission's NAL procedures are rightly intended to allow the agency to receive feedback and additional factual context for purposes of making a final action. In making its final decision, the Commission must consider the serious rule of law concerns regarding lack of fair notice, the Commission's partiality in the matter, and the lack of legal authority to issue fines without a jury trial under the Seventh Amendment and *Jarkesy*. Those concerns are reasons why the proposed penalty against Telnix should not be imposed.

Additional unique circumstances surrounding the Telnix NAL proceeding constitute reasons for concluding that no forfeiture penalty should be imposed. These circumstances include: (1) the agency's rush release of the NAL just a few days before the one-year statute of limitations deadline on February 6, 2025; (2) the fact that the NAL was contrived primarily during the twilight of the Biden Administration FCC and during the transition to a new administration; (3) the reinstatement of Executive Order 13892 on "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" on January 20, 2025 – only a handful of days before the NAL's adoption on February 3, and too close in time to reasonably have been assimilated by the agency to ensure compliance. (The NAL does not include any citation to Executive Order 13892.)

The FCC should rescind its NAL against Telnix, direct its efforts to apprehending MarioCop, and address the apparent data breach at the FCC. Any needed improvements to the Commission's call blocking rules should be made through agency proceedings with general applicability, not individualized enforcement actions. The Commission also should commit to establishing generally applicable rules through notice-and-comment rulemaking or by issuing declaratory orders in all contexts to avoid the problem of "regulation by enforcement" and ensure that all entities subject to the agency's jurisdiction can reasonably ascertain what specific duties are required of them. This includes ensuring that all Commission policies and practices conform to Executive Order 13892 to ensure fairness in agency enforcement proceedings. And the Commission should refrain from assessing fines unless or until courts provide clarity or Congress makes changes that would allow the Commission to impose monetary penalties.

VII. Conclusion

The Commission's Telnyx NAL poses serious rule of law concerns, including the problem of agency "regulation by enforcement" and lack of notice under the Supreme Court's Fifth Amendment Due Process Clause jurisprudence, concerns about partiality at the FCC given the targeting of Commission officials, staff, and family by bad actor MarioCop, and lack of agency authority to issue fines under the Seventh Amendment and the Supreme Court's decision in *SEC v. Jarkesy* (2024). Additional reasons also exist for rescinding the NAL, including ensuring compliance with President Trump's Executive Order 13892, the very first sentence which reads: "Regulated parties must know in advance the rules by which the Federal Government will judge their actions."

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