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April 6, 2010

P. Michele Ellison, Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 10-4
Case Nos. EB-09-DT-0375 and EB-09-MA-0195

Dear Ms. Ellison:

This letter is written on behalf of Wilson Electronics, Inc. ("Wilson") in response to the letter of AT&T Inc. ("AT&T"), dated February 2, 2010, regarding the above-referenced enforcement matters involving the use of signal boosters ("AT&T Letter"). I will also respond to AT&T's attempt to use WT Docket No. 10-4 as a forum to rail against Wilson and to urge the Commission to step up enforcement actions aimed at signal boosters. *See* Reply Comments of AT&T, Inc., WT Docket No. 10-4 (Mar. 8, 2010) ("AT&T Reply").

Instead of reexamining its legal position in light of the trial court's action in *AT&T Mobility, LLC v. Digital Antenna, Inc.*, *see infra* Attachment 1, AT&T blames its litigation setback on the "increasingly aggressive," "outlandish," and "brazen" challenges that Wilson and Digital Antenna, Inc. ("Digital Antenna") have allegedly launched on the Commission's authority. AT&T Reply at 19. Rather than attempting to "undermine" the Commission's authority, Wilson is simply standing by its products, its customers, its legal opinions, and its principles. It has incurred AT&T's wrath by refusing to knuckle under to its legal claims that are plainly wrong and unprincipled.

In this letter, I will refer to AT&T as a "Wireless Service" provider, by which I mean that AT&T is a carrier that provides a wireless telecommunications service, as defined under § 1.907 of the Commission's Rules ("Rules") and authorized by either Part 20, 22, 24 or 27 of the Rules. As such, AT&T is a telecommunications carrier that is subject to regulation as a common carrier under the Communications Act of 1934, as amended ("Act"), *see* 47 U.S.C. §§ 153(44)

332(c)(1)(A), the Rules, *see* 47 C.F.R. §§ 1.907, 22.9(a), and federal common law. *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999). Therefore, all Wireless Service providers must: (1) furnish “communication service upon reasonable request,” 47 U.S.C. § 201(b); (2) engage in reasonable practices in connection with such service, *see id.* § 201(b); and (3) give no unreasonable preference or advantage to any person in connection with their service. *See id.* § 202(a). And they must provide service indiscriminately to those they are suited to serve. *See NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). These statutory and common law duties are at least of equal weight to AT&T’s responsibilities under § 310(d) of the Act and § 22.305 to maintain operational control over its network.

I. THE ONE CALL NOW INCIDENT DEMONSTRATES THE INJUSTICE THAT RESULTS FROM THE ENFORCEMENT OF AT&T’S INTERPRETATION OF § 22.165 OF THE RULES

AT&T claimed that one of its engineers, Shawn Roush, met with Todd Cagle at the One Call Now building in Troy, Ohio. *See* AT&T Letter, Decl. of Robert W. Peebles (“Peebles Decl.”), Attach. 2 at 1 (“AT&T Incident Report”). According to Mr. Roush, Mr. Cagle explained that a Wilson bi-directional amplifier (“BDA”) had been installed “to improve the AT&T signal,” and that One Call Now had not entered into a “service enhancement agreement with AT&T.” AT&T Incident Report at 3. Mr. Cagle declined Mr. Roush’s request to leave the BDA offline and send it back to Wilson for repair. Mr. Cagle did the same when David Jamison from AT&T’s sales department requested that the BDA be shut off. *See id.*

AT&T Engineer Robert W. Peebles took measurements in the area of the One Call Now building to confirm the source of the interference. *See id.*

According to AT&T, it filed a “trouble ticket” with the Bureau on December 1, 2009. Peebles Decl. at 1 (¶ 5). On the same day, Mr. Peebles planned to hand-deliver a “cease and desist” letter to One Call Now. *Id.* Having never spoken with anyone at One Call Now, Mr. Peebles nevertheless claimed that he found it necessary to get Officer Jeff Hubbard of the Troy Police Department to escort him when he delivered the cease and desist letter to One Call Now’s President, Angela Kirchner. *See id.* He claimed that he “secured a police escort” consistent with AT&T’s policy that applies when one of its employees “feels physical safety may become an issue.” *Id.* On his way back to Columbus, Ohio, Mr. Peebles received a telephone call in which Mr. Cagle allegedly was “abusive.” AT&T Incident Report at 5. Mr. Peebles referred Mr. Cagle to AT&T’s trial attorneys at Adorno & Yoss, LLP. *See id.*

AT&T apparently informed the Bureau’s field office that Mr. Cagle/One Call Now was operating a BDA on the frequencies 835.02 - 848.97 MHz between November 23, 2009 and December 1, 2009. *See* Letter from James A. Bridgewater to Todd Cagle, Case No. EB-09-DT-0375, at 1 (Dec. 8, 2009) (“Warning Letter”). (Cincinnati SMSA Limited Partnership, which AT&T apparently controls, holds the Channel Block B authorization to serve the Dayton, Ohio

P. Michele Ellison
April 6, 2010
Page 3

MSA, which includes Troy.) AT&T informed a Bureau field agent that it had not given Mr. Cagle/One Call Down authorization to install a BDA. *See* Warning Letter at 1.

On December 8, 2009, the Bureau's Field Office in Farmington, Michigan issued Mr. Cagle a warning for unlicensed operation of a BDA that required him to provide evidence that he had "authority to operate granted by the FCC or [had] obtained consent from a licensed Common Carrier." *Id.*

AT&T has now admitted that One Call Now may not have been operating on the frequencies 835.02 - 848.97 MHz. *See* AT&T Letter at 6. AT&T disclosed that the alleged interference was caused to its network when One Call Now attempted to "amplify the signals of a competing carrier using a Wilson broadband signal booster. Amplification was not required to receive AT&T signals at the location in question." *Id.* at 6 n.17.

It appears that One Call Now was operating the Wilson BDA primarily on the Channel Block A frequencies 824 - 846.5 MHz licensed to New Par, a Verizon Wireless ("VZW") affiliate, in the Dayton MSA. The Bureau apparently did not attempt to determine whether or not VZW/New Par authorized One Call Now to operate a BDA.

The legacy Wilson signal booster operated by One Call Now was always used by a Wireless Service subscriber, presumably in most cases by a VZW/New Par subscriber. As I showed in my letter to you of January 13, 2010 ("Wilson Letter"), any such subscriber is authorized to operate a "fixed station" signal booster under the authorization held by the Wireless Service provider. *See* Wilson Letter at 3-4 (citing 47 C.F.R. §§ 1.903(c) & 22.3(b)).

The Bureau warned Mr. Cagle that he violated § 301 of the Act by installing a BDA without AT&T's "explicit authorization" and operating the device on frequencies licensed to AT&T. Warning Letter at 1. Moreover, the Bureau informed him that the violation could subject him "to substantial monetary forfeitures, *in rem* arrest action against the offending radio equipment, and criminal sanctions including imprisonment." *Id.* But the Bureau apparently had no evidence to prove Mr. Cagle ever operated the BDA on AT&T's licensed frequencies, and therefore was without legal or evidentiary support for its charge that Mr. Cagle violated § 301 of the Act by failing to obtain AT&T's "explicit authorization" to install or operate the BDA.

In fact, AT&T acknowledged that the operation of the One Call Now signal booster increased the "noise floor in the gama sector" of AT&T's cell site in Troy. AT&T Incident Report at 1. Of course, all signal boosters generate noise across their passband which can increase the noise floor in the immediate area. However, the Commission does not protect AT&T from such "interference" to its base receivers at its cell site. *See* 47 C.F.R. § 22.352(c)(1). *See also id.* § 22.353. AT&T was obligated to "attempt to resolve such interference by technical means or operating arrangements." *Id.* § 22.352(c)(1). Instead, AT&T

filed a misleading claim with the Bureau and showed up at One Call Now's door with a police officer.

AT&T's excuse for its "police escort" is implausible on its face. Mr. Peebles did not explain why he feared for his "physical safety" before he departed for the One Call Now office on December 1, 2009. Apparently, he had neither met nor spoken with Mr. Cagle. In fact, Mr. Peebles accused Mr. Cagle of becoming "abusive" during a call after Peebles delivered AT&T's letter to Ms. Kirchner and during his trip to Columbus. Regardless, Mr. Peebles' excuse begs the question why he found it necessary to hand-deliver AT&T's cease and desist letter in the first place. When AT&T's trial counsel, Albert L. Frevola, Jr., sent Wilson a cease and desist letter, he did so by certified mail. *See infra* Attachment 2. Mr. Peebles (or counsel) could have done the same with respect to One Call Now.

AT&T was obviously attempting to intimidate One Call Now, which simply exemplifies the "scorched earth" tactics that AT&T has employed against those who manufacture or use signal boosters. AT&T has threatened to file suit against Wilson, *see id.*, filed both a court suit and a complaint with the Commission against Digital Antenna, and prohibits its dealers from "selling or even recommending" signal boosters for use with its network. *See infra* Attachment 3. AT&T appears to have elicited the Bureau's assistance in preventing Wireless Service subscribers from using signal boosters to ensure that the service they pay for is reliable. Wilson urges the Bureau to exercise caution in issuing warning letters to Wireless Service subscribers based only on AT&T's factual representations and a "template" prepared by a Commission attorney. AT&T Letter at 4. The Bureau should be particularly judicious considering the possibility that AT&T is engaged in a pattern of anticompetitive conduct. *See infra* pp. 17-18.

II. THE RULES PERMIT SUBSCRIBERS TO USE OR OPERATE SIGNAL BOOSTERS

Section 301 of the Act provides that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with [the Act] and with a license in that behalf granted under the provisions of [the Act]." 47 U.S.C. § 301. To determine what license or authorization must be granted prior to using or operating a signal booster, a Wireless Service subscriber must turn to Subpart F of Part 1 of the Rules, starting with § 1.903 which specifically addresses the "[a]uthorization required" for all Wireless Services. 47 C.F.R. § 1.903.

The general rule under § 1.903 is that stations in the Wireless Services "must be used and operated only in accordance with the rules applicable to their particular service ... and with a valid authorization granted by the Commission under the provisions of this [Subpart F]." *Id.* § 1.903(a). Hence, a Wireless Service subscriber must look elsewhere for the rules that would apply to the use and operation of a signal booster. But to determine what authorization has to be granted under Subpart F, the subscriber need only look to § 1.903(c) which applies explicitly to

“subscribers” and provides in pertinent part:

Authority for subscribers to operate mobile or fixed stations in the [Wireless Services] ... is included in the authorization held by the licensee providing service to them. Subscribers are not required to apply for, and the Commission does not accept, applications from subscribers for individual mobile or fixed station authorizations in the [Wireless Services].

None of the service-specific rules in Parts 20, 22, 24 and 27 of the Rules conflict with § 1.903(c). To the contrary, Part 22 contains a rule that is identical to § 1.903(c). *See* 47 C.F.R. § 22.3(b). And §§ 22.571 and 22.927 explicitly confirm that, when their mobile stations are receiving service from an authorized system, Public Mobile Service subscribers in good standing — including cellular subscribers in good standing — are “considered to be operating under the authorization of that ... system.” *Id.* § 22.927. But, even if there were a conflict with a corresponding rule in Parts 20, 22, 24 and 27, § 1.903 would govern. *See* 47 C.F.R. § 1.902. Because a signal booster meets the Subpart F definitions of a “mobile station” and a “fixed station,” *see id.* § 1.907, a Wireless Service subscriber would need no authorization to use a signal booster unless the authority to operate a mobile or fixed station was *not* included in the authorization held by the subscriber’s Wireless Service provider.

There is no service-specific rule in Parts 20, 22, 24 or 27 that *excludes* the authority to operate mobile or fixed stations from the authorizations issued to Wireless Service providers. On the other hand, the Part 22 rules explicitly permit Public Mobile Service providers to operate signal boosters under their authorizations. Sections 22.383 and 22.527 provide:

Licensees may install and operate in-building radiation systems without applying for authorization or notifying the FCC, provided that the locations of the in-building radiation systems are within the protected service area of the licensee’s authorized transmitter[s] on the same channel or channel block.

* * * *

Licensees may install and operate signal boosters on channels listed in § 22.531 only in accordance with the provisions of § 22.165 governing additional transmitters for existing systems. Licensees must not allow any signal booster that they operate to cause interference to the service or operation of any other authorized stations or systems.

Section 22.165 provides that a Public Mobile Service licensee “may operate additional transmitters at additional locations on the same channel or channel block as its existing system without obtaining prior Commission approval provided,” *inter alia*, that the locations are within the system’s protected service area. 47 C.F.R. § 22.165. Thus, it is clear from §§ 22.165, 22.383

and 22.527 that authorizations issued to Public Mobile Service providers include the authority to operate “fixed” or “stationary” signal boosters at locations within their protected service areas.

Wilson has scoured Parts 20, 22, 24 and 27 of the Rules for any rule that would explicitly modify or limit the application of the governing language of § 1.903(c) that provides that the authority for Wireless Service subscribers to operate mobile or fixed stations is “included in the authorization held by the licensee providing service to them.” As the Wireless Telecommunications Bureau (“WTB”) recently confirmed, signal boosters “can be either fixed or mobile.” *WTB Seeks Comment on Petitions Regarding the Use of Signal Boosters and other Signal Amplification Techniques Used with Wireless Services*, DA 10-14, 2010 WL 25749, at *1 (Jan. 6, 2010). Because signal boosters can be operated as mobile or fixed stations within the meaning of § 1.903(c), a Wireless Service subscriber is authorized to operate a signal booster by the authorization held by the subscriber’s licensed service provider subject only to the conditions that the rules impose on the licensee’s authority.

Finally, there is only one other Wireless Service rule that expressly applies to signal boosters. Section 22.377 states in part:

... [T]ransmitters used in the Public Mobile Services, including those used with signal boosters, in-building radiation systems and cellular repeaters, must be certificated for use in the radio services regulated under [Part 22].

... The FCC may list as certificated only transmitters that are capable of meeting all technical requirements of the rules governing the service in which they will operate. The procedure for obtaining certification is set forth in [Part 2 of the Rules].

The equipment certification provisions of § 22.377 are significant. They show that cellular signal boosters that have been certificated for use in the Public Mobile Services have been deemed by the Commission to be capable of meeting all the technical requirements of the cellular rules.

III. LICENSEE CONSENT IS NOT REQUIRED FOR SUBSCRIBERS TO OPERATE SIGNAL BOOSTERS

AT&T claims that the “licensee consent” requirement is derived from §§ 1.903, 22.3 and 22.305 of the Rules, which allegedly: (1) give the Wireless Service licensee the “exclusive use” of its licensed frequencies; (2) make the service provider the “licensee of all transmitting devices on its spectrum;” and (3) require the licensee to “maintain control over all devices operating on its network.” AT&T Reply at 16-17. The short answer to AT&T’s claim is that the rules it cites have no such effect.

Obviously, §§ 1.903(a) and 22.3 do not afford a licensee the “exclusive use” of its licensed frequencies when § 1.903(c) and § 22.3(b) explicitly authorize the licensee’s subscribers to operate mobile and fixed stations on its licensed frequencies. Moreover, § 1.903(c) trumps any Part 22 rule that arguably makes a Wireless Service provider the licensee of all the “transmitting devices” that operate on its spectrum, as well as any such rule that requires the service provider to control such devices. Any construction of a Part 22 rule that would require a Wireless Service subscriber to obtain the authorization of the service provider to operate a Commission-certificated transmitting device would create a conflict between the Part 22 rule and § 1.903(c). In that case, the Part 22 rule would have to give way to the plain meaning of the Part 1 rule. *See* 47 C.F.R § 1.902.

Sections 22.165, 22.383 and 22.957 of the Rules specify that a “licensee may” either operate additional transmitters, in-building radiation systems, or signal boosters. *Id.* §§ 22.165, 22.383 & 22.957. Thus, the maxim *expressio unius est exclusio alterius* could have been applied to those three rules prior to 1998, when the Commission promulgated Subpart F in order to consolidate, revise and streamline the licensing rules for services licensed by the WTB. *See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 13 FCC Rcd 21027, 21030 (1998). With the adoption of § 1.903(c) and the new Subpart F definitions, the blanket authority licensees once held to operate in-building radiation systems and signal boosters had to be shared with their subscribers in good standing. As long as the apparent conflict between § 1.903(c) and §§ 22.165, 22.383 and 22.527 remains, Wireless Service providers are powerless to prevent their subscribers from sharing their blanket authority to operate signal boosters.

Even if §§ 22.165, 22.383 and 22.957 could be construed to only allow Wireless Service providers to operate signal boosters, they cannot be interpreted to empower the licensees to authorize subscribers to operate signal boosters. The Commission has been delegated the authority to issue a license to operate radio transmitting facilities under § 301 of the Act, or a “station license” under § 307(a), but it has no authority to *subdelegate* its statutory authority to outside parties such as Wireless Service providers. *See United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004). Because § 1.903(c) *prohibits* Wireless Service subscribers from obtaining “individual mobile or fixed station authorizations” from the Commission, 47 C.F.R. § 1.903(c), the authority to operate such a station that a subscriber derives from § 1.903(c) must constitute a Commission license for the purposes of §§ 301 and 307(a) of the Act. If the subscriber’s operating authority *is not* included in the Wireless Service provider’s authorization under § 1.903(c), then the provider cannot authorize a subscriber to operate a mobile or fixed station by granting its consent to such operation. Otherwise, the Wireless Service provider would be exercising a power that Congress conferred exclusively upon the Commission: the statutory authority to grant station licenses. *See* 47 U.S.C. §§ 301 & 307(a).

IV. THE REQUIREMENT THAT LICENSEES MAINTAIN OPERATIONAL CONTROL OVER MOBILE UNITS DOES NOT CREATE AN ENFORCEABLE REQUIREMENT THAT SUBSCRIBERS OBTAIN LICENSEE CONSENT TO USE SIGNAL BOOSTERS

On the one hand, AT&T recognizes that “substantive rule amendments” must follow notice-and-comment rulemakings conducted in accordance with the Administrative Procedures Act (“APA”). AT&T Letter at 8-9. On the other hand, AT&T wants the Bureau to enforce a “rule” that has never been adopted in an APA rulemaking and would make it unlawful for Wireless Service subscribers to operate signal boosters without licensee consent. In fact, AT&T attempts to resurrect a new version of a rule that was revoked in an APA notice-and-comment rulemaking.

AT&T tries to construct a rule out of its contention that ensuring a licensee’s operational control over mobile units was “part-and-parcel of taking advantage of blanket licensing.” *Id.* at 6. In support of that contention, AT&T cites to procedures adopted in the 1980 deregulatory rulemaking order that eliminated individual land mobile licenses. *See id.* at 7 (citing *Amendment of Part 22 of the Rules to Modify Individual Licensing Procedures in the Public Mobile Services*, 77 F.C.C. 2d 84, 85-86 (1980) (“*Blanket Licensing*”). Those procedures were codified in § 22.514 of the Rules. *See Blanket Licensing*, 77 F.C.C. 2d at 91-92. According to AT&T, under §22.514, “the subscriber secured carrier consent to operate its device under blanket licensing by demonstrating that the carrier could control the device, consistent with its obligations as a licensee.” AT&T Letter at 7.

Under the rubric “[r]esponsibility for operational control and maintenance of mobile units,” § 22.514(a) explicitly allowed subscribers to provide their own mobile units. 47 C.F.R. § 22.514(a) (1981). However, the subscriber was required to: (1) comply with all applicable Rules; (2) use type accepted equipment only and furnish the type accepted number to the carrier; (3) provide evidence to the carrier that the mobile unit is compatible with the carrier’s mobile system; (4) use only the mobile units which the carrier has agreed to serve; (5) notify the carrier of the subscriber’s name and address; (6) take prompt action to eliminate unacceptable interference to the mobile system or to other users; and (7) make the mobile unit available for inspection by the Commission. *See id.* If the subscriber failed to meet any of the requirements of § 22.514(a), the licensee could refuse or suspend service until the subscriber corrected the deficiency. *See id.* § 22.514(b).

In 1981, § 22.514(a) of the Rules required a subscriber to provide evidence to the radiotelephone service licensee that the subscriber’s mobile units met the “compatibility specifications of the carrier’s mobile system.” *Blanket Licensing*, 77 F.C.C. 2d at 91. However, when it adopted cellular rules in 1981, the Commission imposed no such requirement on cellular subscribers. With no explanation, the Commission adopted § 22.912(a) which simply provided:

The licensee of a base station in this service shall be responsible for exercising effective operational control over all mobile stations with which it communicates. The proper installation, maintenance and repair of such mobile stations shall normally be the responsibility of the cellular system licensee except that customer provided equipment shall be the responsibility of the customer.

Cellular Communications Systems, 86 FCC 2d 469, 572 (1981); 47 C.F.R. § 22.512(a) (1981).

The more restrictive provisions of § 22.514(a) never applied to cellular mobile units. However, as part of the second comprehensive rewrite of Part 22, the Commission proposed to make substantively identical changes to §§ 22.514 and § 22.912. *See Revision of the Part 22 of the Rules Governing the Public Mobile Services*, 7 FCC Rcd 3658, 3714, 3742 (1992). Proposed new §§ 22.571(a) and 22.927(a) were to read as follows:

Except for subscriber provided mobile transmitters ... licensees are responsible for the proper installation, maintenance and repair of mobile transmitters. Subscribers are responsible for the proper installation, maintenance and repair of subscriber-provided mobile transmitters.

Id.

Bell Atlantic objected to the proposal contending that “cellular customer premises equipment (CPE) providers should not be treated differently from other CPE providers.” *Revision of the Part 22 of the Rules Governing the Public Mobile Services*, 9 FCC Rcd 6513, 6573 (1994) (“*Part 22 Rewrite*”). The Commission apparently agreed:

Upon further consideration, we find that this existing requirement is no longer needed. Mobile equipment owned by the subscriber (not the carrier) appears to be the rule rather than the exception. We leave it to consumers to determine the arrangements they prefer for installation, repair, and maintenance of equipment they own.

Id.

With regard to the requirements of § 22.514(a) to which AT&T attaches such lasting significance, the Commission simply eliminated them as “unnecessary” in 1994. *Id.* at 6566. For the past 16 years, subscribers to a two-way service in the Paging and Radiotelephone Service no longer had to furnish the type accepted number of their mobile units to the carrier, provide evidence to the carrier that their mobile units were compatible with the carrier’s mobile system, or use only the mobile units which the carrier had agreed to serve. Cellular subscribers have

never been subject to such requirements.

The Commission adopted the current versions of §§ 22.571 and 22.927 in 1994. Both rules govern “[r]esponsibility for mobile stations” and contain substantively identical provisions. The cellular rule provides as follows:

Mobile stations that are subscribers in good standing to a cellular system, when receiving service from that cellular system, are considered to be operating under the authorization of that cellular system. Cellular system licensees are responsible for exercising effective operational control over mobile stations receiving service through their cellular systems. Mobile stations that are subscribers in good standing to a cellular system, when receiving service from a different cellular system, are considered to be operating under the authorization of such different system. The licensee of such different system is responsible, during such temporary period, for exercising effective operational control over such mobile stations as if they were subscribers to it.

The requirements of §§ 22.571 and 22.927, as well as the automatic roaming provisions of § 20.12 of the Rules, demonstrate the modicum of operational control that the Commission expects of Wireless Service providers. These rules require a Wireless Service licensee or “host carrier” to exercise operational control over mobile stations operated by subscribers of other licensees and with whom the host carrier has no contractual relationship. *See* 47 C.F.R. §§ 20.3, 20.12(d), 22.571, 22.927. Clearly, a Wireless Service licensee need only exercise the same operational control over one of its own subscribers that operates a signal booster that it does over a subscriber of another licensee that is temporarily using its service. If it believed that §§ 301, 303(f), and 310(d) of the Act required Wireless Service providers to exercise more than token control over the devices used on their networks, the Commission would have adopted a rule that required subscribers to obtain licensee consent before operating such devices and it certainly would not have eliminated § 22.514(a) of the Rules.

V. THE BUREAU CANNOT ENFORCE THE COMMISSION’S 2005 POLICY STATEMENT

The “in-building radiator rule” of § 22.383 allows licensees to operate in-building radiation systems without applying for authorization or notifying the Commission. *See* 47 C.F.R. § 22.383. The rule does not speak to the operation of in-building radiation systems pursuant to a licensee’s “permission and control.” *But see* AT&T Letter at 7. Moreover, the rule only applies to low power radiators “designed to improve service reliability inside buildings or structures located within the service areas of stations in the Public Mobile Services.” 47 C.F.R. § 22.99. And the rule certainly does not prohibit any conduct by a licensee’s subscribers, much less prohibit them from operating in-building radiation systems or *any other types of signal boosters* without a license or licensee consent.

The Commission did not give notice that in-building radiation systems can only be operated by licensees or pursuant to their permission in 2003, when it issued a notice of proposed rulemaking (“NPRM”) to eliminate § 22.383. See *Amendment of Part 22 of the Rules to Benefit Consumers of Air-Ground Telecommunications Services*, 18 FCC Rcd 8380, 8399 (2003) (“*Part 22 Biennial Review NPRM*”). Parties could not have anticipated that the Commission would make any substantive changes to § 22.383 after proposing its elimination. And the Commission ultimately made no such change in the in-building radiator rule. See *Amendment of Part 22 of the Rules to Benefit Consumers of Air-Ground Telecommunications Services*, 20 FCC Rcd 4403, 4454 (2005) (“*Part 22 Biennial Review*”).

Although supporting the elimination of § 22.383, VZW had requested the Commission “to clarify that boosters may only be operated by a licensee or pursuant to the licensee’s permission and control.” Comments of VZW, WT Docket No. 03-103, at 11 (Sept. 23, 2003) (“VZW Comments”). VZW argued that such Commission action was “necessary because there are commercially available boosters that can be purchased and operated by non-licensees without the approval and control of the licensee. These off-the-shelf boosters can cause considerable disruptive interference to licensed cellular networks.” *Id.* at 11-12.

Citing only VZW’s “concern that readily available off-the-shelf boosters could cause harmful interference to cellular networks,” the Commission decided not to act on its proposal to eliminate § 22.383. *Part 22 Biennial Review*, 20 FCC Rcd at 4454. Noting that its staff was “examining a set of issues related to the appropriate regulatory treatment of wireless boosters,” the Commission elected to “address § 22.383 in the context of that examination.” *Id.* However, it took the “opportunity to clarify that, under our current policies, such devices may only be operated by a licensee or pursuant to the licensee’s permission and control.” *Id.* (citing VZW Comments at 11-12). That “clarification” is unenforceable for three distinct reasons.

First, VZW did not suggest, and the Commission did not decide, that any provision of the Act or the Rules provided that “wireless boosters” could only be operated by a licensee or with a licensee’s permission and control. Because the Commission did not purport to construe any language of the Act or any substantive regulation, its so-called clarification in its *Part 22 Biennial Review* cannot be considered an interpretative rule. See *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995); *Syncor International Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997). In its own words, the Commission was clarifying its “current policies.” Therefore, it was issuing a non-binding policy statement. See *Syncor*, 127 F.3d at 94.

Second, the various rules that applied to “wireless boosters,” including the in-building radiator rule, did not empower Wireless Service licensees to authorize the operation of wireless boosters pursuant to their permission and control. Because the *Part 22 Biennial Review* expressed a change in substantive law, the Commission had to observe the APA’s notice-and-comment rulemaking requirements if it intended that its “clarification” have a binding effect.

P. Michele Ellison

April 6, 2010

Page 12

See General Electric Co. v. EPA, 290 F.3d 377, 382-83 (D.C. Cir. 2002). But the Commission aborted its rulemaking with regard to § 22.383 specifically in favor of examining the appropriate regulatory treatment of wireless boosters generally in a subsequent proceeding. Having failed to conduct the requisite APA rulemaking, the Commission's clarification is unenforceable as a legislative or substantive rule. *See General Electric*, 290 F.3d at 385.

Third, the Commission's NPRM afforded notice of the proposed elimination of § 22.383, which applied only to in-building radiation systems. No notice was afforded that the Commission was contemplating changes in its definition of "signal booster" in § 22.99 or in the language of § 22.527 that pertained to the operation of signal boosters. *See Part 22 Biennial Review NPRM*, 18 FCC Rcd at 8424-25. The NPRM did not invite comments on "issues related to the appropriate regulatory treatment of wireless boosters used to improve or facilitate service in a number of areas, *including buildings*." *Part 22 Biennial Review*, 20 FCC Rcd at 4454 (emphasis added). Thus, the Commission's policy statement that all "wireless boosters" may only be operated by a licensee or pursuant to a licensee's permission or control did not represent a "logical outgrowth" of the NPRM. *See CSZ Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009). The policy statement is unenforceable because it was issued in violation of the APA's notice requirement. *See id.* at 1083.

AT&T does not show how the Commission's *Part 22 Biennial Review* policy statement can be enforceable. It simply stated its conclusion that Wilson's "extended argument" that the statement is unenforceable "lacks any basis in fact or law." AT&T Letter at 8. However, based on § 533 of the APA and §§ 1.411-1.415 of the Rules, the Commission cannot adopt an enforceable prohibition on subscriber operation of signal boosters by fiat. When its field agents attempt to enforce a non-binding policy statement against Wireless Service subscribers such as One Call Now, the Bureau is misusing the policy. *See Robert A. Anthony, Interpretative Rules, Policy Statements, Guidelines, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1312 (1992).

VI. SUBSCRIBER OPERATION OF A SIGNAL BOOSTER WITHOUT LICENSEE CONSENT IS NOT PROHIBITED UNDER COMMISSION PRECEDENT

AT&T claims it discovered an "unbroken line of precedent" under which end-user operation of signal boosters without licensee consent is prohibited. AT&T Letter at 3. AT&T's line of "precedent" consists of warning letters issued by the Bureau, which AT&T admits are not routinely made available to the public. *See id.* at 4 & nn.7. Indeed, AT&T cites to six such letters sent in 2008 and 2009, none of which have been published. *See id.* at 4 n.7. However, none of the six unpublished letters may be "relied upon, used or cited as precedent," except against those with actual notice of the letters. 47 C.F.R. § 0.445(e). Moreover, no person without such notice can be expected to comply with any prohibition allegedly set forth in the Bureau's letters. *See id.* Hence, AT&T's unbroken line of precedent amounts to no precedent at

all.

AT&T managed to cite the published notice of apparent liability for forfeiture (“NALF”) that the Division issued *Digital Antenna* as an example of the Commission’s unequivocal rejection of a direct challenge to the enforcement of its “rule” that signal boosters may be only operated with licensee consent. *See* AT&T Letter at 4-5 & n.12 (citing *Digital Antenna, Inc.*, 23 FCC Rcd 7600, 7601 (Spectrum Enf. Div. 2008)). Obviously, however, a finding of *apparent* liability for forfeiture by a division of the Bureau cannot be characterized as an unequivocal Commission rejection of any challenge to any enforcement action. More importantly, AT&T relies on a Division statement that is unenforceable dicta.

In *Digital Antenna*, the Division found that the signal booster manufacturer apparently failed to fully comply with a notice of inquiry (“NOI”) that called on it to provide certain information related to its products. *See* 23 FCC Rcd at 7601-02. Included in the Division’s statement of the background facts was the disclosure that it had sent an unpublished letter to *Digital Antenna* that included a statement to the effect that “cellular and PCS boosters and repeaters are transmitters and may only be used ... by end user customers with the express authorization of the licensed provider.” *Id.* at 7601. That statement was obvious dicta since the Division recognized that the question of whether signal boosters may be used by subscribers only with licensee permission was not material to its finding that *Digital Antenna* failed to comply with the NOI. *See id.* at 7602 (“Irrespective of whether *Digital Antenna* agrees with the Bureau that either an FCC license or authorization from a licensed cellular or PCS provider is required to operate its devices, it was obligated to respond fully and completely to the Bureau’s inquiry”).

The opinion that the Division expressed in its unpublished letter did not become enforceable by appearing as dicta in a published Division decision. Tellingly, the Division itself acknowledged that its statement about signal boosters in *Digital Antenna* was by way of background and not intended as a statement of law. *See infra* p. 16. Its published NALF constitutes precedent, but certainly not on the issue of whether signal boosters can be operated by subscribers without licensee consent.

VII. THE BUREAU CANNOT CONSTITUTIONALLY SANCTION THE USE OF SIGNAL BOOSTERS

AT&T wants the Bureau to step-up enforcement of a “rule” that (1) has never been adopted in an APA rulemaking, and (2) would make it unlawful for Wireless Service subscribers to operate signal boosters without licensee consent. Enforcement of such a prohibition will subject the subscribers who purchased signal boosters and are operating the devices to criminal sanction and/or the deprivation of their property. Such enforcement cannot pass muster under the Due Process Clause of the Fifth Amendment.

Due process requires that a criminal law “provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal,” because no person “shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Buckley v.*

Valeo, 424 U.S. 1, 77 (1976). Consequently, a law is unconstitutionally vague if it: (1) “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,” or (2) “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). When judged under those standards, the rule that AT&T seeks to have enforced against ordinary Wireless Service subscribers is unconstitutionally vague on its face.

By law, a person of ordinary intelligence can be put on notice of the conduct that is prohibited by the Commission only by the rules published in the Federal Register, *see* 47 C.F.R. § 0.445(c), and by the Commission’s properly-published and legally effective opinions, orders, interpretations, and formal policy statements. *See id.* § 0.445(e). The question is what notice does the Commission’s properly-published and legally-effective rules and policy statements provide to an ordinary Wireless Service subscriber who is considering buying and operating a signal booster because he or she is paying for service that is unreliable. The clear answer is that the subscriber would *not* be on notice that it would be illegal to buy and operate such a device.

A subscriber whose service is unreliable would not be on notice that it would be unlawful to purchase a Commission-certificated signal booster, since no published rule currently in effect explicitly prohibits the sale of a Commission-certificated signal booster to a non-licensee. *See infra* Attachment 4. Nor would the subscriber be on notice that it would be unlawful to install and operate a Commission-certificated signal booster without the permission of the Wireless Service provider, since no published rule currently in effect explicitly prohibits the installation and operation of a signal booster without the licensee’s permission. To the contrary, two properly-published and legally-effective rules authorize Wireless Service subscribers to operate mobile and fixed stations under the authorizations held by their Wireless Service provider. *See* 47 C.F.R. §§ 1.903(c) & 22.3(b). Consequently, a Wireless Service subscriber who needs to operate a signal booster is on notice that he or she is entitled to do just that.

The fair notice requirement of due process would be satisfied if a Wireless Service subscriber in need of a signal booster could review the Commission’s public statements and determine “with ascertainable certainty” that such a device can be operated only with the permission of the Wireless Service provider. *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000). However, no properly-published, legally-effective Commission opinion, order, interpretation, or policy statement makes it “ascertainably certain” to a Wireless Service subscriber that it must obtain licensee consent to operate a signal booster. The only published Commission pronouncement to that effect was in its *Part 22 Biennial Review*, and that pronouncement violated the APA and is legally unenforceable. In the absence of adequate and effective notice that subscriber use of signal boosters without licensee consent is unlawful, due process precludes the Commission from penalizing such use. *See High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (D.C. Cir. 2002).

VIII. THE COMMISSION HAS NOT NOTIFIED WILSON THAT OPERATION OF A SIGNAL BOOSTER REQUIRES A LICENSE OR LICENSEE CONSENT

AT&T has alleged that “Digital Antenna and Wilson are aware that operation of a signal booster requires a license or licensee consent because the FCC flatly has told them so, on multiple occasions.” AT&T Reply at 27. I cannot speak for Digital Antenna. However, I know that the Commission has not flatly told Wilson that subscribers cannot operate one of its signal boosters without licensee consent. The following may be juxtaposed with AT&T’s bullet-point recitation of the “history” of the Commission’s statements on signal boosters. *See id.* at 27-30.

- June 28, 2004. The Division wrote a letter informing TX RX Systems, Inc. that the direct marketing of signal boosters to CMRS subscribers does not warrant further investigation because the Rules do not explicitly prohibit the sale of such devices to non-licensees. *See infra* Attachment 4.
- November 4, 2005. AT&T claims that the Audits and Compliance Branch (“Branch”) of the Office of Engineering and Technology informed Digital Antenna by letter that its PowerMax signal booster cannot be marketed to the public under the Rules. *See* AT&T Reply at 28. Examination of the Branch’s letter shows that it was not based on the fact that Digital Antenna was marketing the signal boosters to non-licensees without licensee consent. *See infra* Attachment 5.
- December 2, 2005. Digital Antenna asked the Branch to identify the regulations that prohibited the sale of the signal booster. *See infra* Attachment 1 at 12. The Branch apparently did not respond to that request. *See id.*
- February 4, 2008. The Division informed Digital Antenna that signal boosters are transmitters and, therefore, cannot be used without a Part 22 or 24 license. *See id.* at 13. It opined that the contract between a cellular carrier and a user does not authorize the use of a signal booster. *See id.* The Division reiterated its request that Digital Antenna disclose the steps it has taken to inform its customers that a signal booster requires a license or express authorization from a cellular provider. *See id.*
- May 12, 2008. The Division issues its NALF to Digital Antenna for failing to respond fully to the Division’s directive to provide information related to its products. *See Digital Antenna*, 23 FCC Rcd at 7602. The background section of the NALF included the statement that the Division’s NOI informed Digital Antenna that signal boosters may only be used by end user customers with the express authorization of the licensed provider. *See id.* at 7601.
- May 14, 2008. As soon as I read the NALF, I sent an email to the Division informing it

that I had just researched the issue and concluded that signal boosters could be used without the authorization of the cellular licensee. Having issued a legal opinion letter to that effect, I asked the Division how I could obtain a copy of the Division's NOI to Digital Antenna. The Division informed me that I would have to file an FOIA request to obtain the NOI.

- May 19, 2008. I sent an email to the Division in which I explained that having issued an opinion letter, it was "extremely important for me to know the rule section or published decision that prohibits the use of cellular booster by an end user customer absent express authorization of the licensee." I received a telephone call from the Division confirming that no rule or published case prohibits the use of a cellular booster by an end user customer absent express authorization of the cellular licensee. I was advised that the NALF was about the refusal to provide information requested by the Commission, and the statement in the NALF about the use of cellular boosters was by way of background. It was not intended to be a statement of law.
- September 11, 2009. A Bureau field agent testified with respect to the Bureau's warning letters that state that a "licensee's authority to install a [signal booster] does not permit a subscriber to install a [signal booster], unless the subscriber has received explicit authorization from the licensee to do so." AT&T Letter at 4. The agent allegedly testified the warning letters were based on a template prepared by a Commission attorney in Washington and are issued frequently. *See id.*
- November 3, 2009. Wilson submitted its petition for rulemaking in WT Docket No. 10-4. Attachment 2 to the petition set forth the results of my legal research on the law applicable to signal boosters. Page 10 of that attachment recited the information that I was given by the Division on May 19, 2008.
- January 13, 2010. In my previous letter, I expressed my opinion that existing law did not allow the Bureau's field agent to represent to Mr. Todd Cagle in Case No. EB-09-DT-0375 that he was subject to criminal prosecution for operating an in-building signal booster without AT&T's explicit authorization. I stated, "If I am incorrect, and there is legal authority for the agent's claim, it is imperative that I so inform my client. Accordingly, please advise me of any such authority." Wilson Letter at 6. I was never so informed by the Bureau.
- January 6, 2010. The WTB issued a public notice calling for public comment on the use of signal boosters. The WTB stated that the use of signal boosters, which can either be fixed or mobile, is allowed under the Rules. It did not state that the operation of a signal booster requires either a license or licensee consent.

In view of the foregoing, AT&T's claim that Wilson is aware that the operation of a signal booster requires a license or licensee consent is baseless. Wilson's position on the current law has been well known within the Commission for approximately ten months. It has been a matter of public record for four months. The Commission has been given several opportunities — both formally and informally — to inform Wilson if its view of the law was incorrect. The fact that Wilson has not been so informed speaks for itself.

The Bureau should disregard AT&T's call for an immediate issuance of a NALF "affirming that operation of a signal booster requires a license or licensee consent." AT&T Reply at 32. To issue such a NALF would require the Bureau to "identify each specific provision, term, and condition of any Act, rule, regulation, order treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization" which was apparently violated. 47 U.S.C. § 503(b)(4). No specific provision of the Act or the Rules can be identified that prohibits Wireless Service subscribers in good standing from using Commission-certificated signal boosters without licensee consent. There is simply no rule that can be enforced to AT&T's liking.

IX. THE BUREAU SHOULD CONSIDER WHETHER AT&T
IS ENGAGED IN ANTICOMPETITIVE CONDUCT

AT&T sells and leases radio devices that are capable of interstate communications. Thus, AT&T's trade is in interstate commerce within the meaning of § 313 of the Act. *See Memphis Radio Telephone Co., Inc. v. Mahaffey Message Relay, Inc.*, 49 F.C.C. 2d 258, 259 (1974). Accordingly, AT&T is subject to the Commission's jurisdiction to determine whether it has engaged in conduct to prevent equipment manufacturers from competing in interstate trade and commerce in radio devices. *See id.* at 258-59. Moreover, the Commission has applied the principles of *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) and *Carterfone*, 13 F.C.C. 2d 149, *reconsideration denied*, 14 F.C.C. 2d 571 (1968) to Wireless Service providers. *See Radio Telephone Industries, Inc. v. Mahaffey Message Relay, Inc.*, 61 F.C.C. 2d 212, 214 & n.9 (1976). Accordingly, AT&T is also subject to the Commission's jurisdiction under §§ 201(a) and 202(a) of the Act over "any charge, practice, classification or regulation" of a Wireless Service provider that affects "a subscriber's right to make beneficial use of his mobile telephone in interstate communications." *Id.* at 214.

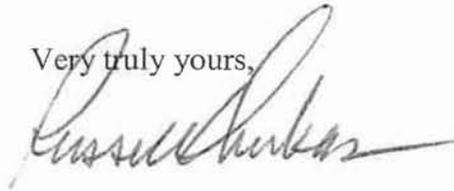
In its hearing designation order in *Mahaffey Message Relay*, the Commission found that a Wireless Service provider's policies and practices concerning the maintenance shops that install and maintain customer-owned mobile equipment "may adversely affect a subscriber's right to make beneficial use of his mobile telephone." 61 F.C.C. 2d at 216. It held that a Wireless Service provider could require that it approve maintenance shops in order to maintain operational control over its system as was required in 1976 by § 22.514(a) of the Rules. *See id.* However, approval of maintenance facilities had to be based upon "reasonable standards of technical

P. Michele Ellison
April 6, 2010
Page 18

capability.” *Mahaffey Message Relay*, 61 F.C.C. 2d at 216. A licensee could not adopt arbitrary or “unreasonable requirements for approval which would have an anticompetitive effect.” *Radio Telephone Industries, Inc. v. Mahaffey Message Relay, Inc.*, 79 F.C.C. 2d 399, 409 (Rev. Bd. 1980). The Commission ultimately found that the Wireless Service provider violated § 202(a) of the Act when it “acted unreasonably and for the purpose of discouraging competition in the mobile telephone maintenance market by refusing to approve additional maintenance shops on the ground that there was no subscriber need for more shops.” *Id.*

The teaching of *Mahaffey Message Relay* is that a Wireless Service provider can violate §§ 201(a) and 202(a) by engaging in unreasonable and anticompetitive practices that both adversely affect a subscriber’s right to the beneficial use of the service and lessen competition in interstate trade and commerce in radio devices. The Bureau should consider the possibility that AT&T has engaged in a pattern of conduct with respect to signal boosters that could be deemed unreasonable and anticompetitive under *Mahaffey Message Relay* before it takes any further enforcement actions against signal boosters at AT&T’s behest.

Very truly yours,



Russell D. Lukas

cc: Kathryn Berthot
Joel Kaufman
Roger Noel
Thomas Derenge
James A. Bridgewater
Stephen DeSena
Angela Manning-Kirchner
M. Robert Sutherland
Alan S. Tilles
Brian M. Josef
Robert H. Schwaninger
Michael D. Saperstein, Jr.
Steven A. Augustino
Michael P. Goggin

ATTACHMENT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-60639-CIV-SEITZ/O'SULLIVAN

AT&T MOBILITY, LLC, et al.

Plaintiffs,

v.

DIGITAL ANTENNA, INC.,

Defendant.

ORDER GRANTING IN PART DEFENDANT'S CONVERTED MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER is before the Court on Plaintiffs' Motion for Preliminary Injunction [DE 2] and Defendant's Motion to Dismiss [DE 21, 24]. AT&T Mobility ("ATT") brought this suit to enjoin Digital Antenna ("Digital") from marketing its PowerMax signal amplifier to consumers for use with their cellular phones. ATT alleges that, as a result of PowerMax-induced disruptions on its network, it has suffered a loss of goodwill, reputation, and customers. The source of these disruptions, according to ATT, is Digital's advertising, which deceives customers into believing that the PowerMax is a non-harmful device, compatible with ATT's network, and is approved for use by the Federal Communications Commission.

ATT fashioned its Complaint using the law of unfair competition. It has pled federal and state law claims of false advertising and trademark infringement, as well as a state law claim for tortious interference with ATT's subscriber agreements. ATT moves for preliminary injunctive relief on each claim. Digital opposes ATT's motion, raising identical arguments made in its motion to dismiss.¹ After reviewing the parties' motions, the responses and replies thereto, the record developed in preliminary discovery, the testimony and argument of the parties at the omnibus hearing,² and the relevant legal authorities, the Court will grant with prejudice that part

¹ On January 19, 2010, without objection from the parties, the Court converted Digital's motion to dismiss to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(d). By its Motion for Leave [DE 77], Digital seeks to address arguments ATT made in its response to the Rule 12(d) conversion. The Court will deny Digital's motion.

² At the hearing, the Court heard argument on ATT's Motion for Judicial Notice [DE 35] and denied the motion. (See Sept. 15 Transcript at 109.) This order codifies the Court's earlier oral ruling.

of Digital's motion relating to ATT's false advertising claims because ATT has failed to demonstrate a sufficiently direct causal nexus or proximate relationship between Digital's advertising and its alleged harm to satisfy the requirements for Lanham Act prudential standing. Further, the Court will deny ATT's motion for preliminary injunction because it fails to show a substantial likelihood of success on both its trademark infringement and tortious interference claims. At this juncture, there is insufficient evidence of a substantial likelihood of success in showing a likelihood of consumer confusion. There is also no evidence that Digital directly and intentionally sought to induce ATT users to breach their subscriber agreements by operating the PowerMax in a harmful fashion.

I. Factual Background

A. AT&T's Cellular Network and Cellular Signal Boosting Technology

1. The Birth of Cellular Technology and AT&T's Network

In 1968, the Federal Communications Commission ("FCC") advised telephone companies and other stakeholders that it sought to allocate a portion of the radio spectrum to mobile telephone services. (*See* Hearing Ex. 112 "Skype Petition" at 3.)³ Around this time, ATT began designing and developing a wireless telecommunications network across the United States. (*See* DE 1 "Complaint" ¶ 14.) The network would be composed of individual towers which would capture and broadcast cell phone signals within a radius of several miles. (*See id.*) As cell phone users travel across a coverage area, their signal would pass from tower to tower to ensure uninterrupted service. (*See id.*) By 1977, ATT constructed a prototype cellular system and initiated public trials. (*See id.* ¶ 15.) In 1982, the FCC licensed commercial cellular service over United States airwaves. (*See id.*) ATT's licenses allow it to operate its network on two frequency bands: (1) 850 MHz; and (2) 1900 MHz. (*See* DE 3 at 9 "Shively Decl." ¶ 4.)

2. ATT's Customer Agreements

In every agreement with its customers, ATT prescribes rules for wireless service use and device

³ *See also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commissions's Rules Relative to Cellular Communications Systems*, Report and Order, CC Docket No. 79-318, FCC 81-161, 86 FCC.2d 469 (1981).

compatibility.⁴ (See Complaint ¶ 17.) Specifically, ATT's service agreements require that the customer's device "be compatible with, and not interfere with, our service and must comply with all applicable laws, rules, and regulations." (See DE 1, Ex. 2 "Subscriber Agreement" at 13.) Further, customers are prohibited from using ATT's cellular internet services for activities that "adversely affect[] the ability of other people or systems to use either AT&T's wireless services or other parties' Internet-based resources." (See DE 2, Ex. 2 "Plan Terms" at 14.)

3. Digital's PowerMax Device

Digital manufactures the PowerMax, a device which enhances the capabilities of cellular phones across the wireless spectrum. (See Complaint ¶ 19.) The enhancement process is comprised of several steps. First, the PowerMax's receiving antenna captures a cellular phone signal in close proximity. (See Sept. 15 Transcript at 17-19.) Second, the receiving antenna transmits the signal to the PowerMax amplifier, which increases signal strength and relays the signal to the PowerMax's broadcast antenna.⁵ (See *id.* at 19-20; Shively Decl. ¶ 6.) The broadcast antenna then transmits the enhanced signal to the network tower. (See *id.*; Sept. 15 Transcript at 19-20.) When used properly, the PowerMax seeks to improve cell phone reception, increase signal range up to 50 miles, reduce dropped calls, and extend battery life. (See Complaint ¶ 21.) Digital does not sell the PowerMax directly to customers; rather it sells the PowerMax to distributors who sell the device to retailers who, in turn, sell it to end users. (See DE 22, Ex. 2 "Jones Decl." ¶ 17.)

The PowerMax is a "broadband" device, meaning that it can amplify signals on different frequencies, including signals operating in ATT's, Verizon's, or Sprint's frequencies. (See Shively Decl. ¶ 9.) Because the PowerMax emits radio frequency energy, the FCC requires Digital to obtain an equipment certification. See 47 C.F.R. §§ 2.901, 2.915; *see also* 47 C.F.R. § 2.803(a) (prohibiting marketing of radio frequency device prior to

⁴ "Device," as the term is used in the subscriber agreement, includes "all phones and other [instruments] containing a SIM [card]." (See Subscriber Agreement at 11.) According to Digital, the PowerMax does not contain a SIM card. (See Sept. 15 Transcript at 46.)

⁵ Because the PowerMax amplifies in two directions, it is referred to as a "bi-directional amplifier" or BDA. (See Shively Decl. ¶ 6.)

equipment authorization). Accordingly, on June 14, 2004, Digital obtained equipment authorizations for the PowerMax. (*See* DE 1, Ex. 6.)

4. ATT's Device Authorization Process and Amplifying Solutions

ATT subjects every device used on its network to a three-step certification process. (*See* Shively Decl. ¶ 10.) Digital has not sought to complete this certification process for the PowerMax. (*See id.*) First, the device manufacturer must obtain an FCC equipment authorization. (*See id.*) Second, the device must obtain certification from a cellular industry review board known as the PCS-1900 Type Certification Review Board ("PTCRB"). (*See id.*) Third, the device must pass ATT's internal laboratory tests to ensure compliance with its proprietary network standards. (*See id.*)

For customers requiring signal enhancements, such as universities and hospitals, ATT maintains relationships with two BDA vendors: (1) Cellular Specialities, Inc.; or (2) Powerwave, which both produce BDAs approved by ATT. (*See* DE 30 "Erickson Decl." ¶ 7.) ATT will install and maintain these BDAs in fixed locations, such as buildings, but not in mobile settings. (*See* Sept. 15 Transcript at 96-98.) This allows ATT to control and monitor the device in the event it requires repair, replacement, or is discontinued in favor of an alternative signal strengthening solution, such as a new tower. (*See id.*) Approved BDAs are calibrated to operate on ATT's network and licensed frequencies alone, and not on other networks or frequencies. (*See id.* at 85.)

B. The Marketing Statements of Digital and its PowerMax Retailers

In marketing the PowerMax, Digital makes the following statements:⁶

1) In the "Frequently Asked Questions" page on Digital's website until 2006, Digital claimed that "neither the user nor the installer [of a PowerMax] needs an FCC license" and that "we [Digital] are the only manufacturer with carrier approvals."

2) In its 2008 and 2009 product catalogs, Digital claimed that the PowerMax is "FCC and IC approved for use with all North American cell phones operating on 850 or 1900 MHz (except Nextel or IDEN)."

⁶ In one instance in June 2005, Digital used the ATT trademark "AT&T" in a news release. (*See* SoF ¶ 43.)

3) On its current website, Digital claims that “All of Digital Antenna’s amplifiers and repeaters are dual band (850 MHz and 1900 MHz) and can be used on multiple carriers simultaneously. The 850 MHz and 1900 MHz frequency bands are used by all cellular carriers in North America, except Nextel and IDEN.”

4) In the PowerMax’s Installation and Operation Manual, Digital claims that the device “operates with all carriers in the USA and Canada except Nextel/iDen providers.”

(See DE 1, Ex. 1; Ex. 2; Ex. 3; Ex. 4; Ex. 5.)

Through several mediums, including the internet and yachting magazines, Digital’s retailers make similar claims regarding the PowerMax:

1) WPSantennas.com: “compatible with: All cellular and PCS carriers in the USA and Canada, including Cingular, AT&T, Verizon, Sprint, Alltel, and T-Mobile (850 MHz, 1900 MHz).”

2) Solidsignal.com: “compatible with all cellular and PCS carriers in the USA and Canada, including Cingular, AT&T, Verizon, Sprint, Alltel and T-Mobile.”

3) Davesmarineelectronics.com: “The DA4000 is the only amplifier FCC approved to amplify all cell carriers in the US.”

4) Phonemerchants.com: “FCC approved to amplify all cell carriers in the USA, including Cingular, AT&T, Verizon, Sprint, Alltel and T-Mobile.”

5) Samstores.com: “The DA4000SBR is the only amplifier/repeater FCC approved to amplify all cell carriers in the US, including Cingular, AT&T, Verizon, Sprint, Alltel and T-Mobile.”

(See DE 2, Ex. 5; DE 30 “Townsend Decl.” ¶ 5.)

In 2009, Digital imposed a Minimum Advertised Pricing (“MAP”) policy on all PowerMax distributors and retailers. (See Hearing Ex. 10.) Pursuant to the MAP policy, distributors and retailers were required to advertise the PowerMax at or above a minimum price from December 1, 2008 to November 30, 2009. (See *id.*)

Digital reserved the right to discontinue shipments to distributors and retailers who did not comply with the MAP policy.⁷ (See *id.*)

⁷ Shipments to distributors and retailers are consummated by way of “stocking order[s],” in which the retailers agree to purchase a specific number of PowerMax devices. (See Hearing Ex. 10.)

Peter Townsend, a PowerMax owner and Sprint customer, recalls seeing PowerMax advertisements on the internet and in yachting magazines. (*See* Townsend Decl. ¶¶ 3-5.) Although he does not remember the specific advertising claims made, he recalls that the PowerMax was advertised as being legal to operate without further license or authorization. (*See id.*) Louis Watson, a fellow PowerMax owner and Sprint and Verizon customer, asserts that, after researching the PowerMax on Digital's website and reading the claims Digital made about the PowerMax, he believed that no further authorization was required to use the device. (*See* DE 30 "Watson Decl." ¶¶ 3-5.) Neither Townsend nor Watson is an ATT customer. (*See* Townsend Decl. ¶ 2; Watson Decl. ¶ 2.)

C. The Problems of Radio Frequency Interference (RFI)

1. Causes of RFI

There is no dispute that the PowerMax is capable of causing RFI. (*See* Jones Decl. ¶ 15; Shively Decl. ¶ 7.) RFI is a type of electromagnetic energy which disrupts cellular network signals. (*See id.* ¶ 23.) According to ATT, the PowerMax is capable of generating RFI in two situations. First, RFI may result from "Oscillation," which occurs when the PowerMax's two antennae are placed too close together, creating a feedback loop. (*See id.* ¶ 7.) Oscillation is analogous to the consequences of placing a microphone close to a speaker. (*See* Jones Decl. ¶ 15.) Oscillation generates a signal which can radiate through a broadcast antenna to ATT's network towers which, in turn, interpret the signal as "external noise" that dilutes the connection to cellular phones. (*See* Shively Decl. ¶ 7.) In response, the network towers increase their "transmit" strength in an effort to overcome the perceived noise, but this action effectively narrows the network tower's coverage causing dropped calls and lost signals. (*See id.*)

Second, RFI may result from saturation. If a vehicle or vessel in which a PowerMax is installed comes too close to the network towers, they may displace and overpower signals from other cell phones in the area. (*See id.*) Digital concedes that the PowerMax is capable of oscillating, but only when improperly installed. (*See* Jones Decl. ¶ 15.) However, Digital disagrees that the PowerMax is capable of "saturating" ATT's network towers. (*See* Sept. 15 Transcript at 20-23.) Rather, Digital asserts that the PowerMax cannot amplify and

rebroadcast a signal at any greater strength than that produced by a cellular phone's broadcast antenna. (*See id.*)

Because the PowerMax is a "broadband" device, it operates across the cellular wireless spectrum. (*See* Shively Decl. ¶ 9.) Therefore, irrespective of whether the PowerMax is used by an ATT, Verizon, or Sprint customer, RFI generated by the PowerMax can affect ATT's network. RFI persists until ATT is able to identify the source of, and remove, the interference. (*See Id.* ¶ 8.)

2. RFI Events on ATT's Network

According to ATT, RFI emanating from a PowerMax device has caused 39 "Network Disruption Events" since August 2007 in South Florida alone. (*See* DE 3 "Vencl Decl." ¶¶ 10, 11; DE 49 "SoF" ¶ 55.) In each case, ATT observed a decline in network tower performance in the subject sector, including depressed signal strength, increased traffic blocking, and a higher dropped call rate. (*See* Sept. 14 Transcript at 8, 12-13.) To locate the source of the RFI in each sector, ATT engineers and investigators⁸ used a spectrum analyzer device and Yagi directional antenna.⁹ (*See* DE 3 "Vencl Supp. Decl." ¶ 9; Sept. 14 Transcript at 15-16.) The spectrum analyzer measures the strength of a broadcast signal by way of the Received Signal Strength Indicator ("RSSI"). (*See* Vencl Decl. ¶ 6; Vencl Supp. Decl. ¶ 9; Sept. 14 Transcript at 14.) Attached to the Yagi antenna, the spectrum analyzer will depict the RSSI of any signal broadcasted toward the Yagi antenna. (*See* Vencl Decl. ¶ 6; Sept. 11 Transcript at 16.) ATT engineers and investigators rotate their position with the Yagi antenna in hand to locate, by process of elimination, the direction from which the interfering signal is emanating. (*See id.*)

Throughout its investigations, ATT has observed several characteristics typical of BDA-induced disruption events. (*See* Vencl. Supp. Decl. ¶¶ 11-12.) First, network towers in the subject sector will experience a rapid increase in the "noise floor." (*See id.*) The noise floor measures the number of signals received by a particular tower; the more phone calls received, the higher the noise floor. (*See id.* ¶¶ 9-10.) According to ATT,

⁸ ATT retains an independent contractor called Reliant Communications to help investigate disruption events. (*See* DE 30 "Heron Decl." ¶ 2.)

⁹ Digital's engineer John Jones observed that a spectrum analyzer cannot identify the PowerMax's digital signature. (*See* Jones Decl. ¶ 7.)

a network tower's noise floor increases dramatically in the presence of a BDA-amplified cellular signal, a phenomena not associated with normal call volume. (*See id.* ¶¶ 11-12.) Second, although a tower instructs the BDA-amplified phone to power-down, the noise floor persists at a high level. (*See id.*)

ATT focuses on three specific disruption events to illustrate its point.

a. The Tugboat Betty

In November 2007, ATT engineer Lu Vencl was informed that three ATT towers in Key West were experiencing high levels of interference. (*See* Sept. 14 Transcript at 22.) After collecting performance data from the affected towers, Vencl concluded that the towers were experiencing interference consistent with other BDA-induced disruption events. (*See id.* at 22-23.) Vencl identified the source of the interference as emanating from the Tugboat Betty, which was docked at a Key West marina. (*See id.* at 26.) Because the vessel was unoccupied at the time, Vencl requested the vessel captain's contact information from the marina dock master. (*See id.*)

Once in touch with the captain, Vencl learned that the device could not be turned off immediately because the captain was out of town. (*See id.*) According to Vencl, the captain confirmed that he had a Digital BDA aboard the vessel.¹⁰ (*See id.* at 27.) In a November 26, 2007 email to fellow ATT engineers, Vencl discussed a photo taken of the upper portion of the vessel and the pilot's house in which the BDA was installed. (*See* Hearing Ex. 91.) Vencl observed that the BDA aboard the vessel appeared to be mis-installed, leaving only approximately 25 feet between the receiving and broadcasting antenna rather than the required 40 feet. (*See id.*) According to Digital, the BDA's broadcasting antenna is not a Digital product. (*See* Sept. 15 Transcript at 31-32.)

The disruption persisted for several days, forcing ATT to disable its 3G network and migrate all phone calls in the Key West area to its 2G network. (*See* Sept. 14 Transcript at 27-28.) ATT did not observe any dropped calls after the migration, but Vencl believes that the towers experienced call blocking. (*See id.* at 62.) The disruption dissipated several days later. (*See id.* at 27-28.) Vencl learned that the Tugboat Betty left the

¹⁰ The captain's statement to Vencl is hearsay. However, the Court may consider hearsay on a motion for preliminary injunction. *See Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

marina the same day the disruption ceased. (*See id.*)

b. SBA Communications Event

The SBA Communications event differed from the pattern ATT had previously observed. (*See id.* at 31.) VencI concluded that the towers did not experience interference from a single signal, such as in the Tugboat Betty. (*See id.*) Rather, VencI discovered that the towers suffered from a wideband noise which disabled transmissions across ATT's licensed spectrum. (*See id.*) This atypical disruption required seven months to properly diagnose, but VencI eventually discovered a PowerMax unit mounted on a light pole near the affected towers. (*See id.* at 31-34.) VencI was given access to the building, disabled the PowerMax, and the disruption ceased. (*See id.*)

c. The Pipe Dream Event

In September 2007, ATT observed interference affecting several towers in the Fort Lauderdale, Florida area. (*See VencI Decl.* ¶ 10; Sept. 11 Transcript at 48.) To assist ATT's investigation, VencI contacted Michael Mattern, an agent with the FCC Enforcement Bureau and Gary Gray, a telecommunications manager for the City of Fort Lauderdale. (*See id.* at 14-15.) Using their spectrum analyzer and Yagi antenna, VencI, Mattern, and Gray were able to isolate the disruption to the vessel Pipe Dream docked at an intercoastal marina during the Ft. Lauderdale boat show. (*See id.* at 17, 49.) VencI gained access to the vessel and found that the source of the disruption came from a broadcast antenna at the top of the vessel. (*See Sept. 14 Transcript* at 30.) VencI discovered that the antenna was connected to a PowerMax unit and that the system was mis-installed, leaving inadequate separation between the receiving and broadcast antenna. (*See id.* at 54-55.)

Once aboard the vessel, Gray observed that his police radio experienced interference and that communications with the police dispatcher were so garbled as to make them virtually unintelligible. (*See Sept. 11 Transcript* at 51.) Gray could not identify any public safety calls that were dropped, however. After the Power Max was disconnected, Gray was able to communicate clearly on his radio. (*See id.* at 51-52.) Gray also observed that, once the PowerMax was powered-down, the RSSI on VencI's spectrum analyzer declined. (*See id.* at 57.)

However, ATT never recorded a screen shot from the spectrum analyzer once the PowerMax was powered-down. (*See id.* at 66.) Indeed, the available screen shot, taken while the PowerMax was on, does not depict the public safety downlink frequency band on which Gray and other city officials received radio signals. (*See id.* at 67.) Rather, it only depicts the public safety uplink frequency band and ATT's licensed frequency band. (*See id.* at 61-62.) According to Digital, the screen shot depicts normal signal traffic across the public safety uplink and ATT bands. (*See* Sept. 15 Transcript at 26-27.)

According to Digital engineer John Jones, ATT's screen shot indicates that the public safety uplink frequency band is operating properly, successfully transmitting voice or data rather than noise. (*See id.* at 27.) Jones conducted quality testing of Digital's PowerMax devices to ensure against causes of RFI, such as oscillation. (*See id.* at 35.) As a demonstrative example, Jones submitted three of his own spectrum analyzer screen shots, one which measured the ambient noise and signals surrounding his South Florida office, a second which measured the signal of a PowerMax directly linked to the spectrum analyzer, and a third which measured the signal of a PowerMax from a 20-foot distance using a Yagi antenna. (*See id.* at 39-44.) According to Jones's screen shots, when attached directly to the spectrum analyzer, the PowerMax amplified the surrounding ambient noise approximately 15 to 20 dB. (*See id.*) By contrast, when measured with the Yagi antenna at a 20-foot distance, the PowerMax's signal strength had dissipated, nearly equaling the strength of the ambient noise surrounding Jones's office. (*See id.*)

3. Customer Response to RFI Events

ATT sales manager Gail Deviddio asserts that two booster-induced disruption events in Key West, one in November 2007 and another in February 2008, resulted in a high volume of ATT customers complaining to her about dropped calls and lack of service. (*See* DE 3 "DeViddio Decl." ¶¶ 3-5.) She claims that she learned that the disruptions were booster-induced after speaking with ATT technicians. (*See id.* ¶ 7.) In each incident, she observed that the customers were frustrated and dissatisfied. (*See id.*) She claims that, in response to the February 2008 incident, twelve ATT customers cancelled their service. (*See id.* ¶ 8.) She does not indicate, however, whether the February 2008 incident involved a PowerMax.

While ATT concedes it cannot identify any of its customers who have terminated their service as a result of a PowerMax disruption event, Mark Austin, ATT's Assistant Vice President for Network Churn Reduction, claims that BDA-induced disruption events generally increase the number of customers lost to competitors and the number of former customers who disparage ATT's brand image and reputation. (*See* SoF ¶ 63; Sept. 11 Transcript at 134-35.) To demonstrate this point, ATT refers to two studies, one analyzing customer satisfaction and the other addresses the causes of customer loss, otherwise known as "churn." (*See* Hearing Ex. 96, 97.) The customer satisfaction study surveys the customers of five major cellular service providers, including ATT, during a ninety day period beginning in July 2009. (*See* Hearing Ex. 96.) According to the study, 31% of overall customer satisfaction is attributable to network performance and reliability.¹¹ (*See id.*) Of the 31% of network performance-related satisfaction, 16% derives from customer experiences with dropped and disconnected calls.¹² (*See id.*)

The churn study polls 200 ATT customers lost -- "churners" -- per region in 27 regions across the country in June 2009. (*See* Hearing Ex. 97; Sept. 11 Transcript at 130.) The study indicates that the most significant cause of churn in June 2009 was cellular service costs and ATT billing practices,¹³ but that in the preceding year overall, network performance was the most significant cause of churn. (*See* Hearing Ex. 97.) Other causes of churn include competitive lure, customer service issues, and equipment related issues. (*See id.*)

The churn study also measures churners' willingness to recommend ATT to others. (*See id.*) Among all network performance-related churners, only seventeen percent were willing to recommend ATT to others. (*See id.*) Nearly half of all network performance-related churners, however, are *unlikely* to recommend ATT to others. (*See id.*) The study designates these network performance-related churners as "brand assassins," which,

¹¹ Other attributes of customer satisfaction include: (1) cost of service; (2) billing practices; (3) customer service; and (4) offerings and promotions. (*See* Hearing Ex. 96.)

¹² The size of a customer's local calling area is the most significant network performance-related factor, comprising 21% of all satisfaction attributable to network performance. (*See* Hearing Ex. 96.) Other factors include: (1) call quality – 14%; (2) indoor calling capability – 13%; (3) call success on first attempt – 12%; (4) timely receipt of voicemail and text messages – 12%; and (5) calls outside local service area – 11%. (*See id.*)

¹³ According to Austin, the recent increase in churn from cost and billing is caused by external factors such as the economy. (*See* Sept. 11 Transcript at 131.)

according to Austin, indicates that these churners are so dissatisfied with ATT that they will affirmatively disparage ATT's brand.¹⁴ (*See* Sept. 11 Transcript at 132.) By contrast, 75% of all customer service-related churners become "brand assassins," according to the study. (*See* Hearing Ex. 97.) Further, only 6% of customer service churners express a willingness to recommend ATT's services to others. (*See id.*)

D. FCC Actions

1. Enforcement Actions Regarding BDAs

On November 4, 2005, Ray Laforge, Chief of the Office of Engineering and Technology within the Audits and Compliance Bureau of the FCC, sent a letter to Digital regarding the sale and use of the PowerMax. (*See* Hearing Ex. 78.) Laforge stated that the PowerMax could not be marketed to the general public under the FCC's rules and regulations. (*See id.*) On December 2, 2005, Digital responded to Laforge's letter, stating that it did not believe that it was in violation of the FCC's rules and regulations and asked Laforge to "provide [Digital] with the specific areas of the FCC regulations that you believe we are violating to allow us to make a more specific response to your questions of sales in violation of the FCC regulations." (*See* Hearing Ex. 80.) Digital emphasized that "[i]t is our belief that we have sold product that requires and has FCC approval into the marketplace for which it was approved." (*See id.*) Laforge never replied to Digital's response. (*See* SoF ¶ 18.)

On October 25, 2007, ATT asked the FCC to review the equipment authorizations for the PowerMax. (*See id.* ¶ 23.) On November 5, 2007, Kathryn S. Berthot, Chief, Spectrum Enforcement Division of the Enforcement Bureau of the FCC ("Bureau") sent Digital a Letter of Inquiry ("LOI") in which she stated that the PowerMax's equipment authorizations require that Part 22 or 24 licenses must first be obtained before the devices can be used, but that Digital is marketing the PowerMax to individual consumers who cannot obtain such licenses. (*See id.* ¶¶ 24-25.) Ms. Berthot asked Digital to explain why it was marketing PowerMax devices to individuals who could not obtain the required licenses and what steps Digital has taken to inform its customers that the devices may not be operated without appropriate licensing. (*See id.* ¶ 26.)

¹⁴ The survey itself does not explain whether the term "brand assassin" applies to churners resolved to proactively disparage ATT's brand or merely to churners who express a strong unwillingness to recommend ATT's services to others.

In Digital's November 6, 2007 response, it claimed that PowerMax devices do not constitute "transmitters" under Part 22 or 24, and therefore did not require licenses. (*See id.* ¶ 27.) Digital explained that the cellular phone whose signal the PowerMax amplifies is the "transmitter" and use of the phone is licensed by virtue of the fact that cellular carriers like ATT authorize users to transmit on their networks pursuant to a contractual agreement. On February 4, 2008, Berthot responded to Digital and stated that Digital's reading of the rules was incorrect. (*See id.* ¶ 28.) Berthot stated that the PowerMax and other BDAs are transmitters and therefore cannot be used without a Part 22 or 24 license. (*See id.*) Berthot maintained that the contract between a cellular carrier and a user to use a cellular phone does not also provide authorization to use a BDA. (*See id.*) Berthot reiterated her request that Digital reveal what steps it has taken to inform its customers that the PowerMax requires a license or express authorization from a cellular provider. (*See id.* ¶ 30.)

Digital responded to Berthot's letter by insisting that BDAs are not transmitters and that they may be used without express authorization of a cellular service provider. (*See id.* ¶ 31.) On May 8, 2008, the FCC issued a Notice of Apparent Liability ("NAL"), which declared that Digital may be liable for failing to provide complete responses to a Bureau inquiry, and proposed an \$11,000 monetary forfeiture for failure to comply. (*See id.* ¶ 32.) In its June 11, 2008 response to the NAL, Digital maintained that the Bureau did not follow proper procedure in issuing the NAL because Digital is not an entity regulated by the FCC. (*See id.* ¶ 34.) The Bureau has not taken further action on the LOI or the NAL.

In August, October, and November 2008, agents from the Bureau's field offices issued several warning letters to individual BDA users warning them that BDA use by anyone other than licensees such as ATT or Verizon or without their express authorization was prohibited by FCC rules. (*See* Hearing Ex. 119, 120, 121.) The letters required individual users to cease use of their BDAs. (*See id.*; Sept. 11 Transcript at 20-21.) Agent Mattern issued one of these letters to the Captain of the Pipe Dream after the vessel's PowerMax device was disabled. (*See id.*)

2. FCC Proposed Rulemakings and Declaratory Proceedings

Since 2005, stakeholders have urged the FCC to take some form of action on BDA use. On August 18,

2005, Bird Technologies sought a new rule that would require that BDA use be prohibited unless users obtained express licensee permission. (*See* DE 76 at 9-12 “FCC Public Notice.”) On February 20, 2007, Skype, a software application company, petitioned the FCC to declare that end users had the right to attach devices to wireless networks that they used. (*See* SoF ¶ 22.) Later that year, on November 2, 2007, the Cellular Telecommunications & Internet Association (“CTIA”), of which ATT is a member, filed a petition with the FCC requesting a declaratory ruling that the sale of BDAs is unlawful. (*See id.* ¶¶ 20-21.) On September 25, 2008, Jack Daniel Co. sought clarification that the FCC did not intend to regulate broadband BDAs in a manner that would inhibit local governments and public safety entities from improving their wireless coverage. (*See* FCC Public Notice.) On October 23, 2009, the DAS Forum, an industry association, sought a new rule to regulate the marketing, installation, and operation of BDAs without requiring prior licensee consent. (*See id.*) A final petition, filed by Wilson Electronics on November 3, 2009, requested a new rule to create special FCC equipment certifications for BDAs to ensure that they will not cause interference.

In response to the several requests, the FCC began taking action in late 2009. On October 22, 2009, the FCC issued a Notice of Proposed Rulemaking, in which they requested industry input on whether, consistent with Skype’s request, it should allow end users to attach devices to wireless networks. (*See* DE 68, Ex. 1 ¶ 166.) On January 6, 2010, the FCC issued a request for comment on the various BDA-related petitions, including CTIA’s petition, which “seek[] clarification of or changes to Commission rules to address the proper use and regulation of these devices.” (*See* Public Notice.) The FCC noted that “[g]enerally, signal boosters are treated as licensed transmitting devices and must go through the equipment certification process outline in Part 2 of the Commission’s Rules.” (*See id.*)

E. ATT’s Cease and Desist Correspondence with Digital

On August 8, 2008, ATT’s counsel Albert Frevola wrote Digital asking it to cease advertising and selling all boosters, including the PowerMax, and recall all booster products placed into commerce. (*See* DE 1, Ex. 6 at 8.) On October 28, 2008, Digital issued an advisory notice requesting that all Digital distributors and resellers stop using ATT trademarks in their advertising. (*See* DE 2, Ex. 5 at 35.) On February 26, 2009, Albert Frevola

again wrote Digital, insisting that it cease: (1) use of ATT's marks; (2) advertising that the PowerMax is "FCC approved," and requesting that Digital place a disclaimer on its products which reads that use of the PowerMax without FCC license or express permission from a licensee is unlawful. (*See* DE 1, Ex. 6 at 9-10.) Frevola warned that if a satisfactory response was not forthcoming in seven days, he would be compelled to seek relief before this Court. (*See id.*) On April 30, 2009, ATT filed its Complaint. (*See* Complaint.)

II. Procedural Background

Along with its Complaint, ATT filed its motion for preliminary injunction seeking injunctive relief for all six Counts. (*See* Complaint; DE 2.) For purposes of organization, each Count can be grouped under one of three headings. First, Counts I (Lanham Act False Advertising), II (Florida Deceptive and Unfair Trade Practices Act "FDUTPA"), and IV (Florida Statutory False Advertising) each allege false advertising claims. (*See* Complaint ¶¶ 46-51, 52-55, 65-69.) Second, Counts II (FDUTPA), V (Lanham Act Trademark Infringement), and VI (Common Law Trademark Infringement) assert trademark infringement claims. (*See id.* ¶¶ 52-55, 70-76, 77-83.) Finally, Counts II (FDUTPA) and III (Florida Tortious Interference) state claims for tortious interference. (*See id.* ¶¶ 52-55, 56-64.) Unlike the other Counts, the FDUTPA claim is pled to include allegations of false advertising, trademark infringement, and tortious interference under one, over-arching unfair competition claim.¹⁵ (*See id.* ¶ 54.)

On June 24, 2009, Digital moved to dismiss each Count on grounds of preemption, primary jurisdiction, and failure to state a claim. (*See* DE 21.) Although drafted as a Fed. R. Civ. P. 12(b)(6) argument, Digital also argued that ATT lacked prudential standing under the Lanham Act. (*See id.* at 23-24.) In the event that the Court referred this matter to the FCC, Digital also requested a stay of ATT's trademark claims. (*See id.* at 19.) That same day, Digital also responded to ATT's motion for preliminary injunction, reasserting many of the arguments raised in its motion to dismiss. (*See* DE 22.) On July 8, 2009, the Court granted the parties' joint request to open an expedited discovery period and continue the omnibus hearing on the parties' motions to September 11, 2009.

¹⁵ Because the FDUTPA claim can at once be interpreted as a false advertising, trademark infringement, and tortious interference claim, the Court will analyze the claim under each heading *infra*.

(See DE 29.) ATT filed its reply in support of its motion for preliminary injunction and response to Digital's motion to dismiss on July 29, 2009. (See DE 32, 33.) Digital filed its reply in support of its motion on August 14, 2009. (See DE 41.)

Over the course of four days, the Court held an evidentiary hearing at which it heard testimony and argument on the issues raised in the parties' motions. (See DE 57-59, 62.) Most significantly, the Court heard testimony on: (1) the mechanics behind ATT's network, signal strengthening technology, and ATT's network disruption investigations; (2) the causal nexus between Digital's advertising and harm to ATT's reputation and lost customers; and (3) BDA-related enforcement actions by the FCC. (See Sept. 11, Sept. 14, Sept. 15, Sept. 22 Transcript.) Due to the fact that the parties had conducted discovery and relied on such discovery in arguing issues raised in Digital's motion to dismiss,¹⁶ the Court gave notice to the parties pursuant to Fed. R. Civ. P. 12(d) that it would convert Digital's motion to dismiss into a motion for summary judgment. (See DE 75.)

In their response to the Rule 12(d) notice, ATT agreed that the extensive discovery covered several topics raised in Digital's motion to dismiss, but that the Court should be reluctant to grant summary judgment because: (1) it had not yet completed discovery; and (2) if discovery has revealed a curable pleading deficiency, it should be given leave to re-plead such a claim. (See DE 76 at 3-5.) Digital moved for leave to file a rejoinder to ATT's response, stating that the arguments ATT raises are improper. (See DE 77.) In the alternative, Digital moved to strike ATT's response. (See *id.*)

Further filings on the Rule 12(d) issue is unnecessary. The Court is well-aware that discovery has not concluded in this action, and, having converted Digital's motion to dismiss to a motion for summary judgment, is careful not to grant judgment as a matter of law on claims to which an amendment is appropriate. However, after careful consideration of the record and the three types of claims raised – false advertising, trademark infringement, and tortious interference – the Court is convinced that neither amendment nor further discovery will cure the prudential standing deficiencies in ATT's false advertising claims. The remaining claims –

¹⁶ In connection with the testimony and argument from the omnibus hearing, the parties submitted proposed findings of fact and conclusions of law, and replies thereto, which the Court has considered in arriving at this decision. (See DE 63-64, 66-67.)

trademark infringement, tortious interference, and their FDUTPA overlays – survive summary judgment, but, due to insufficient evidentiary support at this juncture, do not allow for preliminary injunctive relief.

III. Standards

A. Summary Judgment

Summary judgment is appropriate when “the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 991 (11th Cir. 2001). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The Court must view the record and all factual inferences therefrom in the light most favorable to ATT, the non-moving party, and decide whether “‘the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52).

B. Preliminary Injunction

To warrant a preliminary injunction, ATT bears the burden of showing that: (1) it has a substantial likelihood of success on its claims; (2) it will be irreparably harmed if Digital is allowed to continue its advertising claims during the pendency of this action; (3) ATT’s threatened injury outweighs any harm to Digital; and (4) an injunction would not be adverse to the public interest. *State of Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005). “A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites.” *American Civil Liberties Union of Fla. v. Miami-Dade County School Board*, 557 F.3d 1177, 1198 (11th Cir. 2009) (citation omitted). Nevertheless, in trademark infringement actions, where a plaintiff has shown a substantial likelihood of success, irreparable harm is generally presumed. See *Levi Strauss*, 51 F.3d at 986. Both the motion for preliminary injunction and motion to dismiss raise jurisdictional issues which the Court must

address before reaching the merits.

IV. Jurisdictional Discussion

A. The Preemption Argument Fails

Digital contends that ATT's Complaint is preempted because it alleges, in essence, a type of nuisance claim. Because the alleged harm necessarily involves RFI, Digital insists that all grievances fall within the jurisdiction of the FCC and are therefore preempted. However, the cases Digital cites involve plaintiffs who assert express nuisance and trespass claims against persons whose devices cause RFI. *See Howington v. Spectrasite Communications, Inc.*, 2006 WL 335580, *3 (S.D. Ala. Feb. 13, 2006) (preempting nuisance and trespass claims against company who erected allegedly disruptive towers); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320 (2d Cir. 2000) (hold that federal law preempts local zoning board regulations on FCC-licensed radio station towers which allegedly caused RFI). By contrast, the Complaint in this case focuses on the device manufacturer's (Digital's) advertising, not directly on the owner's use of the device.¹⁷

While the Court does not ignore the fact that use of the device and RFI are essential factual predicates of ATT's harm, ATT's claims are not preempted merely because such factual predicates fall within the FCC's jurisdiction. *See, e.g., North American Medical v. Axiom Worldwide*, 522 F.3d 1211, 1225-26 (11th Cir. 2008) (holding that district court did not err in finding that the defendants "FDA approved" ad was literally false by considering and applying FDA approval standards). Furthermore, the Court is not at liberty to re-plead ATT's Complaint to reflect a more comfortable nexus between the RFI events, ATT's harm, and the claims pled.¹⁸ *Cf. Kemp v. International Business Machines Corp.*, 109 F.3d 708, 712-13 (11th Cir. 1997) (discussing "complete preemption" doctrine in ERISA context). Therefore, the Court will deny Digital's preemption argument.

B. ATT has Article III Standing

Because Article III standing is jurisdictional, the Court must address it before turning to the merits of

¹⁷ ATT readily admits that it also seeks relief before the FCC to stop RFI on its network, albeit relief against Digital. (See Sept. 22 Transcript at 130.)

¹⁸ This holding does not, however, cure the difficulties ATT faces in conforming its harm to the contours of the causes of action pled in the Complaint. These difficulties are discussed in more detail, *infra*.

ATT's claims. *See Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1161 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 1647 (2008) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91-93 (1998)). To demonstrate Article III standing, ATT must establish: "(1) an injury in fact – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical; (2) causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant; (3) redressability – a likelihood that the requested relief will redress the alleged injury." *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1252 (11th Cir. 2003) (citing *Steel*, 523 U.S. at 102-04).

ATT alleges three types of injuries which it suffers at the hands of Digital. First, ATT claims that Digital falsely and deceptively advertises that the PowerMax is FCC approved and compatible with its network. As a result of Digital's advertising, ATT asserts that consumers purchase the PowerMax and trigger disruption events which harms ATT's reputation and causes customers to leave ATT.¹⁹ (*See* Complaint ¶¶ 41-42.) Second, ATT claims that, by its advertising, Digital intentionally seeks to induce ATT's customers to violate the terms of their user agreements which prohibit use of harmful devices. (*See id.* ¶ 60.) Finally, ATT claims that Digital and its distributors use its registered marks to trade on ATT's goodwill, and as a result, confuses consumers as to whether ATT is associated with or approves of the PowerMax. (*See id.* ¶¶ 73, 80.) ATT requests injunctive relief to redress each injury.

ATT satisfies the first prong of the Article III test – in each claim, ATT alleges a harm to a specific contractual or economic interest. The traceability and redressability prongs, however, expose a measure of vulnerability for ATT's false advertising claims.²⁰ The traceability inquiry requires that the connection between Digital's false advertising and ATT's harmed reputation "must not be too attenuated." *Norton*, 338 F.3d at 1254

¹⁹ Although it is not pled, ATT asserts that they are also injured because they are forced to expend funds to locate and neutralize disruption-causing BDAs.

²⁰ By contrast, ATT's trademark infringement and tortious interference injuries do not suffer from similar traceability and redressability concerns. Digital's, and its distributors and retailers's, use of ATT's trademark is fairly traceable to the false association injury alleged, and it is likely that the alleged injury would be redressed were Digital to cease use of ATT's mark. While it is more attenuated than the trademark claim, ATT's tortious interference injury would likely be remedied if ATT users were not induced by Digital's ads to purchase and operate PowerMax devices which cause disruptions to ATT's network, as alleged.

(citing *Allen v. Wright*, 468 U.S. 737, 757 (1984)). Similarly, the injury must be “likely” to be redressed by the relief requested. *Norton*, 338 F.3d at 1256 (citation omitted).

For example, in *Wright*, the plaintiffs challenged the Government’s tax exemptions given to racially discriminatory schools on the grounds that exemptions harmed their interest in racially integrated schools by enabling white students, who would otherwise attend integrated public schools, to attend segregated private institutions. *Wright*, 737 U.S. at 757-58. The Supreme Court, however, held that the plaintiffs’ injury could not be fairly traced to the Government’s tax exemption policies because the relationship between the IRS’s conduct and the plaintiffs’ injury was “highly indirect,” and “results from the independent action of some third party not before the court,” such as private school officials, parents, and students. *Id.* Posing a question of redressability, the court noted that it was “entirely speculative” whether a withdrawal of the tax exemptions would cause a private school to change its discriminatory policies. *Id.*

By contrast, in *Bennet v. Spear*, 520 U.S. 154, 169 (1997), ranchers and irrigation districts objected to the Fish and Wildlife Services’s (“FWS”) Biological Opinion, issued pursuant to the Endangered Species Act (“ESA”), because it provoked the Bureau of Reclamation to limit the amount of irrigation water available to the plaintiffs. The Supreme Court held that, despite the intervening action of the Bureau of Reclamation, which was not before the court, the complained-of conduct had a sufficiently “powerful coercive effect” on the Bureau of Reclamation to strengthen its connection to the plaintiffs. *Id.* at 167. Indeed, the FWS’s Biological opinion “alter[ed] the legal regime to which the [Bureau] [was] subject.” *Id.*; accord *Norton*, 338 F.3d at 1254-56 (holding that FWS action pursuant to the ESA had sufficiently determinative effect on the plaintiffs to be deemed fairly traceable).

In this case, any “powerful coercive effect” exerted by Digital’s advertising is more attenuated than the FWS’s conduct in either *Spear* or *Norton*. ATT posits that Digital’s advertising misleadingly induces customers to buy and use the PowerMax, but that is not the end of the chain of coercion. (See Complaint ¶ 28.) Rather, PowerMax users must first cause a RFI event on ATT’s network, which then disrupt calls for other ATT users, who in turn must attribute the disruption to ATT’s network. (See *id.* ¶ 38.) Ultimately, these users must disfavor

ATT and defect to other wireless providers where they become “brand assassins,” who proactively disparage ATT’s network performance. (*See id.* ¶ 43.)

While the coercive effect of Digital’s advertising appears to dissipate along the chain of events described by ATT, the Court must take care not to conflate the Article III traceability test with a proximate cause inquiry. *See Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263, 1273 (11th Cir. 2003) (“even harms that flow indirectly from the action in question can be said to be fairly traceable to that action for standing purposes”). For purposes of Article III standing, therefore, the Court must be concerned “with something less than the concept of proximate cause.” *Id.* From such a perspective, it is conceivable that Digital’s advertising is likely to be traceable to increases in ATT’s network churn. (*See* Sept. 11 Transcript at 134-35; DeViddio Decl. ¶¶ 3-5.) Similarly, unlike *Allen*, if Digital’s advertising was removed, it is not entirely speculative that ATT’s harm would be redressed: the PowerMax would presumably attract fewer users and would therefore result in fewer RFI events from which ATT’s network could be disrupted and disaffect its customers. For standing purposes then, ATT has met its burden to show traceability and redressability for Article III standing.

C. ATT Lacks Lanham Act Prudential Standing

“Even where constitutional standing exists, however, prudential considerations may preclude standing.” *Phoenix of Broward*, 489 F.3d at 1162. *Phoenix* involved Burger King franchisees who sued McDonald’s for falsely advertising, as a part of a promotional campaign offering various prizes to customers, that consumers had a fair and equal chance of winning certain high-value prizes, when, in fact, some high-value prizes were stolen by McDonalds’ employees. *Id.* at 1160. To determine whether the franchisee-plaintiffs had prudential standing to bring their false advertising claim under the Lanham Act, the *Phoenix* court set forth a five-factor test:²¹

- (1) The nature of the plaintiff’s alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the [Lanham Act]?
- (2) The directness or indirectness of the asserted injury.
- (3) The proximity or remoteness of the party to the alleged injurious conduct.
- (4) The speculativeness of the damages claim.
- (5) The risk of duplicative damages or complexity in apportioning damages.

²¹ In so doing, the Eleventh Circuit endorsed the balancing approach to the prudential standing inquiry developed in the Third Circuit. *See Phoenix of Broward*, 489 F.3d at 1167.

Phoenix of Broward, 489 F.3d at 1163-64 (citing *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998)). Upon weighing the totality of the factors, the *Phoenix* court held that, although the franchisee-plaintiffs alleged a competitive injury, they lacked prudential standing due to the attenuated link between the advertising and their harm and the speculative nature of their damages. *Id.* at 1173. The Court examines each factor, as applied to this case, below.

1. The Nature of the Injury

The parties first disagree on the type of injury Congress sought to protect under the Lanham Act. Digital contends that the *Phoenix* court maintained a “competitive injury” requirement, even where the parties themselves are not direct competitors. Thus, in Digital’s view, ATT would have to assert that its network is disproportionately harmed by PowerMax-induced disruption events, hindering its ability to compete with Verizon and Sprint. By contrast, ATT insists that it need only allege a reasonable business interest, such as it has in the integrity of its FCC-licensed network.

Although the *Phoenix* court indicated that parties need not be direct competitors in order to suffer a cognizable injury, it emphasized that the Lanham Act is concerned with

[P]rotecting commercial interests that have been harmed by a competitor’s false advertising, and in securing to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not.

Phoenix of Broward, 489 F.3d at 1168 (citing *Conte Bros.*, 165 F.3d at 234).

Thus, unless ATT alleges facts that allow the conclusion that Digital’s advertising impairs its “ability to compete” or diverts its good will and reputation to an undeserving party, its harm is unlikely to be the type of harm protected under the Lanham Act. *See id.* at n.6. ATT first alleges that it suffers lost customers as a result of Digital’s advertising. (*See* Complaint ¶ 42.) A loss of customers, however, does not necessarily equate to an impairment of ATT’s “ability to compete.” *See Conte Bros.*, 165 F.3d at 234 (“[w]hile the Appellants have alleged a commercial interest, they have not alleged a competitive harm”).

In *Conte*, the plaintiffs were retailers of engine additives who sued the manufacturer and marketer of Slick 50, an engine additive competing with the products plaintiffs sold, for misrepresenting the properties of

Slick 50. *Id.* at 224. The *Conte* court reasoned that the misleading advertisements did not impair the retailer-plaintiffs' "ability to compete" because the advertisements were not directed at retail-level business interests. *Id.* at 234.²² The court noted that the plaintiffs did *not* allege that the defendants' ads said "don't buy engine additive at [the plaintiffs' stores] - instead, buy Slick 50 directly from the manufacturer." *Id.* (citing *Conte Bros.*, 992 F.Supp. at 715.) In *Phoenix*, however, a loss of customers harmed the Burger King franchisees's ability to compete because McDonald's, the alleged false advertiser, was their direct competitor. *Phoenix of Broward*, 489 F.3d at 1168, n.6. In comparison to the manufacturer's ads in *Conte*, McDonald's allegedly false advertisements threatened to lure customers, who may otherwise patronize the plaintiffs' restaurants, to McDonald's franchisees and would force the franchisee-plaintiffs to incur counter-promotion costs to win back customers. *id.* at 1168.

The "lost customer" harm in this case resembles the circumstances of *Conte* more than *Phoenix*. ATT may lose customers as a result of Digital's advertising, but there is no allegation that it loses such customers to Digital. Similar to the retailers in *Conte*, ATT does not manufacture BDAs that Digital's advertising would force consumers to spurn in favor of the PowerMax. ATT suggests that, like Digital, it offers "coverage solutions" to its customers, including new cellular towers, in-building solutions, and stationary BDAs from approved manufacturers.²³ However, there is no dispute that ATT does not provide *mobile* coverage solutions that compete with the PowerMax. More significantly, ATT's ability to compete in the "coverage solutions" market is not the precise impairment it alleges. Rather, ATT avers that PowerMax-induced disruption events impair its ability to compete in the *proprietary* network performance market which, as its own studies demonstrate, includes *service providers* such as Verizon, Sprint, and T-Mobile, not Digital. (See Hearing Ex. 96, 97.) Assuming that Digital's

²² See also *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 992 F.Supp. 709, 715 (D.N.J. 1998) ("if as a result of Slick 50's false advertising, the fortunes of motor oils began to fall, and the fortunes of Teflon-containing synthetic additives such as Slick 50 to rise, then plaintiffs, as retailers, had the option of altering their inventory to meet the changing consumer demand").

²³ ATT argues that Digital acknowledges the parties' competitive relationship in its motion to dismiss by calling ATT's refusal to allow unauthorized third party devices "anti-competitive." Even assuming, however, that ATT's restrictions on third party devices is "anti-competitive," it does not follow that Digital's advertising harms ATT's "ability to compete" for customers in the market for cellular phone service. While ATT may have a *commercial* interest in the signal strengthening after-market and make decisions which affect Digital's *competitive* interest in the signal strengthening after-market, this relationship does not establish that Digital has a *competitive*, as opposed to a *commercial*, interest in the market for cellular phone service.

advertising results in lost customers, such lost customers cannot be construed as impairing ATT's "ability to compete" in the proprietary network performance market absent an allegation that Digital profits from such lost customers. To be sure, ATT's "lost customer" harm may implicate its "commercial interest," but with respect to Digital, it does not amount to "a competitive harm." *Conte Bros.*, 165 F.3d at 234. ATT's "lost customer" harm is thus not cognizable under the Lanham Act.

ATT also asserts that damage to its good will and reputation is protected under the Lanham Act. To support its view, ATT refers to *Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11-12 (1st Cir. 1986), in which the First Circuit held that cashmere manufacturers and vendors had standing to sue retailers who mislabeled the cashmere content of their coats because "their position as manufacturers and vendors of fabric and clothing containing cashmere gives them a strong interest in preserving cashmere's reputation as a high quality fibre." ATT contends that it has a similarly strong interest in preserving its reputation for providing reliable network performance.

Unlike the plaintiffs in *Camel Hair*, however, ATT does not claim that its reputational harm involves the "diversion from those who have created [the reputation] to those who have not." *Phoenix of Broward*, 489 F.3d at 1168. By mislabeling the cashmere content of their coats, the *Camel Hair* defendants sought to siphon the plaintiffs' reputation for producing coats from a high quality fabric to promote the sale of their own coats. *Camel Hair*, 799 F.2d at 8, 15. In this case, ATT alleges that Digital misleadingly claims that the PowerMax is compatible with its network, see Complaint ¶ 49, but ATT's reputational harm is *not* derived from consumers exposed to Digital's allegedly misleading advertisements.²⁴ Instead, ATT alleges that its reputational harm derives from *non*-PowerMax users – so-called "brand assassins" – who, far from re-directing ATT's reputation to Digital's benefit, attribute BDA-induced network disruptions to ATT's network performance. (*See id.* ¶ 42.)

Indeed, there is no allegation that the troublesome "brand assassins" were ever exposed to or associated with Digital's products, or were otherwise forced to "divert" ATT's goodwill to Digital. Thus, because the

²⁴ Compare *Trump Plaza of Palm Beaches Condominium Ass'n, Inc. v. Rosenthal*, 2009 WL 1812743, *5-6 (S.D. Fla. June 24, 2009) (finding a Lanham Act injury where a realtor's ads suggested to consumers that she was the "designated broker" for the plaintiff's condominium).

“diversion” of ATT’s network performance reputation does not inure to Digital’s benefit, the Lanham Act can play no part in re-routing ATT’s network performance reputation to its rightful owner. The nature of ATT’s injury weighs against a finding of Lanham Act prudential standing.

2. Directness of Injury

The second factor requires the Court to “examine the directness with which the defendant’s conduct affected the plaintiff.” *Phoenix of Broward*, 489 F.3d at 1169. In *Phoenix*, the franchisee-plaintiffs reasoned that customers who would otherwise patronize their restaurants, as opposed to other fast-food establishments, were misled by McDonald’s promise of a fair and equal chance to win a prize, when in fact certain high value prizes, but no low and mid-value prizes, had been stolen. *Id.* The *Phoenix* court held that this theory of causation was too tenuous. *Id.* In this case, to be sure, the connection between Digital’s advertising and ATT’s lost customers and diminished reputation is likewise too attenuated.

To connect Digital’s advertising to ATT’s lost customers and diminished reputation, the Court must traverse the following path: (1) Digital represents that the PowerMax is “FCC approved” and “operates with all carriers in the USA;” (2) rather than depending on the existing signal strength of their cellular devices, users decide to purchase BDAs; (3) in reliance on Digital’s advertising, users buy PowerMax BDAs instead of BDAs from other manufacturers; (4) PowerMax users operate their BDAs, often times after mis-installation; (5) the PowerMax (as opposed to other BDAs *and* other causes of RFI) disrupts ATT’s network; (6) ATT users *who do not use* PowerMax BDAs experience dropped calls or no signal; (7) these ATT users attribute their network disruption to ATT’s network performance, *not* the PowerMax *or* another cause of RFI; (8) such users decide to cancel their ATT service due to ATT’s perceived network performance difficulties, and *not* for other reasons, including billing practices and customer service; and (9) these users defect to other service providers where they become “brand assassins” who proactively disparage ATT’s network performance reputation. At every link in this chain, particularly links 4,5, 6, and 8, the connection between Digital’s advertising and ATT’s harm grows substantially more indirect.

ATT argues that no reasonable customer would purchase the PowerMax without believing that it was

lawful to use, and proffers the affidavits of PowerMax users Peter Townsend and Louis Watson who confirm that they believed that the PowerMax was lawful to use. (*See* Townsend Decl. ¶¶ 3-5; Watson Decl. ¶¶ 3-5.) However, even if Digital's advertising induced users to purchase and use the PowerMax, the Court must still connect PowerMax use to disruptions, disruptions to frustrated customers, frustrated customers to ATT's network performance, and finally lost customers.

ATT insists that it has conclusively proven the connection between PowerMax use and disruption events, citing specifically to the Tugboat Betty, Pipe Dream, and SBA Communication events previously described. Even assuming the PowerMax was the root cause of the disruption in each case, ATT does not dispute that the device was mis-installed in both the Tugboat Betty and Pipe Dream incidents. (*See* Sept. 14 Transcript at 54-55; Sept. 15 Transcript at 31-32.) To be sure, ATT has not confirmed whether the other allegedly disruptive PowerMax devices were installed consistent with Digital's specifications.²⁵ Thus, the Court would have to overlook possible user mis-installation as an intervening cause for the disruptions. Digital's advertising cannot be held to account for user mis-installation.

ATT also contends that PowerMax-induced disruption events are a significant cause of customers lost due to network performance issues. (*See* Sept. 11 Transcript at 134-35; DeViddio Decl. ¶¶ 3-5.) Aside from conclusory statements, however, ATT provides no evidence to support this assertion. In the February 2008 event which, according to Gail DeViddio, customers cancelled their service due to a disruption event, there is no indication that the offending BDA was a PowerMax BDA. (*See id.*) To be sure, ATT does not include the February 2008 event on its exhaustive list of PowerMax-related events. (*See* Vencl Decl. ¶¶ 10-11.) What is more, the studies ATT proffers in no way connect PowerMax use to network performance "churners." (*See* Hearing Ex. 96, 97.) Rather, the studies merely indicate that network performance is important to customer satisfaction and one of the most important factors leading users to switch service providers. (*See id.*) Neither

²⁵ ATT engineer Lubor Vencl claims that he observed one PowerMax in oscillation even though its antennae were 90 feet apart, 50 feet more than Digital's specifications. (*See* Vencl Decl. ¶ 10.) Vencl does not, however, assert that the subject PowerMax's antennae were separated by a structure, as Digital's specifications require. (*See* Jones Decl. ¶ 15.)

study even attempts to analyze the *causes* of users's network performance-related satisfaction or grievances, much less whether such grievances lead to churn.

Furthermore, ATT does not allege that PowerMax users are the customers who disparage their reputation.²⁶ At least the franchisee-plaintiffs in *Phoenix* alleged that the consumers they lost were the same consumers misled by McDonald's advertisements. *Phoenix of Broward*, 489 F.3d at 1169. Here, however, ATT attempts to connect PowerMax users allegedly misled by Digital's advertising to *non*-PowerMax users who leave ATT and become "brand assassins." Given the severe level of attenuation between Digital's ads, PowerMax use, and *non*-PowerMax users's perceptions about ATT's network performance, the Lanham Act is incapable of bearing the causal burden ATT attempts to place on it. The directness of the injury factor weighs against a finding of prudential standing.

3. Proximity to Misleading Advertising

In evaluating ATT's proximity to the alleged harmful conduct, the *Phoenix* court examined whether "there is an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest by bringing a suit." *Phoenix of Broward*, 489 F.3d at 1170. "The existence of such a class diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Id.* Because the Lanham Act focuses on "commercial entities," the *Phoenix* court held that no class was more proximate to McDonald's misleading advertisements than the Burger King franchisee-plaintiffs. *Id.* at 1171. In comparison, the *Conte* court singled-out manufacturers of products competing with Slick 50 as an "identifiable class" of commercial entities closer to the allegedly misleading advertising than the motor oil retailer-plaintiffs. *Conte Bros.*, 165 F.3d at 234-35.

Like the competing manufacturers in *Conte*, Digital's competitors in the BDA manufacturing market are more proximately harmed by Digital's misleading advertising. If, as ATT exclaims, Digital's products are *not*

²⁶ ATT suggests that it does not want ATT subscribers who happen to be PowerMax users to be accosted by the FCC Enforcement Bureau for unlawful use of the PowerMax. This appears to be a laudable aim, but ATT does not explain how these users will experience network disruptions or mis-attribute such disruptions to ATT's network.

FCC approved for use and do *not* operate with North American carriers, then other BDA manufacturers who meet both FCC and carrier specifications would suffer competitive injuries akin to those inflicted on the franchisee-plaintiffs in *Phoenix*. ATT argues that other BDA manufacturers would doom their own business by bringing suit because they would have to prove that their sale of BDAs was illegal. However, ATT completely ignores that other BDA manufacturers *may in fact have obtained* an FCC license or carrier approval and are thereby injured by Digital's allegedly false advertisements. Indeed, ATT-affiliated BDA manufacturers Cellular Specialities, Inc. and Powerwave are presumably suffering a loss of sales due to Digital's allegedly misleading claim that it has FCC approval. (See Erickson Decl. ¶ 7.) Because ATT stands in a position more remote than Cellular Specialities, Inc., Powerwave, and other BDA manufacturers, the third factor weighs against a finding of prudential standing.²⁷

4. Speculative Nature of Damages and Risk of Duplicative Damages

While initially it appeared that ATT sought damages for its Lanham Act false advertising claim, see Complaint, Wherefore Cl. ¶¶ 1, 8-10, at oral argument ATT clarified that it merely sought injunctive relief and damages for costs incurred in investigating disruptions, locating offending BDAs, and disabling them. ATT urges that an inquiry into its damages is unnecessary to determine prudential standing to seek injunctive relief, citing to 5 McCarthy on Trademarks and Unfair Competition § 27:32 n.1 (4th ed. 1996) ("standing to seek only an injunction should be more liberally granted than standing to seek damages . . .").

Even assuming that the Court should disregard the damages factors for purposes of ATT's request for injunctive relief, the first three factors persuade the Court that ATT lacks prudential standing in this case. Similarly, while ATT's investigation costs may be readily calculable, the nature of ATT's harm, the indirectness of the injury, and the remoteness of misleading advertising all demonstrate that the Lanham Act provides no remedy for ATT's reputational and lost customer harm caused by Digital's advertising. Therefore, the Court will

²⁷ ATT also argues that only it can defend its reputational interests and network integrity. However, while ATT has every right to police these interests, the Lanham Act is not always the vehicle for its efforts.

dismiss ATT's Lanham Act false advertising claim.²⁸

D. Lanham Act Prudential Standing and the State Law Advertising Claims

ATT carefully suggests that the prudential standing limitations Congress places on Lanham Act false advertising claims are not similarly imposed on state law false advertising claims. However, ATT ignores that both FDUTPA and the Florida false advertising statute emerge from common law unfair competition principles similar to the Lanham Act.²⁹ Thus, like the Lanham Act prudential standing inquiry, both FDUTPA and the Florida false advertising statute require plaintiffs to demonstrate that they were in fact aggrieved by the misleading advertising. *See Himes v. Brown & Co. Securities Corp.*, 518 So.2d 937, 938 (Fla. 3d DCA 1987) (“[the plaintiff’s] claims suffer from the same major defect . . . [he] did not suffer any actual damages proximately caused by [the defendant’s] alleged violations of Florida’s False Advertising Statute”); *Kertesz v. Net Transactions, Ltd.*, 635 F.Supp.2d 1339, 1348 (S.D. Fla. 2009) (under FDUTPA, a Plaintiff must allege that it is “aggrieved by the deceptive act or practice”). Accordingly, having failed to demonstrate a competitive injury, a direct connection between its harm and the allegedly misleading advertising, or proximity to the misleading advertising under the Lanham Act, ATT also cannot satisfy similar causation requirements for its state law false advertising claims.³⁰ *See Natural Answers*, 529 F.3d at 1332-33 (holding that because the plaintiff’s state law false advertising claims are based on its Lanham Act false advertising claim, its state law claims must fail).

²⁸ Digital suggests that the prudential standing inquiry applied to Lanham Act false advertising claims is equally applicable to Lanham Act trademark infringement claims. However, Digital does not cite, and the Court is unaware of, any case extending the prudential standing requirements for false advertising actions to trademark infringement cases involving valid mark-holders, such as ATT.

²⁹ *See Natural Answers, Inc. v. SmithKline Beecham Corp.*, 529 F.3d 1325, 1332-33 (11th Cir. 2008) (“[t]he purpose of FDUTPA is to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce”); *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F.Supp.2d 1314, 1322-23 (M.D. Fla. 2007) (stating that *competitors* need not show that they relied on false advertising to state a claim under Florida false advertising statute).

³⁰ The Court recognizes that, in addition to false advertising allegations, ATT's FDUTPA claim also contains tortious interference and trademark infringement allegations. The instant analysis relates only to the false advertising allegations in ATT's FDUTPA claim.

In *Natural Answers*, the plaintiff, who sold herbal lozenges designed to control smoking cravings, sued a pharmaceutical company who marketed a FDA-approved nicotine-based lozenge designed to relieve smoking withdrawal symptoms. *Id.* at 1327-28. The Eleventh Circuit held that, because the plaintiff did not sell its herbal lozenge during the period in which the defendant marketed its nicotine-based lozenge, the plaintiff suffered no “competitive injury,” and any harm was too remote, speculative, and risked burdening the defendant with duplicative damage awards. *Id.* at 1331-32. Because the plaintiff lacked prudential standing under the Lanham Act, the *Natural Answers* court held that its state law false advertising claims must also fail:

Natural Answers’s common law claim sounding in false advertising fails because, just as with the false advertising claim brought under the *Lanham Act*, Natural Answers does not have a commercial or competitive interest, lacks a direct injury, lacks proximity to the alleged conduct, and presents a speculative and potentially duplicative damages claim.

* * *

To bring a claim under [FDUTPA], the plaintiff must have been aggrieved by the alleged unfair and deceptive act . . . Natural Answers could suffer no injury as a result of the allegedly false advertising, because its product is not and has never competed with Commit Lozenges, and Natural Answers’s complaint does not allege that it was injured in any manner as a consumer of Commit Lozenges. Thus, just as with its other claims, Natural Answers lacks standing to pursue a claim under FDUTPA.

Id. at 1332-34 (emphasis in original).

In this case, ATT’s FDUTPA and Florida statutory false advertising claims must fail where, based on identical facts, its Lanham Act false advertising claim cannot succeed. ATT has failed to demonstrate a competitive injury arising from Digital’s advertising.³¹ Further, it fails to show that Digital’s advertising was the direct and proximate cause of its harm. Similarly, the existence of other BDA manufacturers, such as ATT affiliates Cellular Specialities, Inc. and Powerwave, renders ATT’s injuries too remote to be remedied by unfair competition laws of any stripe. Therefore, as in *Natural Answers*, ATT’s state law false advertising claims must be dismissed.

³¹ If a plaintiff cannot show reliance on the allegedly false advertising, the Florida statutory false advertising cause of action requires that the plaintiff be a competitor of the advertiser. *See Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F.Supp.2d 1314, 1322-23 (M.D. Fla. 2007). The statute’s competitor requirement – which is arguably more focused than the Lanham Act’s competitive harm requirement – applies here because ATT does not allege that it relied on Digital’s ads. However, ATT fails to demonstrate that it is Digital’s competitor in the signal strengthening after-market, let alone that it suffered a competitive injury. Therefore, ATT’s Florida statutory false advertising claim would fail on these grounds, as well.

E. Primary Jurisdiction

Digital argues that, because ATT's suit involves questions of RFI, the Court should defer to the jurisdiction of the FCC to resolve these issues. Digital suggests that a referral is particularly appropriate given that issues identical to those raised here are being raised at ongoing FCC proceedings, including the recent proposed rulemaking and request for comment in which the FCC raises the question of whether end users should be permitted to attach BDAs and other devices to wireless networks, and if so, under what circumstances. (*See* DE 68, Ex. 1 ¶ 166; Public Notice.) However, a primary jurisdiction referral is unnecessary at this juncture in this case for several reasons.

First, because the Court is dismissing ATT's false advertising claims with prejudice, the crucial regulatory issue raised in this case – the truth of whether the PowerMax has been “FCC approved” – is no longer an issue in this case. Second, Digital does not, nor could it, argue that ATT's trademark claims require FCC intervention.³² Finally, because ATT's tortious interference claim only asks whether Digital's advertising caused customers to create RFI disruption events, the Court will not usurp FCC authority by adjudicating the tortious interference claim.

In its tortious interference claim ATT alleges three things, namely that: (1) its subscriber agreements require use of devices that are compatible with and non-harmful to ATT's network; (2) the PowerMax is not compatible with ATT's network; and (3) by its advertising, Digital intentionally induces users to breach their subscriber agreements by using harmful devices. (*See* Complaint ¶¶ 58-63.) The primary issue of fact raised in this claim – whether PowerMax use is “compatible” with or “interferes” with ATT's network – can be resolved without resort to interpreting FCC terms of art and do not require FCC input. The trier of fact must merely determine whether, as a matter of causation, an ATT user operating a PowerMax device disrupted ATT's network.³³ If so, the Court must then interpret the subscriber agreement to determine whether use of the

³² Because an FCC referral is unnecessary here, Digital's request for a stay of the trademark claims is moot.

³³ In its demonstration of the Pipe Dream incident, ATT was able to show that such incidences were adequate to determine the fact of whether a PowerMax disrupted ATT's network. (*See* Sept. 11 Transcript at 51-57.)

disruptive PowerMax violated the agreement. Because the Court can adjudicate the tortious interference claim without aid from the FCC, a primary jurisdiction referral is unnecessary.

V. Merits Discussion

A. Tortious Interference

ATT maintains that it has a substantial likelihood of success on its tortious interference claim. In response, Digital argues that ATT's tortious interference claim fails as a matter of law because ATT has adduced no facts to demonstrate that Digital's interference with ATT's subscriber agreements was direct, intentional, or that ATT terminated its subscriber agreements or otherwise suffered harm from Digital's alleged interference. To prevail on a tortious interference claim under Florida Law, ATT must allege that: (1) it maintained legitimate subscriber agreements with its users; (2) Digital knew of the relationship between ATT and its subscribers; (3) Digital intentionally and unjustifiably interfered with the subscriber agreements; and (4) ATT suffered damages as a result of Digital's interference. See *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985). The alleged interference must be both direct and intentional. *Hager v. Venice Hosp., Inc.*, 944 F.Supp. 1530, 1535 (M.D. Fla. 1996). Also, absent actual damages, ATT cannot succeed on a tortious interference claim. *Imperial Majesty Cruise Line, LLC v. Weitmauer Duty Free, Inc.*, 987 So.2d 706, 707-08 (Fla. 4th DCA 2008).

While ATT's subscriber agreements prohibit use of disruptive devices on its network,³⁴ ATT has provided no evidence that Digital directly and intentionally induced customers to operate the PowerMax in a disruptive manner. Indeed, as discussed above, in the several instances which ATT submits as examples of PowerMax disruptions, customers mis-installed the device *prior to* any alleged disruption. (See Sept. 14 Transcript at 54-55; Sept. 15 Transcript at 31-32.) Thus, to the extent that the disruptive nature of the PowerMax is tied to user conduct inconsistent with Digital's installation instructions, any breach of the subscriber agreement is attributable primarily to ATT's customers use of the PowerMax. There is not yet evidence to show Digital's direct intent to exploit the PowerMax's harmful capabilities.

Furthermore, ATT has not specifically articulated the actual harm flowing from Digital's alleged

³⁴ (See Service Agreement at 13; Plan Terms at 14.)

interference. ATT has not provided evidence of cancelled subscriber agreements or costs incurred because it had to take action against subscribers for breach of their agreement. Furthermore, as discussed above, there has been no showing that Digital's advertising has caused ATT to lose customers. Indeed, at this juncture, ATT *concedes* that it has not found such a customer. (*See* SoF ¶ 63.) Absent actual harm, therefore, ATT cannot sustain a tortious interference claim.

The Court is careful, however, to remember that discovery in this matter is ongoing and ATT may yet find a PowerMax-related "brand assassin" or identify an ATT user that operated a PowerMax consistent with Digital's specifications, but nevertheless caused a disruption to its network. Therefore, the Court will withhold judgment as a matter of law on the tortious interference claim at this juncture. If, however, at the close of discovery, ATT has not identified a relevant disaffected customer or PowerMax-induced disruption event, the Court shall dismiss the tortious interference claim.³⁵

B. Trademark Infringement³⁶

Digital argues that it has not used ATT's mark since 2005, and ATT cannot hold it liable for its distributors' and retailers' use of ATT's mark because it does not control the operational and marketing activities of its distributors and retailers. ATT responds that, despite the fact that Digital has not used its mark in nearly five years, the Court nevertheless has authority to enjoin future use to ensure that it will not recommence.³⁷ ATT also maintains that Digital exercises pricing control over its distributors and retailers, and therefore should be required to exercise similar authority over their other marketing activities. Before turning to ATT's *prima facie*

³⁵ Having failed to proffer any evidence of direct interference or actual damages to withstand judgment as a matter of law at this stage, ATT cannot therefore meet its burden to obtain preliminary injunctive relief on its tortious interference claim. Therefore, the Court must deny ATT's motion for preliminary injunction on this claim.

³⁶ The Florida common law infringement analysis is identical to the analysis of the Lanham Act claim. *See Gift of Learning Foundation, Inc. v. TGC, Inc.*, 329 F.3d 792, 802 (11th Cir. 2003). Therefore, the Court will analyze both ATT's common law and Lanham Act trademark infringement claims as one.

³⁷ ATT cites to *Clayton v. Howard Johnson Franchise Sys., Inc.*, 730 F.Supp. 1553, 1558 (M.D. Fla. 1988) to demonstrate the Court's authority to enter injunctions against future conduct. While ATT has not yet shown that Digital presents a "cognizable danger of future [trademark] violations," Digital has also not provided any assurance that it will not resume direct use of ATT's mark. *See Upjohn Co. v. American Home Products Corp.*, 598 F.Supp. 550, 554-55 (S.D.N.Y. 1984). Thus, to the extent ATT demonstrates a substantial likelihood of actual confusion from Digital's use of its mark, the Court will enjoin Digital from future use of the mark.

case of trademark infringement, the Court must determine whether Digital can be held liable for the marketing of its distributors and retailers, or merely its own marketing. Digital could be held liable for its distributors and retailers's marketing under a theory of contributory infringement.

1. Contributory Infringement

Liability for contributory infringement turns on whether Digital intended to participate in or actually knew about the allegedly infringing activity. *Mini Maid Services Co. v. Maid Brigade Systems, Inc.*, 967 F.2d 1516, 1521-22 (11th Cir. 1992) (citing *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 853-55 (1982)). In making determinations of intent and knowledge, the Court must consider: (1) "the nature and extent of the communication" between Digital and its distributors; (2) "the extent and nature" of the allegedly infringing use of the mark; and (3) whether Digital has refused, in "bad faith[,] . . . to exercise a clear contractual power to halt the infringing activities . . ." *Id.*

Digital does not dispute that it exercises control over its distributors and retailers's price marketing. By its MAP policy, Digital prohibits distributors and retailers from advertising the PowerMax below a certain price and threatens to discontinue shipments to retailers and distributors if they violate the policy. (See Hearing Ex. 10.) However, when ATT asked Digital to cease using ATT's mark, and to require its retailers and distributors to stop using ATT's mark in connection with PowerMax marketing, Digital merely issued an advisory letter asking its distributors and retailers to stop using the mark. (See DE 1, Ex. 6 at 8; DE 2, Ex. 5 at 35.) However, even after ATT reminded Digital that its retailers and distributors continued to use the mark, there is no evidence that Digital took further steps to deter use of ATT's mark. (See DE 1, Ex. 6 at 9-10; Sept. 22 Transcript at 120; Hearing Ex. 37-39.)

By failing to impose a trademark mis-use policy similar to its MAP policy, Digital has failed to exercise its authority over its distributors and retailers's use of ATT's mark in relation to PowerMax marketing. Therefore, to the extent its distributors and retailers infringed on ATT's mark, there is evidence that Digital knew of the infringement yet it is undisputed that it has not exercised a contractual power to halt its retailers's allegedly infringing advertising, and it can thus be held contributorily liable for their infringement.

2. Trademark Infringement – Applicable Framework

To assert a trademark infringement claim, ATT must first show: (1) that its mark is valid; and (2) that Digital's (and by extension, Digital's distributors and retailers) use of the mark is likely to cause consumer confusion. *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 122 F.3d 1379, 1382 (11th Cir. 1997) (citation omitted). Because the validity of ATT's mark is undisputed, see SoF ¶ 86, the focus here is whether Digital's use of the mark is likely to cause consumer confusion. The traditional trademark infringement action requires an analysis of seven factors to decide whether a likelihood of confusion exists: (1) the type of mark; (2) the similarity of the mark; (3) similarity of the products the marks represent; (4) similarity of the parties' retail outlets and customers; (5) similarity of advertising media used; (6) Digital's intent; and (7) actual confusion. *Id.*

In analyzing these factors, the Eleventh Circuit has counseled against a "mechanistic" summation and application of the seven-factor test. *Custom Manufacturing and Engineering, Inc. v. Midway Services, Inc.*, 508 F.3d 641, 649 (11th Cir. 2007). Rather, a proper evaluation requires an assessment of "the overall balance of the seven [] factors." *Frehling Enterprises, Inc. v. International Select Group, Inc.*, 192 F.3d 1330, 1342 (11th Cir. 1999). To be sure, "[e]ach case presents its own complex set of circumstances and not all of these factors may be particularly helpful in any given case" *Custom Manufacturing*, 508 F.3d at 649. (citation omitted). Therefore, the Court "must evaluate the weight to be accorded the individual subsidiary facts and then make its ultimate fact decision." *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 840 n.17 (11th Cir. 1983).

Digital contends that the circumstances of this case necessitate application of the modified "nominative fair use"³⁸ inquiry to determine a likelihood of confusion. ATT responds that the nominative fair use framework

³⁸ Courts employ the nominative fair use doctrine where "the alleged infringer uses the trademark holder's product, even if the alleged infringer's ultimate goal is to describe his own product" or where "the only practical way to refer to something is to use the trademarked term." *Century 21 Real Estate Corporation v. Lendingtree, Inc.*, 425 F.3d 211, 214 (3d Cir. 2005) (emphasis in original) (citing *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 328 F.3d 1061, 1072 (9th Cir. 2003), *rev'd on other grounds*, 543 U.S. 111 (2004)). In nominative fair use cases, would-be infringers employ marks in order to describe what the mark represents. For example, when a newspaper survey organization employed a pop music band's trademark, it did so to describe the band to survey-takers, thereby enabling the survey-takers to answer band-specific questions. See *New Kids on the Block v.*

is inapplicable because Digital is using ATT's mark to describe an attribute of their product, not ATT's, and is therefore an example of "classic fair use." (*See* Sept. 22 Transcript at 117.) Although the Court recognizes that there is a discussion among the Circuits as to how to properly frame "nominative" and "classic" fair use cases,³⁹ the Court need not decide the issue at this juncture because ATT fails to proffer sufficient evidence of a substantial likelihood of success of a likelihood of consumer confusion.

3. The Likelihood of Confusion Test

a. Type of Mark and Similarity of Mark

The type of mark factor asks whether ATT's mark is strong or weak. *Frehling Enterprises, Inc. v. International Select Group, Inc.*, 192 F.3d 1330, 1335-36 (11th Cir. 1999). The similarity of mark factor "compares the marks and considers the overall impressions that the marks create, including the sound, appearance, and manner in which they are used." *Id.* at 1337. Here, the parties stipulate that ATT's mark is incontestable.⁴⁰ (*See* SoF ¶ 86.) Furthermore, it is evident that Digital and its distributors and retailers used ATT's exact mark. (*See* Hearing Ex. 37-39.) Therefore, these factors weigh in favor of a likelihood of

News America Pub., Inc., 971 F.2d 302, 304, 306-08 (9th Cir. 1992). Similarly, where a car mechanic who specializes in repairing Volkswagen automobiles uses the term "Volkswagen" or abbreviation "VW" in his ads, he does so to signal to Volkswagen drivers that they can expect specialized service from his repair shop. *See Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350, 352 (9th Cir. 1969).

³⁹ As applied in the Third Circuit, the nominative fair use framework requires the Court to discard at least two of the seven factors in the traditional likelihood of confusion inquiry. *See, e.g., Century 21*, 425 F.3d at 224-25 (stating that strength of mark and degree of similarity factors are unhelpful because they "would indicate a likelihood of confusion . . . simply because the mark is being employed in a nominative manner") (emphasis in original). Once a plaintiff demonstrates that confusion is likely, the burden shifts to the nominative use-defendant to show: (1) that the use of the mark is necessary to describe both the plaintiff's product or service and defendant's product or service; (2) the defendant uses only so much of the plaintiff's product as is descriptively necessary; and (3) the nominative use reflects the true and accurate relationship between the products or parties. *Id.* at 222. In the Ninth Circuit, the nominative fair use framework replaces the likelihood of confusion test altogether. *See Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002). A defendant in the Ninth Circuit need only show that: (1) the plaintiff's product is not readily identifiable without use of the mark; (2) the defendant used only so much of the plaintiff's mark as was necessary; and (3) the defendant did not use the mark in a manner to suggest endorsement or sponsorship. *See New Kids*, 971 F.2d at 308. The Eleventh Circuit has not yet subscribed to any reformulation of the traditional likelihood of confusion inquiry in nominative fair use cases.

⁴⁰ The mark "AT&T" is an acronym for "American Telephone and Telegraph," and is thus descriptive of a "characteristic or quality of" ATT's service. *Dieter v. B & H Indus. of Southwest Florida, Inc.*, 880 F.2d 311, 327-28 (11th Cir. 1989) (citation omitted). However, given the length and manner of its use, the "AT&T" mark has achieved secondary meaning. *See Custom Manufacturing*, 508 F.3d at 648, n.8.

confusion.

b. Similarity of ATT's and Digital's Products

The similarity of products factor asks whether “the products are the kind that the public attributes to a single source, not whether or not the public can readily distinguish between the products of the respective parties.” *Frehling*, 192 F.3d at 1338. As ATT argues, the products at issue here – ATT’s cellular network and Digital’s signal boosting BDAs – can both be classified as network “coverage solutions.” It is therefore possible that lay consumers would attribute BDAs and other network products to a single source. Nevertheless, the complementary nature of Digital’s BDAs also suggests that the public may not attribute both products to a single source. BDAs, such as those sold by Digital and ATT affiliates Cellular Specialties, Inc. and Powerwave, complement, rather than supplant, cellular phones operating on ATT’s network. (*See* Sept. 15 Transcript at 5-6.) Therefore, cellular phone customers may understand that complementary products, such as BDAs, compete in after-markets whereas service providers, such as ATT, offer no after-market products. Thus, while this factor suggests that consumers may be confused about the origin of the parties’ products, the evidence proffered at this juncture is not dispositive.

c. Similarity of Outlets and Customers

The similarity of the parties’ retail outlets and customers takes into consideration “where, how, and to whom the parties’ products are sold.” *Frehling*, 192 F.3d at 1339. There need not be direct competition between the parties, but evidence that the products are sold in the same stores is probative. *Id.* While the record is silent as to whether ATT products and the PowerMax are sold at the same locations, there is no dispute that ATT’s consumer base overlaps with Digital’s. Although it is plausible that an overlapping consumer base may be probative of a likelihood of confusion, it is also possible that the overlapping consumers can distinguish Digital’s after-market products from the cellular service ATT provides. Thus, at this juncture, there is little evidence to show that the overlapping consumer base would result in consumer confusion.

d. Similarity of Advertising Media

The similarity of advertising media factor looks to the places in which ATT and Digital advertise. It is

not disputed that both ATT and Digital advertise on the internet and in print media. However, unlike Digital, there is no evidence that ATT advertises in specialty sporting publications, such as yachting magazines. (See Townsend Decl. ¶ 5.) In any event, similar advertising media does not necessarily lend itself to a finding of consumer confusion in this case. Further evidentiary development may demonstrate that consumers privy to the parties' overlapping mediums may be able to recognize the PowerMax as a supplemental device, not affiliated with ATT's network. At this juncture, however, the similarity of media does not prove a likelihood of confusion.

e. Digital's Intent in Using ATT's Mark

This factor asks whether Digital intended to use ATT's mark to pass off the PowerMax as an ATT-approved device. ATT argues that Digital and its distributors and retailers intended to derive a benefit from its reputation because they specifically used the "AT&T" mark and listed other carriers, rather than stating that the PowerMax, a broadband device, is compatible with "all cellular carriers." However, merely because retailers listed carriers in the advertisement is not necessarily dispositive of intent to derive a reputational benefit.

One retailer ad claims that the PowerMax is "compatible with all cellular and PCS carriers in the USA and Canada," and specifies, "including Cingular, AT&T, Verizon, Sprint, Alltel and T-Mobile." (See DE 2, Ex. 5.) While the advertisement lists several major North American carriers and uses ATT's mark in the process, which could suggest an endorsement or approval and would therefore evince an intent to derive a benefit from ATT's reputation, an equally plausible inference is that, by listing each carrier, the retailer merely aims to clarify for the consumer that the carrier's network to which she subscribes is compatible with the device. If a jury should find that the device is in fact compatible, which is unclear at this juncture, then such finding would weigh against a finding of consumer confusion. Without further evidence, the Court cannot conclude as a matter of law that, by listing carriers, Digital intended to derive a reputational benefit. Thus, ATT fails to demonstrate that Digital, or its distributors and retailers, intended to derive a benefit by using ATT's reputation.

f. Evidence of Actual Confusion

ATT concedes it does not have any evidence of actual confusion. While evidence of actual confusion is unnecessary at the preliminary injunctive stage, see *E. Remy Martin & Co., S.A. v. Shaw Ross Int'l Imports*,

Inc., 756 F.2d 1525, 1529-30 (11th Cir. 1985), such evidence would have provided significant support for injunctive relief in this case, given that the preceding factors were not especially probative of a likelihood of confusion.⁴¹

In sum, there remains a possibility of confusion because Digital and its distributors and retailers's used ATT's mark, but ATT has failed to demonstrate a likelihood of confusion sufficient to warrant the extraordinary remedy of preliminary injunctive relief. While the use at issue here involves ATT's exact, incontestable mark, there is insufficient evidence under the remaining factors to establish that ATT will prevail on the merits of its trademark infringement claim. Therefore, the Court will deny ATT's motion for preliminary injunction.

VI. Conclusion

As discussed above, the Court will grant Digital's motion to dismiss that has been converted to a motion for summary judgment, by dismissing with prejudice ATT's false advertising claims under the Lanham Act, Fla. Stat. § 817.41, and FDUTPA. While ATT's trademark infringement and tortious interference claims withstand judgment as a matter of law, ATT has failed to provide an adequate factual basis to show a substantial likelihood of success on the merits to warrant a preliminary injunction on those claims. Thus, the parties may complete discovery on the issue of whether Digital directly and intentionally induced ATT users to breach their contract by operating PowerMax devices and the issues of a likelihood of confusion and any defense Digital seeks to raise. Therefore, it is hereby

ORDERED that

(1) Digital's Converted Motion for Summary Judgment [DE 21, 24] is GRANTED IN PART. ATT's Lanham Act false advertising, Florida statutory false advertising, and FDUTPA false advertising claims are DISMISSED WITH PREJUDICE.

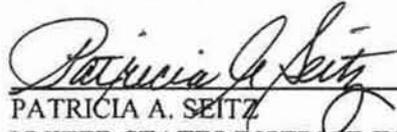
(2) ATT's Motion for Preliminary Injunction [DE 2] is DENIED.

(3) ATT's Motion for Judicial Notice [DE 35] is DENIED.

⁴¹ If for no other reason, it is appropriate to deny Digital's motion for summary judgment on the trademark claims to allow ATT to obtain evidence of actual confusion. Therefore, the Court will deny Digital's motion on the trademark claims.

(4) Digital's Motion for Leave to File a Response to ATT's Rule 12(d) Response [DE 77] is DENIED.

DONE and ORDERED in Miami, Florida, this 8th day of February, 2010



PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge O'Sullivan
Counsel of Record

ATTACHMENT 2

GORDON
HARGROVE
& JAMES

PROFESSIONAL ASSOCIATION
LAW OFFICES

80884-068
FILE COPY

Albert L. Frevola, Jr., Esquire
Phone: (954) 958-1532
E-Mail: afrevola@ghj.com

August 8, 2008

VIA U.S. CERTIFIED MAIL

James W. Wilson, President
Wilson Electronics, Inc.
3301 E. Deseret Drive
St. George, UT 84790

Dear Mr. Wilson:

AT&T Mobility LLC ("AT&T Mobility") has hired this firm to investigate and pursue claims against manufacturers and their customers who purchase and deploy bidirectional amplifiers (BDA's), cellular amplifiers, wireless cellular signal repeaters and other similar devices that routinely disrupt AT&T Mobility's cellular telecommunications network (the "disruptive products"). After months of investigation, AT&T has identified Wilson Electronics, Inc. ("Wilson Electronics") as a manufacturer of disruptive products that have been directly linked to multiple disruptions of AT&T Mobility's cellular network nationwide, causing significant service outages, loss of goodwill and loss of revenue. For the reasons detailed below, AT&T Mobility requests that Wilson Electronics cease immediately the sale and marketing of, and recall the disruptive products in question.

Over the past year, AT&T Mobility increasingly has become aware of a variety of events in Florida and other states in which its cellular telecommunications network has been disrupted, and in some instances shut down completely, because of signals transmitted by unlicensed devices such as those manufactured by your company. Your company's Model 801104 has been a particularly egregious offender that simply overpowers the normal and intended, and more significantly, licensed functions of the network. With cellular telephones typically generating uplink signals in the 200-300 mW range, when a cell site is bombarded with a signal from your company's 3 watt amplifier, it effectively blocks all other devices from making it into the cellular tower site.

AT&T Mobility's investigation has identified incidents where Wilson Electronics' products have shut down or significantly disrupted AT&T Mobility's cellular sites. Wilson Electronics' products are defective in that they fail to safeguard against harmful interference, and are in fact a major cause of harmful interference. Further, the FCC has recently recognized that "cellular and PCS boosters and repeaters are transmitters *and may only be used by licensed cellular/PCS providers or by end user customers with the express authorization of the licensed provider.*" Since AT&T has never granted such permission in connection with your company's

James W. Wilson, President
August 8, 2008
Page 2

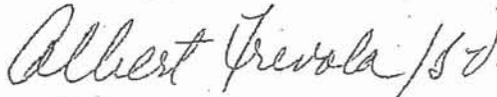
devices, Wilson Electronics and/or its distributors are also making false and deceptive representations about the positive characteristics of its products and wrongfully leading consumers to believe that the units will perform without harming AT&T Mobility's network; that the devices are suitable for their advertised purposes and uses; and that they are approved for such uses by the Federal Communications Commission and telecommunications common carriers such as AT&T Mobility. Of course, none of these representations is true.

Therefore, AT&T Mobility demands that Wilson Electronics and/or its distributors immediately do the following:

1. Cease and desist in selling, furnishing, distributing or otherwise placing the disruptive products into the stream of commerce.
2. Cease and desist in advertising and marketing the disruptive products in a manner which creates a false impression to the public that they are licensed, approved, safe, or otherwise proper for use with wireless telecommunications devices that operate on any Commercial Mobile Radio Service ("CMRS") frequency for which AT&T Mobility is licensed.
3. Cease and desist from the use of the trademark and service mark AT&T, AT&T Mobility, or Cingular Wireless, and any related trademarks or service marks, in any advertising, product literature, internet website, catalog, or any other document whatsoever.
4. Recall, retrieve, repurchase or destroy any and all of the disruptive products.

I invite you or your counsel to contact me to discuss the contents of this letter and the seriousness of the concerns of my client, AT&T Mobility. If we do not have a satisfactory response within thirty (30) days AT&T Mobility has authorized us to pursue appropriate legal remedies for damages and injunctive relief against Wilson Electronics and its customers to prevent further harm to AT&T Mobility and its customers.

Very truly yours,



Albert L. Frevola, Jr., Esq.

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James W. Wilson, President
August 8, 2008
Page 3

bcc: Tom Green, Esq.

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ATTACHMENT 3

To: All Authorized Dealers ("Dealer")

From: AT&T Mobility LLC ("Company")

Re: Prohibition of Wireless Amplifiers

Date: 07/25/2008

The Company has been experiencing a growing problem with unauthorized wireless telecommunications equipment known as bidirectional amplifiers, cellular amplifiers, wireless cellular signal repeaters and other similar products that disrupt the Company's cellular network ("Unauthorized Wireless Products").

The distributors of the Unauthorized Wireless Products may claim that these products are approved by the Company, approved by the Federal Communications Commission for their intended use, or will improve coverage without harming the Company's wireless service. None of these claims are true, however.

The Unauthorized Wireless Products are not authorized by the FCC for their intended use and have caused many disruptions to the Company's wireless network. These high power devices actually block service to the cell sites around them and cause significant loss of coverage and in some instances complete network outages. The use of these devices has become increasingly harmful to the Company's wireless service especially in coastal areas, and has cost the Company lost revenue and harmed its goodwill.

While the Company is pursuing the distributors of the Unauthorized Wireless Products, it is imperative that Dealer is aware of how harmful these devices are to the Company and that they are strictly prohibited under your Dealer/Agency Agreement. Selling these Unauthorized Wireless Products also involves misleading customers and violating the standards of honesty, integrity, and compliance with laws required by the Dealer/Agency Agreement.

As a result, Dealer is prohibited from selling or even recommending any Unauthorized Wireless Products for use with the Company's network. Company will hold Dealer accountable for the harm it suffers as a result of Dealer's involvement with any Unauthorized Wireless Products.

Please let your Account Representative know if you have any questions or information related to Unauthorized Wireless Products.

ATTACHMENT 4



FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Spectrum Enforcement Division
445 12th Street, S.W.,
Washington D.C. 20554

June 28, 2004

Via Facsimile and Certified Mail

Mr. Ronald Jakubowski
Chief Engineer, RF Systems
TX RX Systems, Inc.
8625 Industrial Parkway
Angola, NY 14006

Dear Mr. Jakubowski:

This letter is in response to your fax transmission of May 25, 2004 and attached letter dated March 17, 2004. The Spectrum Enforcement Division of the Enforcement Bureau has reviewed your complaint concerning the direct marketing of signal boosters and in-building radiation systems to commercial mobile radio subscribers and found no evidence of a violation. While it is correct that these devices may only be installed and operated by licensees, the Commission's Rules do not explicitly prohibit the sale of such devices to non-licensees. Accordingly, we find that further investigation is not warranted at this time.

Please direct any questions regarding this matter to Kathy Berthot, 202-418-7454.

Sincerely,

A handwritten signature in cursive script that reads "Joseph P. Casey".

Joseph P. Casey
Division Chief
Spectrum Enforcement Division
Enforcement Bureau

ATTACHMENT 5



Federal Communications Commission
7435 Oakland Mills Road
Columbia, MD 21046
March 4, 2009

IN REPLY REFER TO:
1300F2
2009-009

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Digital Antenna Inc.
5325 NW 108th Ave.
Sunrise, FL 33351

In re: FCCID: PZODA4000MR, PowerMax™ Wireless Mobile Repeater

Dear Sir or Madam:

It has come to our attention that you're marketing the above device without the proper FCC equipment authorization to the general public in violation of Section 15.101 of the FCC Rules. Further, the above captioned FCD ID number is not in our Equipment Authorization data base of approved FCC ID numbers. We note FCC ID NO PZODA4000BR is an approved device but the internal components are different from the device that is being marketed under the above captioned FCC ID.

Please provide an explanation in 30 days as to how this occurred and what your plan is to correct this situation. Please provide information on the number of units sold without the proper equipment authorization.

Importation and marketing of these units must cease immediately pursuant to Section 302(b) of the Communications Act and Section 2.803 of the rules. Willful violations of the FCC Rules and the Communications Act, may subject the violator to a monetary forfeiture of not more than \$11,000 per violation, with a maximum of \$97, 500 for a repeated or continuing violation.

Failure to respond to this letter could subject you to the penalties set forth in Section 501-503 of the Communication Act of 1934 as amended.

If you have any questions concerning this request, please contact Ms. Phyllis B. Parrish (301) 362-3045. Your cooperation in this matter is appreciated.

Sincerely,

Ray LaForge, Chief
Auditing and Compliance Branch