

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Touch-Tel USA, LLC
File No.: EB-TCD-12-000004091
NAL/Acct. No.: 201132170027
FRN: 0018234609

FORFEITURE ORDER

Adopted: September 14, 2015

Released: October 21, 2015

By the Commission: Commissioners Pai and O’Rielly dissenting and issuing separate statements.

I. INTRODUCTION

1. We impose a penalty of \$5,000,000 against Touch-Tel USA, LLC (Touch-Tel or Company), for deceptively marketing its prepaid telephone calling cards. The Company earned more than \$ [REDACTED] in 2010 and 2011 with claims that, for a card costing just a few dollars, buyers could make international phone calls for hundreds or thousands of minutes. However, unless consumers used all of the hundreds or thousands of minutes in a single telephone call, they could make calls for only a small fraction of the advertised time. Although the Company included lengthy “disclosures” in fine print, the terms were misleading, confusing, and inadequate; indeed, the Company’s descriptions of its multiple fees and surcharges were so unclear that it would be impossible to calculate the cost of almost any call. After reviewing Touch-Tel’s response to the Notice of Apparent Liability, we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the \$5,000,000 forfeiture the Commission previously proposed.

II. BACKGROUND

2. The Federal Communications Commission (FCC or Commission) issued a Notice of Apparent Liability against Touch-Tel (NAL or Touch-Tel NAL) on September 1, 2011.2 The Touch-Tel NAL sets forth in detail the facts and circumstances upon which this Forfeiture Order is based and need not be repeated here at length. Touch-Tel is a Texas corporation that provides long distance telecommunications through the use of prepaid calling cards; the Company establishes the rates for its prepaid cards, including the rates, terms and conditions for which minutes are deducted from the cards.3 Retail vendors used marketing posters that Touch-Tel designs and distributes to encourage consumers to

1 This case was formerly assigned the file number EB-10-TC-401. In January 2012, the Telecommunications Consumers Division assigned the case a new file number.

2 Touch-Tel, LLC, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12836 (2011) (NAL or Touch-Tel NAL). The Touch-Tel NAL is incorporated by reference.

3 See Letter from Touch-Tel USA, LLC, to Telecommunications Consumers Division, FCC Enforcement Bureau at 1 (May 3, 2010) (on file in EB-TCD-12-00000409) (LOI Response).

buy the cards.⁴ The Company's typical posters prominently represented that buyers of cards costing just several dollars could make hundreds of minutes of calls to various international destinations using the card.⁵ The Company earned more than \$ [REDACTED] in 2010 and 2011 from the sale of prepaid calling cards.⁶

3. Based upon these and other facts in the record, the Commission issued the *Touch-Tel NAL* on September 1, 2011, and found that the Company's practice of using misleading and deceptive marketing materials to sell its prepaid calling cards apparently constituted an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, as amended (Act).⁷ The Commission explained that Touch-Tel made apparently deceptive representations regarding the number of minutes buyers of its cards could use to make calls to foreign countries and failed to disclose, in any meaningful way, material information about its rates, charges, and practices that would enable consumers to calculate the cost of certain international or interstate calls, and thus substantially harmed persons who purchased its calling cards.⁸ The Commission concluded that the forfeiture must consider the extent and gravity of Touch-Tel's egregious conduct and must serve as an adequate deterrent against deceptive marketing practices.⁹ The Commission also considered the Company's ability to pay and proposed a forfeiture of \$5,000,000.¹⁰ On October 11, 2011, Touch-Tel responded to the *Touch-Tel NAL*.¹¹

III. DISCUSSION

4. We have considered the Company's response to the *Touch-Tel NAL*, which includes a variety of legal and factual arguments, but we find none of them persuasive. We find that the Company willfully and repeatedly violated Section 201(b) of the Act and find no reason to cancel, withdraw, or reduce the proposed forfeiture amount. We therefore affirm the \$5,000,000 forfeiture proposed in the *Touch-Tel NAL*.

5. Touch-Tel argues that the Commission should rescind the *Touch-Tel NAL* because: (1) Section 201(b) imposes no duty on common carriers to make accurate and authentic representations in their promotional practices;¹² (2) the Commission has not adopted rules related to the advertising of prepaid calling cards;¹³ (3) the precedent cited by the Commission in the *Touch-Tel NAL* does not apply

⁴ *Id.* at 1.

⁵ *Touch-Tel NAL*, 26 FCC Rcd at 12837, para. 4.

⁶ See Touch-Tel USA, LLC, 2012 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2011 Revenues)); Touch-Tel USA, LLC, 2011 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)).

⁷ 47 U.S.C. § 201(b).

⁸ *Touch-Tel NAL*, 26 FCC Rcd at 12841, para. 14.

⁹ *Id.* at 12841–43, paras. 15, 17.

¹⁰ *Id.*

¹¹ Touch-Tel USA, LLC's Response to Notice of Apparent Liability for Forfeiture (Oct. 11, 2011) (on file in EB-TCD-12-00000409) (NAL Response).

¹² See *id.* at 10.

¹³ See *id.* at 9.

to Touch-Tel;¹⁴ (4) its disclosures are adequate;¹⁵ (5) the Commission did not base the *Touch-Tel NAL* on consumer complaints;¹⁶ and (6) Touch-Tel has complied with state regulations and agreements.¹⁷

6. We have already thoroughly addressed and rejected four of Touch-Tel's arguments in our companion *STi Forfeiture Order*.¹⁸ Specifically, the *STi Forfeiture Order* explains that Section 201(b) reaches deceptive marketing¹⁹ (including the types of practices engaged in by Touch-Tel) and that it does so even in the absence of implementing rules.²⁰ Likewise, that *Order* explains that the Commission does not need to base its forfeiture orders on complaints²¹ or a showing of actual consumer harm in order to find violations of Section 201(b).²² Finally, the *STi Forfeiture Order* underscores that compliance with state regulations, as well as settlements or other agreements with state authorities, does "not preclude the Commission from taking action to protect consumers from deceptive advertising on its own motion under the Act."²³ We reject those arguments from Touch-Tel for the same reasons. We address each of Touch-Tel's remaining arguments below.

A. The NOS Standard Applies to Touch-Tel

7. Under our interpretation of Section 201(b), advertising associated with telecommunications services must provide "clear and conspicuous disclosure on how to calculate the total cost of a call" and that "in the absence of clear and conspicuous disclosure regarding the nature and components of the rate structure," a carrier's marketing materials would "certainly be misleading to consumers" ²⁴ Touch-Tel argues that because *NOS* and other cases referenced in the *NAL* do not specifically reference prepaid calling cards, they are inapplicable.²⁵ Touch-Tel is wrong.

8. We interpret and apply Section 201(b) to advertising and marketing of telecommunications services using a standard that was described in *NOS*. This standard applies to *all* consumers and *all* calls and does not depend upon the type of telecommunications service (e.g., prepaid or post-paid). The apparent violations described in *NOS* were based on the content of written disclosures²⁶ and rate sheets faxed to customers.²⁷ Thus, the focus of the conduct at issue in *NOS* was

¹⁴ See *id.* at 4–7.

¹⁵ See *id.* at 7–8.

¹⁶ See *id.* at 3–4.

¹⁷ See *id.* at 7–9.

¹⁸ See *STi Telecom Inc.*, File No. EB-TCD-12-00000453, Forfeiture Order, FCC 15-113 (rel. Oct. 21, 2015) (*STi Forfeiture Order*).

¹⁹ See *id.* at paras. 7–11 (citing *Bus. Disc. Plan, Inc.*, Order of Forfeiture, 15 FCC Rcd 14461, 14468, para. 15 (2000) (*BDP*), *recon. granted in part and denied in part*, 15 FCC Rcd 24396, 24399, para. 8 (2000) (*BDP Order on Reconsideration*); *NOS Commc'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133, 8136, para. 6 (2001) (*NOS*) (finding that deceptive marketing can "constitute unjust and unreasonable practices under section 201(b)").

²⁰ See *STi Forfeiture Order*, FCC 15-113 at paras. 16–18.

²¹ See *id.* at para 32.

²² See *id.* at para. 25.

²³ *Id.* at para. 28.

²⁴ *NOS*, 16 FCC Rcd at 8138, para. 9 (2001) (*NOS*). For ease of reference, we refer to this colloquially below as the "NOS standard" or the like.

²⁵ See *NAL Response* at 4–7.

²⁶ See *NOS*, 16 FCC Rcd at 8134, para. 3.

²⁷ See *id.* at 8140, 8141, paras. 16, 19.

whether the content of the written disclosures allowed consumers to calculate the cost of a call—not on any potentially unique aspects of post-paid services. Likewise, in the *Touch-Tel NAL* the Commission found apparent violations based on whether Touch-Tel’s consumers could calculate the cost of a call. Touch-Tel cites no authorities and makes no argument as to why the content of its written disclosures and rate sheets for pre-paid services are distinct in any meaningful way from the content of written disclosures and rates for post-paid services such that the Commission should not also apply Section 201(b) to the Company’s marketing posters consistent with the *NOS* standard.²⁸

9. In sum, the crux of *NOS* is not the manner in which the call is made or the industry that provides the service, but whether the disclosures allow a consumer to calculate the cost of the call. As such, Touch-Tel’s attempt to distinguish *NOS* solely on the type of telecommunications service offered is unavailing.²⁹ As discussed more fully below, Touch-Tel’s indefinite description of its fees make it impossible for a consumer to calculate the cost of a call at the point of sale—exactly the type of unjust and unreasonable practice that Section 201(b), as interpreted and applied by the Commission, prohibits. For the foregoing reasons, we find that the *NOS* standard applies to the Commission’s evaluation of Touch-Tel’s advertising and marketing of prepaid calling cards under Section 201(b).³⁰

B. The Company Violated the Standard Enunciated by the Commission in *NOS*

10. As noted above, pursuant to Section 201(b), Touch-Tel must abide by the *NOS* standard—marketing and advertising for telecommunications services must include disclosures that allow consumers to calculate the cost of their calls.³¹ We find that the Company violated this standard.

11. Touch-Tel claims that the disclosures of all the associated surcharges on its cards are adequate³² and provide “complete disclosures of its pricing.”³³ We disagree. As an initial matter, we reject Touch-Tel’s assertion that consumers have full knowledge of its disclosures. These disclosures are in small print, are far from clear or conspicuous in relation to the claim of total available minutes on

²⁸ Touch-Tel also discusses another case mentioned in the *NAL* involving deceptive advertising practices. See *NAL* Response at 5–6 (citing *Telecomms. Research & Action Ctr. & Consumer Action*, Memorandum Opinion and Order, 4 FCC Rcd 2157 (Com.Car. Bur. 1989) (*TRAC*)). In *TRAC*, the various companies engaging in deceptive advertising practices were part of an insular and uncompetitive industry. Touch-Tel argues that *TRAC*’s finding that deceptive advertising practices violate Section 201(b) should be inapplicable to Touch-Tel because it operates in a competitive industry. See *NAL* Response at 5–6. However, as we have already noted, the focus of the *NOS* standard is not the nature of the industry but the ability of a consumer to calculate calls. See *supra* para. 8.

²⁹ See *NAL* Response at 4–5. Touch-Tel also argues that the Commission only cites to the disclosures on hang-tags attached to its prepaid cards, but not those on the card itself. *Id.* at 6-7. Touch-Tel has not, however, pointed to any cards that contain additional disclosures on the card itself. In fact, the Puro Mexico card cited in this order only contains local access numbers while the hang-tag includes all of the disclosures. See E-mail from William Stankos, Chief Operating Officer, Touch-Tel USA, LLC, to David Marks, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau at attachment, Puro Mexico card (Apr. 1, 2011, 13:10 EDT) (Supplemental LOI Response).

³⁰ Touch-Tel also attempts to evade the reach of Section 201(b) by distinguishing *BDP*, claiming that any finding of deceptive advertising in *BDP* was merely a “further mitigating factor” to other violations. *NAL* Response at 7. Touch-Tel is wrong; the Commission made separate and independent holdings in *BDP*, finding both cramming violations and deceptive marketing practices. See *BDP*, 15 FCC Rcd at 14461, para. 1. We also note that Touch-Tel incorrectly states that *BDP* involved both slamming and cramming violations; *BDP* involved slamming violations, in addition to deceptive advertising violations, but did not involve any cramming violations.

³¹ See *NOS*, 16 FCC Rcd at 8137–38, para. 9.

³² *NAL* Response at 7–8.

³³ *Id.* at 5.

Touch-Tel's marketing posters, and fail to meet the standard enunciated by the Commission in *NOS*.³⁴ For example, Touch-Tel's "Puro Mexico" calling card (as well as the poster used to market the card³⁵) is illustrative and reads, as translated into English, as follows:

The published minutes shall apply only to the first call from a private phone and are subject to change without notice. The charges made after the first call include \$1.09 bi-weekly maintenance fee and a service charge of up to \$ 1.50 per call. All calls made from a payphone will incur a \$.99 charge. All calls connected via an 800 number will be subject to a maximum charge of \$.05 per minute. All call minutes are rounded up to the next minute. The card expires on the date indicated on the card or 180 days from first use.³⁶

These "disclosures" violate the *NOS* standard; they omit important information and make it impossible to calculate the cost of almost any call. For example, a caller cannot determine:

- the exact cost of the per call fee;
- the exact cost of an 800 call; or
- to what extent minutes will be changed without notice.

12. In sum, as the Commission noted in the *Touch-Tel NAL*, Touch-Tel's disclosures do not provide the information necessary for a consumer to know the amount of applicable fees, and when and how they will affect the number of calling minutes offered.³⁷ Touch-Tel's disclosures not only state that even the advertised minutes are subject to change without notice, but also include possible ranges of fees and the Company gives no meaningful explanation of how such ranges relate to the initial advertised rate. Thus, in addition to vague and misleading representations, Touch-Tel's disclosures omit key facts that consumers would need to understand the rate structure and calculate the cost of a call.³⁸

³⁴ As the Commission has explained, "accurate information in the text may not remedy a misleading impression created by a headline because reasonable consumers may glance only at the headline. Written disclosures in fine print may be insufficient to correct a misleading impression Qualifying disclosures must be legible and understandable. The totality of the ad or the practice must be evaluated" *Joint FCC/FTC Policy Statement For the Advertising of Dial-Around and Other Long Distance Services to Consumers*, Policy Statement, 15 FCC Rcd 8654, 8656, para. 8 (2000).

³⁵ See Supplemental LOI Response, attachment, Puro Mexico Poster

³⁶ Supplemental LOI Response, attachment, Puro Mexico card. The disclosure on the card and poster is in Spanish. It reads: "Los minutos publicados se aplicarán solo en la primera llamada solamente desde un telefono privado y serán sujetos a cambiar sin previo aviso. Los cargos realizados después de la primera llamada incluyen \$1.09 quincenalmente por cargo de mantenimiento y, un cargo por el servicio de hasta \$1.50 en cada llamada. Todas las llamadas realizadas desde un telefono publico seran sujetos a un cargo de \$.99. Todas las llamadas conectadas por medio de un número 800, serán sujetos a un cargo adicional máximo de \$.05 por minuto. Todas las llamadas se redondean al próximo minuto inmediato. La tarjeta expira en la fecha indicada en la tarjeta o a los 180 dias del primer uso." *Id.*

³⁷ *Touch-Tel NAL*, 26 FCC Rcd at 12840, para. 10.

³⁸ Moreover, Touch-Tel makes a number of other frivolous arguments. The Company argues that because "the prepaid calling card industry is extremely competitive" and "[c]onsumers have a wide-range of choices," it follows that consumers who purchase the Company's cards are not "unhappy with or confused by Touch-Tel's calling cards." *NAL Response* at 6. The Company also argues that it "cannot be held responsible if a consumer chooses not to read the disclosures" *Id.* at 8. These arguments are immaterial and have no bearing on Touch-Tel's failure to comply with the *NOS* standard.

IV. CONCLUSION

13. We have reviewed Touch-Tel's arguments and find no reason to cancel, withdraw, or reduce the proposed forfeiture. Touch-Tel fails to rebut the overwhelming evidence that, during the 12 months prior to release of the *Touch-Tel NAL*, it engaged in an unlawful practice by deceptively marketing thousands of prepaid calling cards.³⁹ Accordingly, consistent with precedent, the Commission finds that Touch-Tel's advertising of prepaid calling cards is an "unjust and unreasonable" practice under Section 201(b). Pursuant to Section 503(b)(1)(B), we affirm the \$5,000,000 forfeiture proposed in the *Touch-Tel NAL*.

V. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,⁴⁰ and Section 1.80 of the Rules,⁴¹ Touch-Tel USA, LLC, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of five million dollars (\$5,000,000) for willfully and repeatedly violating Section 201(b) of the Act.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release of this Forfeiture Order.⁴² If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁴³

16. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Touch-Tel USA, LLC, shall send electronic notification of payment to Johnny Drake at johnny.drake@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴⁴ When completing the Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions that should be followed based on the form of payment selected:

³⁹ Commissioner Pai's dissent argues that it is unclear on which dates prepaid calling cards were sold and, in some instances, whether any cards at all were sold in the year preceding the release of the *NAL*. However, Touch-Tel reported a total of \$ [REDACTED] in gross-billed revenues on its four quarterly filings for Universal Service contributors spanning October 1, 2010, through September 30, 2011 (encompassing 11 of the 12 months considered in the *NAL*). See Touch-Tel February 2011 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for October 1, 2010, to December 31, 2010); Touch-Tel May 2011 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for January 1, 2011, to March 31, 2011); Touch-Tel August 2011 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for April 1, 2011, to June 30, 2011); Touch-Tel November 2011 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for July 1, 2011, to September 30, 2011). In addition, the Company reported \$ [REDACTED] in historical quarterly revenues for July 1, 2010, to September 30, 2011, which encompasses the remaining one month the *NAL* considered. See Touch-Tel November 2010 FCC Form 499-Q. Touch-Tel's cards were typically sold for \$5 or less. See *NAL*, 26 FCC Rcd at 12836, 12837, paras. 2, 5. Even if we assumed the cards averaged \$10 each and assumed only \$ [REDACTED] in revenues, it would equate to the sale of at least [REDACTED] cards in a year, or an average of [REDACTED] cards each day (and even more if the calculation was made based on a \$5 or \$2 card). It is a logical and reasonable inference that at least one card (and likely [REDACTED] of cards) were sold on each of the 365 days preceding the *NAL* – far more than the mere 125 needed to support the forfeiture amount.

⁴⁰ 47 U.S.C. § 503(b).

⁴¹ 47 C.F.R. § 1.80.

⁴² *Id.*

⁴³ 47 U.S.C. § 504(a).

⁴⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with completed Form 159) must be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

17. Any request for full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.⁴⁵ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

18. **IT IS FURTHER ORDERED** that a copy of this Order for Forfeiture shall be sent by first class mail and certified mail, return receipt requested, to Touch-Tel USA, LLC, Attention: Michael B. Hazzard and Katherine Barker Marshall, Arent Fox LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁵ See 47 C.F.R. § 1.1914.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
Simple Network, Inc., File No.: EB-TCD-12-00000406
Touch-Tel USA, LLC, File No.: EB-TCD-12-00000409
NobelTel, LLC, File No.: EB-TCD-12-00000412
Locus Telecommunications, Inc., File No.: EB-TCD-12-00000452
STi Telecom Inc. (formerly Epana Networks, Inc.), File No.: EB-TCD-12-00000453

Locus Telecommunications, Inc., Lyca Tel, LLC, NobelTel, LLC, Simple Network Inc., STi Telecom Inc., and Touch-Tel USA, LLC each used blatantly misleading and deceptive marketing materials to sell prepaid calling cards. These six companies, moreover, focused their deceptive marketing on immigrants. Such behavior, especially when it involves preying upon vulnerable populations, should not be tolerated.

Unfortunately, the Commission's ability to lawfully impose a forfeiture upon these companies has been fatally compromised by its inadequate and incomplete investigation into their conduct. Here's why.

In each of these cases, the Commission contends that "a separate violation of Section 201(b) occurred each time a consumer purchased" a misleading and deceptive prepaid calling card.¹ Accepting this position for the sake of argument, it raises a number of questions pertaining to each violation (*i.e.*, each purchase of a prepaid calling card). Section 503(b)(4) of the Act requires Notices of Apparent Liability to set forth, among other things, "the nature of the act or omission charged against such person and the facts upon which such charge is based" as well as "the date on which such conduct occurred."² So: On which dates did the purchases of prepaid calling cards take place? Who purchased them? Where did the sales take place? And which type of card was purchased?

The six underlying Notices of Apparent Liability did not answer *any* of these questions with respect to even a single purchase of a prepaid calling card (nor do these Forfeiture Orders answer any of these questions either). Indeed, the Commission did not even ask these questions of the companies. I therefore do not believe that the Commission has complied with Section 503(b)(4) of the Act or fundamental aspects of due process.

To be sure, the Commission claims that it was not required to include any of this specific information, including particular dates, in the Notices of Apparent Liability. Rather, it contends that the companies were engaging in an unlawful "practice" that included activities repeated over time. Therefore, for example, the Commission argues it was sufficient that the Notices of Apparent Liability "refer[red] to the *time period* during which the unlawful practice giving rise to the violation occurred."³

Were the Commission finding here that these six companies had each committed a single continuing violation of Section 201(b) in the form of an unlawful practice, then I could understand the argument that the facts set forth in the Notices of Apparent Liability were sufficiently specific. However, the Commission does not make such a finding, probably because each company's liability then would

¹ See, e.g., *STi Forfeiture Order* at para. 13.

² See 47 U.S.C. § 503(b)(4).

³ *STi Forfeiture Order* at para. 15 (emphasis added).

have been capped at \$1.575 million.⁴ Instead, the Commission concludes that each company committed a separate violation of Section 201(b) each time that a consumer purchased a misleading and deceptive prepaid calling card—but fails to specify the basic facts underlying even a single sale, including (as noted above) the “date on which such conduct occurred.” This is not legally permissible.⁵

This lack of specificity leads to another problem. Neither the Notices of Apparent Liability nor the Forfeiture Orders in at least two of these cases⁶ contain any concrete evidence that any misleading and deceptive prepaid calling cards were sold within the one-year statute of limitations period, as required by Section 503(b)(6) of the Act.⁷ While the Commission points out that the companies’ marketing posters contained expiration dates that fell within the limitations period, it doesn’t put forth any evidence of a specific sale of a misleading and deceptive prepaid calling card that occurred during that time. All that is offered is speculation and conjecture. Indeed, it appears that we have no idea when the companies stopped selling any of the relevant cards.⁸

Finally, these Forfeiture Orders do not offer a coherent explanation of why the forfeiture imposed in each item is \$5 million. As in prior cases, it appears that this number was plucked out of thin air rather than determined through the use of a rational methodology.

* * *

When it comes to enforcement, I have previously expressed the concern that the Commission is more interested in seeking headlines than respecting the rule of law. This is yet another example of this problem. Here, the Commission appropriately identified six companies engaging in deeply problematic conduct. But because the Commission’s investigation of these companies was deeply flawed, I am unable to conclude that the six Forfeiture Orders issued today are lawful. Therefore, I must respectfully and regretfully dissent.

⁴ See 47 C.F.R. § 1.80(b)(2).

⁵ In these Forfeiture Orders, the Commission attempts to correct this mistake by implying that all of the prepaid calling cards sold by these companies were unlawful and by finding “it is a logical and reasonable inference that at least one card (or likely tens of thousands of cards) were sold on each of the 365 days preceding the NAL.” See, e.g., STi Forfeiture Order at para. 14. While this assertion could very well be true, there is a rather big problem with this gambit. None of this information was included in the Notices of Apparent Liability, as required by the Section 503(b)(4) of the Act. Nowhere do the NALs state that every single card marketed by the companies was unlawful or that each company sold a misleading prepaid calling card each and every day in the year prior to the issuance of the NALs. Indeed, the NALs fail to even mention each of the different cards sold by the companies, let alone go through the analysis necessary to explain how each was misleading and deceptive. Unfortunately, the Commission’s after-the-fact attempt here to rehabilitate the NALs cannot change the fact that the allegations against the companies contained in those NALs were simply too vague and conclusory to comply with the statute or basic principles of due process.

⁶ *NobelTel, LLC*, File No. EB-TCD-12-00000412; *STi Telecom Inc. (formerly Epana Networks, Inc.)*, File No. EB-TCD-12-00000453.

⁷ See 47 U.S.C. § 503(b)(6)(B).

⁸ While the Commission points to the companies’ Form 499-Qs to demonstrate that each was selling prepaid calling cards within the statute of limitations, see, e.g., STi Forfeiture Order at n. 57, that is not the relevant issue. Rather, the question is when those companies were selling the specific misleading and deceptive prepaid calling cards mentioned in the NALs. And with respect to that question, the NobelTel and STi Forfeiture Orders contain no relevant information. Indeed, as STi points out, it provided the Commission with examples of products distributed prior to May 2010 and products distributed after May 2010. See STi Telecom Inc.’s Response to Notice of Apparent Liability for Forfeiture at 4-5. And in the STi NAL, the Commission only discussed products distributed prior to May 2010. See *id.* As such, the Commission must be able to show that those products, which were distributed before May 2010, were sold after August 31, 2010. And the STi Forfeiture Order is bereft of such evidence.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
Simple Network, Inc., File No.: EB-TCD-12-00000406
Touch-Tel USA, LLC, File No.: EB-TCD-12-00000409
NobelTel, LLC, File No.: EB-TCD-12-00000412
Locus Telecommunications, Inc., File No.: EB-TCD-12-00000452
STi Telecom Inc. (formerly Epana Networks, Inc.), File No.: EB-TCD-12-00000453

Through these six Forfeiture Orders, the Commission further expands the reach of section 201(b) to regulate every aspect of how providers market their services. Even worse, there is no limiting principle to the Commission's analysis. While prepaid calling card providers are the focus of today's actions, broadband providers, and even edge providers, should be extremely concerned about how these decisions will ultimately impact their own advertisements, including disclosures about their rates, terms, and conditions.

To start, I object to the notion that the Commission has authority under section 201(b) to regulate "deceptive marketing". I cannot change the fact that the Commission first applied section 201(b) to cover such conduct over a decade ago. And it is bad enough that the Commission routinely fines providers under section 201(b) when the conduct is already subject to penalty under express statutory authority, such as section 258's prohibition on slamming. But I will not agree to extend section 201(b) even further.

I was not at the Commission when the NALs underlying the current Forfeiture Orders were issued, and I would not have supported them had I been here. As Commissioner Furchtgott-Roth argued when the Commission started down this path:

The FCC has neither the authority nor the ability to be the "marketing police" of the telecommunications industry. . . . The plain meaning of the term "practices" taken in the context of Section 201 does not clearly reach advertising. Indeed, if "practices" includes advertising, then it is hard to imagine what it does not include.¹

Sadly, this Commission may lack many things, but imagination is not one of them.

Moreover, I continue to be troubled when the Commission seeks to impose a fine in the absence of any rules. If section 201 is truly "ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities" then how are providers supposed to know what conduct will run afoul of it?²

To be sure, the items point to the *Business Discount Plan Forfeiture Order* from 2000 and the *NOS Communications Notice of Apparent Liability* from 2001, but these actions provide no precedential value for the current items and are also easily distinguishable. Among other things, both involved actual consumer complaints. The Commission processed "thousands" of complaints about Business Discount

¹ *Business Discount Plan Forfeiture Order*, 15 FCC Rcd 14461, 14475 (2000) (dissenting statement of Commissioner Furchtgott-Roth).

² *STi Telecom Inc.*, para. 9 (quoting *Metrophones Telecomms., Inc. v Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005)).

Plan,³ and “almost 900” complaints regarding NOS and its related company.⁴ Here, there was not a single complaint. If the advertisements were “so unclear that it was impossible to calculate the cost of almost any call” you wouldn’t know it from the deafening silence of the public.⁵

The items also cite the 2000 *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*. However, a Policy Statement is no substitute for actual rules. Hasn’t the Commission learned by now that it can’t base enforcement actions on a Policy Statement? Moreover, a Policy Statement on a subject area over which the Commission has no jurisdiction carries no weight at all.

Not only does the Commission lack jurisdiction over advertising; it also lacks experience. The only items cited are the trio of actions from 2000-2001 described above.⁶ One might rationally conclude that those were the high water mark of advertising enforcement by an overly aggressive prior Commission.⁷ Moreover, while the FTC consistently pursued claims against prepaid calling card distributors, the NALs underling these Forfeiture Orders marked the first time that the Commission pursued prepaid calling card providers for their ads.

Certainly no reasonable company would have expected that the Commission would suddenly target companies, without any preceding complaints, for disclosure language that seems fairly standard in the industry, much less hone in on the font sizes of their disclosures. The *STi Forfeiture Order*, for example, highlights that the advertisements state that “[r]egional and local phone company” charges “may” apply; that a “daily maintenance fee” of “up to \$1.99” will apply; that calls from cellular phones and to 800 numbers “are billed at higher rates”; and that fees and rates are subject to change without notice.⁸

First of all, if the Commission is going to cite a company for failure to specify “how much of the card will be used up by regional and local phone company charges”,⁹ then I challenge it to produce its own list of all regional and local phone company charges. There are only a handful of people at the Commission that would even know how to go about that task, parts could be subject to change at any time by the states, and it would not even come close to fitting on an advertisement in a font size acceptable to the Commission.

In addition, a quick search of other well-known prepaid calling card providers turned up disclosures with very similar qualifications. Likewise, posters with disclosures in smaller print on the bottom seem to be the norm. If the prior items and Policy Statement articulated a clear standard that provided companies with fair notice of the conduct required, as the Commission now alleges, then why

³ *Business Discount Plan Forfeiture Order*, 15 FCC Rcd at 14461.

⁴ *NOS Communications Notice of Apparent Liability*, 16 FCC Rcd 8133, 8134 (2001).

⁵ *Id.*, para. 1.

⁶ See also Telecommunications Consumers Division - Marketing Enforcement Actions Detailed Information (last updated June 12, 2015), <https://transition.fcc.gov/eb/tcd/mktg.html>.

⁷ While the Commission has pursued slamming and cramming violations throughout this timeframe, including under 201(b), those actions provided no additional notice as to how the Commission would regulate the content of providers’ advertisements and disclosures. Slamming typically involves misrepresentation of the identity of the provider, and cramming entails wholly unauthorized charges. Therefore, they provide no additional guidance on what constitutes “clear and conspicuous” disclosures.

⁸ *STi Forfeiture Order*, paras. 2-3.

⁹ *Id.*, para. 21.

doesn't anybody seem to know it? Selective application of penalties when nobody appeared to be on notice is very troubling.

Moreover, if the standard is that every single rate, term, and condition must be explained and spelled out to the last cent, the Commission has a term for that: tariff.¹⁰ However, the Commission long ago deregulated and detariffed most long-distance service, including detariffing prepaid calling card service, "because the FCC has determined that the long-distance market is competitive."¹¹

Some may be tempted to dismiss these actions as merely closing out the enforcement backlog on an industry that has been on the decline for years, with no effect on other types of companies. Think again. The Commission has no assurance that the Department of Justice will even take up these cases, which involve conduct from 2010-2011 and NALs from 2011-2012. Indeed, it is not clear that all of these companies remain in business today. Since this isn't about getting the money, which may never happen, then it must be about setting the principle. And that's what's really concerning. Once this bad "precedent" is set, it will undoubtedly be used against other types of providers in the future.

For instance, the qualification that rates and/or terms and conditions are subject to change is commonly used in both the voice and broadband context by wireline, cable, wireless and other providers. Will they be required to specify their rates, terms, and conditions in greater detail? So much for promises that "utility-style" regulations, including tariffing, were a thing of the past. Furthermore, if the "NOS standard" means that companies face heightened scrutiny if they do not use a price per minute calculation, what are the implications of that today? Will broadband providers have to disclose a price per megabit? That sounds a lot like backdoor rate regulation.

Additionally, it is typical for companies to include disclosures in smaller print at the bottom of a web page, or through a mouse-over or separate page or tab. Will they have to change their font size or disclosure placement? Seek FCC approval? How long before the Commission makes the claim that advertising impacts broadband adoption and, therefore, all parts of the supposed virtuous cycle—including edge providers—will have their ads and disclosures scrutinized? Since the Commission makes clear it can and will act even in the absence of complaints, it is only a matter of time before someone in the Enforcement Bureau spots another ad that supposedly doesn't comply with its new standard.

While the Commission's position that it has roving section 201(b) authority to police providers' advertisements is unlawful and unwise, it was not unpredictable. This is just another link in the chain of decisions to extend the Commission's authority over all parts of the communications sector. I must dissent.

¹⁰ Tariffs (last visited Sept. 11, 2015), <https://www.fcc.gov/encyclopedia/tariffs>.

¹¹ *Id.*