Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
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STi Telecom Inc. (formerly Epana Networks, Inc.)	)	File No.: EB-TCD-12-00000453[1]
	)	
	)	NAL/Acct. No.: 201132170024
	)	
	)	FRN: 0007413867
	)	
	)	

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 STi Telecom Inc. (STi), formerly known as Epana Networks, Inc. (Epana) (STi and Epana together, the Company), for deceptively marketing its prepaid telephone calling cards. The Company earned more than $[redacted] between 2011 and 2012 by targeting its marketing to immigrants 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 phone call, consumers 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 was impossible to calculate the cost of almost any call. After reviewing STi'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 Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) began its investigation of Epana[2] on April 2, 2010, by issuing a letter of inquiry (LOI).[3] In response to an inquiry by the Bureau, Epana represented that it is a New York corporation that provides

[1] This case was formerly assigned the file number EB-10-TC-394. In January 2012, the Telecommunications Consumers Division assigned the case a new file number. All further communications with respect to this case should use the new file number.

[2] In August 2011, the Company informed the Commission that it had changed its corporate legal name from Epana Networks, Inc., to STi Telecom Inc., but that it remained the same entity. *See* Letter from Roberta Kraus, General Counsel, STi Telecom Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 8, 2011). This Forfeiture Order occasionally uses the name Epana in reference to conduct by the Company prior to its corporate name change.

[3] *See* Letter from Colleen K. Heitkamp, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Epana Networks, Inc. (Apr. 2, 2010) (on file in EB-TCD-12-00000453) (LOI).

long distance telecommunications service through the use of prepaid calling cards and establishes the rates for those cards, including the number of minutes deducted to pay various fees.[4] Consumers in the United States used the cards primarily to make international calls.[5] Retail vendors used marketing posters that Epana designed and distributed to encourage consumers to buy the cards.[6] The Company earned more than $[redacted] between 2011 and 2012.[7]

3. As part of its response, Epana provided sample posters and calling cards from 2009 and 2010, as well as a number of audio and video advertisements. Typical posters prominently represented that buyers of cards costing just several dollars could make hundreds or thousands of minutes of calls to various international destinations using the card. For example, the poster for the "O.M.A.F." card advised that buyers of a $5 card could make 1305 minutes worth of calls to Guadalajara.[8] In small font at the bottom of the poster—in the case of the O.M.A.F. card, about 1/15th the size of the text used to display "1305" minutes—various terms and conditions were listed, including that certain fees and surcharges might apply that would reduce the card's value. The small print disclosed neither the precise circumstances under which these fees and charges would be assessed, nor the precise magnitude of them. For example, the O.M.A.F. card indicated that a connection or disconnection fee would apply "to certain destinations;" that "[r]egional and local phone company" charges "may" apply; that a "daily maintenance fee" of "up to $1.99" will apply; and that calls from cellular phones and to 800 numbers "are billed at higher rates."[9] The posters further stated that fees and rates are subject to change without notice.[10]

4. Based upon these and other facts in the record, on September 1, 2011, the Commission issued the *STi NAL*,[11] which found that the Company's practice of using misleading and deceptive marketing materials to sell its prepaid calling cards constituted an unjust and unreasonable practice in apparent violation of Section 201(b) of the Communications Act of 1934, as amended (Act).[12] The Commission explained that Epana made 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 and/or interstate calls, and thus substantially harmed persons who purchased its calling cards.[13] The Commission concluded that the proposed forfeiture must consider the extent and gravity of Epana's egregious conduct and must serve as an adequate deterrent against

[4] *See* Letter from Mitchell F. Brecher, Counsel for Epana Networks, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (May 20, 2010) (LOI Response). Epana twice supplemented its initial LOI Response. *See* Letter from Mitchell F. Brecher, Counsel for Epana Networks, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (July 29, 2010) (Supplemental Response); Letter from Mitchell F. Brecher, Counsel for Epana Networks, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 13, 2010) (Second Supplemental Response).

[5] *See STi Telecom Inc. (formerly Epana Networks, Inc.)*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12808, 12809, para. 3 (2011) (*NAL* or *STi NAL*).

[6] LOI Response at 3; Supplemental Response at 4.

[7] *See* Epana 2011 and 2012 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2010 and 2011Revenues)).

[8] Second Supplemental Response at EPN 000868, O.M.A.F. poster.

[9] *Id*. at EPN 000867, O.M.A.F. card

[10] *Id*. at EPN 000867, O.M.A.F. card.

[11] The *NAL* is incorporated by reference.

[12] 47 U.S.C. § 201(b).

[13] *See STi NAL*, 26 FCC Rcd at 12813–14, para. 15.

deceptive marketing practices.[14] The Commission also considered the Company's ability to pay and ultimately proposed a forfeiture of $5,000,000.[15] On January 30, 2012, STi responded to the *STi NAL*.[16]

III. DISCUSSION

5. We have considered the Company's response to the STi 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 *STi NAL*.

6. STi argues that the Commission should rescind the *STi NAL* because: (1) Section 201(b) does not reach advertising claims;[17] (2) the *STi NAL* violates the one-year statute of limitations period in Section 503(b)(6)(B) of the Act;[18] (3) the Commission did not identify specific dates of violations as required by Section 503(b)(4) of the Act;[19] (4) the Commission has not adopted clear rules related to the advertising of prepaid calling cards;[20] (5) the Commission has not adopted a standard that meets the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 et seq.;[21] (6) Epana's advertising was not an unreasonable practice, deceptive, or misleading;[22] and (7) the Commission has not cited any consumer complaints against Epana and, therefore, cannot show that the deceptive advertising was material to or harmed consumers.[23] We address each of these arguments below.

A. Section 201(b) of the Act Grants the Commission Authority to Address Deceptive Marketing by Common Carriers that Provide Prepaid Calling Card Telecommunications Services

7. Section 201(b) of the Act states that "[a]ll . . . practices . . . for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such . . . practice . . . that is unjust or unreasonable is declared to be unlawful."[24] Although STi argues that the Commission lacks authority to regulate the advertising practices described in the *STi NAL*,[25] the Commission has previously found that the kind of deceptive marketing at issue here constitutes unjust or unreasonable "practices . . . in connection with" communications services and therefore falls squarely within the FCC's core authority under Section 201(b).[26]

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[14] *See id*. at 12814, 12815, paras. 16, 18.

[15] *See id*. at 12814, para. 16.

[16] STi Telecom Inc.'s Response to Notice of Apparent Liability for Forfeiture (Jan. 30, 2012) (on file in EB-TCD-12-00000453) (NAL Response).

[17] *See id*. at 5–8.

[18] *See id*. at 3–5, 19–20.

[19] *See id*. at 2–3, 19.

[20] *See id*. at 8–10.

[21] *See id*.

[22] *See id*. at 10–12.

[23] *See id*. at 16–19.

[24] 47 U.S.C. § 201(b).

[25] *See* NAL Response at 5–8.

[26] *See 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*) (granting a reduction in the forfeiture amount but denying BDP's claim that the Commission did not have authority under Section 201(b)). As specifically explained in the *STi NAL*, the Commission has found (in three decisions and a policy statement) that the kind of deceptive marketing practices at issue here are clearly within the agency's

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8. STi ignores the substance of three previous decisions of the Commission[27] and instead relies on a lone dissenting opinion in two of those cases (as well as a dissent in a policy statement), which do not have legal force.[28] As we previously explained when exercising our jurisdiction over this kind of marketing, "[i]n enacting section 201(b), Congress did not enumerate or otherwise limit the specific practices to which this provision applies. Instead, it granted us a more general authority to address such practices as they might arise in a changing telecommunications marketplace."[29] We reject STi's suggestion to modify our well-established interpretation of Section 201(b).[30]

9. Moreover, the courts have broadly construed the Commission's authority to deem a practice "unjust or unreasonable" to extend "far beyond those core original provisions [of Section 201] . . . ."[31] As the D.C. Circuit has explained, "[b]ecause 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are

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jurisdiction. *See STi NAL*, 26 FCC Rcd. at 12810, para. 6 & nn.12–13 (citing *NOS Commc'ns, Inc.*, Notice of Apparent Liability, 16 FCC Rcd 8133 (2001) (*NOS*); *BDP*, 15 FCC Rcd 14461; *Telecomms. Research & Action Ctr. & Consumer Action*, Memorandum Opinion and Order, 4 FCC Rcd 2157 (Com. Car. Bur. 1989) (*TRAC Order*); *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long Distance Services to Consumers*, Policy Statement, 15 FCC Rcd 8654 (2000) (*Joint Policy Statement*)).

[27] *See STi NAL*, 26 FCC Rcd at 12810, para. 6 & n.12 (explaining that unfair and deceptive marketing practices are unjust and unreasonable under Section 201(b)).

[28] *See* NAL Response at 5–6; *see also, e.g.*, *Sprint v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (Commissioners' individual "statements are not institutional Commission actions.").

[29] *BDP Order on Reconsideration*, 15 FCC Rcd at 24399, para. 8. We further note that the U.S. Supreme Court has cited this treatment of deceptive marketing as an example of the Commission's discretion to declare practices unjust and unreasonable. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc*., 550 U.S. 45, 53–54 (2007) (*Global Crossing*) (citing *NOS*, 16 FCC Rcd at 8136, para. 6). For similar reasons, we also reject arguments in dissenting statements in earlier Commission items suggesting that this interpretation of section 201(b) is undercut by express mention of advertising or other consumer protection matters in other provisions of the Act. *See, e.g.*, *Joint Policy Statement*, 15 FCC Rcd at 8672 (Statement of Commissioner Furchtgott-Roth, dissenting) (*Joint Policy Statement Dissent*). *Cf. BDP*, 15 FCC Rcd at 14476 (Statement of Commissioner Furchtgott-Roth, dissenting in part and concurring in part) (*BDP Dissent*) (arguing that if Congress intended the Commission to have such authority it would have provided it expressly, and citing an express grant of authority to the FTC); *NOS*, 16 FCC Rcd at 8152 (Statement of Commissioner Furchtgott-Roth, dissenting) (*NOS Dissent*) (similar). Given the "broad grant of authority" in section 201(b), a canon of interpretation like *expressio unius* "is a 'feeble helper'" in determining Congressional intent. *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (citations omitted). Against the backdrop of our interpretation of the broad authority granted in the text of section 201(b) itself, we likewise reject claims that because the legislative history of section 201(b) of the Act is silent on this issue, that undercuts this interpretation of section 201(b). *See, e.g.*, *BDP Dissent*, 15 FCC Rcd at 14476.

[30] STi refers to a 2009 bill introduced in Congress that, if enacted, would have granted the Federal Trade Commission (FTC) some jurisdiction over calling card advertising. *See* NAL Response at 7, n.5. STi mischaracterizes the proposed bill as legislation that would have stripped the Commission of its existing authority to regulate a calling card company's advertising practices; in fact, the bill included a savings clause that protected the Commission's authority. In any event, STi's reliance on the proposed legislation is misplaced because the legislation was never enacted. *See* http://www.govtrack.us/congress/bills/111/hr3993 (last visited Mar. 24, 2014) (listing the status as "Died (Passed House)"); *see also* http://www.govtrack.us/congress/bills/111/s562 (last visited Mar. 24, 2014) (listing the status as "Died (Referred to Committee)").

[31] *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1067 (9th Cir. 2005) (*Metrophones Telecomms.*), *aff'd*, 550 U.S. 45, 58 (2007) ("Congress, in § 201(b), delegated to the [FCC] authority to 'fill' a 'gap,' *i.e.*, to apply § 201 through regulations and orders with the force of law."). However, we reject arguments that the Commission is claiming unbounded authority. *See, e.g.*, *Joint Policy Statement Dissent*, 15 FCC Rcd at 8672; *BDP Dissent*, 15 FCC Rcd at 14476. As the Ninth Circuit observed in *Metrophones Telecomms.*, "the term 'practice' must be interpreted to be consistent with the words around it," *Metrophones Telecomms.*, 423 F.3d at 1068, and thus must involve a practice for or in connection with the common carrier's interstate or foreign communications service. 47 U.S.C. § 201. The use of our section 201(b) authority to protect consumers from deceptive marketing of interstate common carrier services falls readily within the purposes for which the

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ambiguous statutory terms, [] court[s] owe[] substantial deference to the interpretation the Commission accords them."[32] Further, the Ninth Circuit has stated that "§ 201(b) is ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities related to the services provided and rates charged by a long distance carrier."[33] "Section 201(b) speaks in terms of reasonableness . . . . This is a determination that 'Congress has placed squarely in the hands of the [FCC].'"[34] Moreover, the U.S. Supreme Court has recently clarified that the Commission's interpretation of its own jurisdiction is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[35]

10. STi's attempt to frame the *STi NAL*'s basis, and the Commission's authority, merely in terms of regulating the Company's advertising and marketing practices—as somehow apart from enforcing the Company's statutory duty to act in a just and reasonable manner—is also misplaced.[36] STi repeatedly states that the Act in general, and Section 201(b) in particular, do not reach advertising or marketing, but STi never claims that its advertising and marketing of its prepaid calling cards are not "practices . . . for and in connection with" the telecommunications services it provides and, thus, subject it to Commission jurisdiction under Section 201(b).[37] The Commission's review of the Company's practices focused on whether the Company breached its statutory duty to act in a just and reasonable manner under Section 201(b) in connection with its marketing, sale, and provision of prepaid calling card telecommunications services. That question cannot be answered properly without determining whether the Company's "marketing practices are fair and non-deceptive . . . ."[38] An integral factor in determining whether a telecommunications service provider has acted reasonably is assessing whether the service actually provided is consistent with the service described to consumers at the time of purchase.[39]

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Commission was established, given the interest in ensuring consumers accurately understand the service they are getting and at what cost. *See generally Joint Policy Statement*, 15 FCC Rcd 8654 (discussing the importance of advertising claims and the potential consumer and competitive harms from deceptive advertising of telecommunications services). Moreover, the Commission has for some time pursued efforts to seek to ensure that customers have such an understanding. *See, e.g.*, *Himmelman v. MCI*, 17 FCC Rcd 5504, 5509, para. 15 (2002) ("While the [carriers at issue] have great latitude in the manner in which they choose to offer a service, the Commission has consistently encouraged service providers to furnish customers with information that enhances their ability to understand and utilize a service. Without such information, customers will be unable to make informed choices and benefit from the competitive marketplace.") (citing *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122 (1998); *Truth-In-Billing and Billing Format*, 14 FCC Rcd 7492 (1999)).

[32] *See Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994).

[33] *Metrophones*, 423 F.3d at 1068.

[34] *Long Distance Telecomm. Litig.*, 831 F.2d 627, 631 (6th Cir. 1987) (second alteration in original) (quoting *Consol. Rail Corp. v. Nat'l Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981)).

[35] *See City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1872 (2013) (rejecting argument that *Chevron* deference is inapplicable to questions about the scope of the FCC's jurisdiction and explaining that the "false dichotomy between 'jurisdictional' and 'nonjurisdictional' agency interpretations may be no more than a bogeyman, but it is dangerous all the same.").

[36] *See* NAL Response at 5–8.

[37] *See id*.

[38] *See Bus. Disc. Plan, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 340, 356, para. 31 (1998) (subsequent history omitted).

[39] *See generally Joint Policy Statement*, 15 FCC Rcd at 8654-56, paras. 1–9.

11. In addition, STi cites to two cases involving state preemption,[40] but we have previously considered and rejected the notion that such cases undermine the Commission's jurisdiction under Section 201(b) over fraudulent and deceptive telemarketing and advertising practices.[41] The holdings of these decisions merely stand for the proposition that the Act does not indicate a uniquely federal interest in common carriers' unfair and deceptive telemarketing practices, and thus does not necessarily preempt state efforts to also address these practices.[42] Indeed, the holdings of these cases do not even involve the Commission's well-established interpretation of its own authority under Section 201(b) to address the kind of deceptive practices at issue here.[43] In sum, although the states share our interest in preventing deceptive advertising, Section 201(b) squarely applies to the marketing practices at issue in this order (i.e., marketing of international and/or interstate communication services), and we are not barred from addressing these fraudulent practices under our own authority.

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[40] *See* NAL Response at 8 (citing, inter alia, *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 439 (D.N.J. 1996) (*Weinburg*), *appeal after remand*, 173 N.J. 233, 801 A.2d 281 (2002); *Bauchelle v. AT&T Corp.*, 989 F. Supp. 636, 643-46 (D.N.J. 1997) (*Bauchelle*)).

[41] *See BDP*, 15 FCC Rcd at 14468–69, para. 16; *BDP Order on Reconsideration*, 15 FCC Rcd at 24398, para. 6. Specifically, the Commission stated that it had considered and rejected "BDP's reliance on state preemption analyses to support its claim that its marketing practices do not constitute unjust and unreasonable practices under section 201(b) . . . ." *BDP*, 15 FCC Rcd at 14468, para. 16. The argument made by BDP was virtually identical to STi's current argument and likewise relied upon *Weinberg* and *Bauchelle*. *See Bus. Disc. Plan, Inc.*, Response to Notice of Apparent Liability of Forfeiture, File No. Enf-98-02, at 20–22 (Feb. 2, 1999) (available to the public via the FCC Reference Information Center, located in Room CY-A257 at the Commission's Headquarters); *Bus. Disc. Plan, Inc.*, Petition for Reconsideration, File No. ENF-98-02, at 12-13, paras. 18–19 (Aug. 16, 2000) (available to the public via the FCC Reference Information Center, located in Room CY-A257 at the Commission's Headquarters).

[42] *See Weinberg*, 165 F.R.D. at 439 (federal magistrate judge granting plaintiff's motion to remand action to state court and holding that the court "lack[ed] the authority to recharacterize plaintiff's claims as exclusively federal . . . ."); *Bauchelle*, 989 F. Supp. at 644–47. STi also relies upon two additional cases that do not even mention Section 201(b). Both cases found that, with respect to a carrier's marketing disclosures, Congress never intended the Act or federal common law to preempt state law. *See Bauchelle*, 989 F. Supp. at 643–46; *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998).

[43] Moreover, the state preemption cases STi relies upon arose prior to 2001 when the "filed rate doctrine" (or "filed tariff doctrine") still had meaningful application in the context of the services at issue here. Before 2001, common carriers providing interstate and foreign wire or radio communication were required to file a list of tariffs with the FCC outlining, among other things, pricing information. *See* 47 U.S.C. § 203(a); *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1164–65 (S.D.N.Y. 1996). As with other tariffed services, all consumers were conclusively presumed to have knowledge of the tariffs. *See Marcus v. AT&T Corp.*, 938 F. Supp. at 1169; *Marcus v. AT&T Corp.*, 138 F.3d at 63. Where that doctrine applies, consumers are presumed to have knowledge of the rates, and thus no carrier's advertisement or other representation (or misrepresentation) could be deemed deceptive so long as the actual rates charged conformed to the filed tariff. *See Marcus v. AT&T Corp.*, 938 F. Supp. at 1169; *Marcus v. AT&T Corp.*, 138 F.3d at 63. In contrast, currently non-dominant providers of domestic interexchange and international service, like STi, are subject to mandatory detariffing under 47 C.F.R. § 61.19. Therefore, in the current, post-detariffing environment that applies to the services at issue here, carriers no longer file tariffed rates and consumers are no longer presumed to have knowledge of them. *See Dreamscape Design, Inc. v. Affinity Network Inc.*, 414 F.3d 665, 669 (7th Cir. 2005). As a result, Section 201(b) is now even more important to protect consumers from unjust and unreasonable practices, including practices related to deceptive or misleading advertising and marketing. *See, e.g.*, *Global Crossing*, 550 U.S. at 57 ("[T]raditionally, the filing of tariffs was 'the centerpiece' of the '[Communications] Act's regulatory scheme.' . . . Yet when Congress rewrote the law to bring about these changes [diminishing the role of tariffs], it nonetheless left § 201(b) in place. That fact indicates that the statute permits, indeed it suggests that Congress likely expected, the FCC to pour new substantive wine into old regulatory bottles.") (citations omitted); *Boomer v. AT&T Corp.*, 309 F.3d 404, 421–422 (7th Cir. 2002) (filing of tariffs "merely served as a mechanism by which the FCC could assure compliance with the standards set forth in Sections 201 and 202 . . . [f]ollowing detariffing, those goals remain, as do the substantive requirements of Section[] 201," namely, "the federal prohibition on terms and conditions which are unjust or unreasonable.").

B. The *NAL* Complies with the Statute of Limitations and Provides Sufficient Specificity as to Dates of Violations

12. The Act imposes a one-year statute of limitations for the Commission to issue a notice of apparently liability (NAL) for the kind of unlawful acts that the Company committed here.[44] The Commission met that deadline in issuing the *STi NAL*.

13. STi contends that "the NAL relies solely on the sample posters and calling cards distributed ***before September 2010*** as the basis for Epana's apparent liability and as the basis for the purported imposition of a $5 million forfeiture penalty," and therefore "runs afoul of the Act's one-year statute of limitations . . . ."[45] STi's statute of limitations argument fails because it rests upon the false premise that the violation occurred only when Epana "distributed" (i.e., placed in circulation) the posters and calling cards.[46] The date a particular poster or calling card was placed in circulation is merely the *first* date on which a violation could have occurred, not the only or final date—because both the posters and calling cards contained misleading and deceptive information, the Commission properly found that a separate violation of Section 201(b) occurred each time a consumer purchased an Epana prepaid calling card.[47] As we said in the *STi NAL*, "we find that Epana failed to disclose, in any meaningful way, material information about its rates, charges and practices *at the point of sale*, resulting in substantial harm to consumers who purchased its prepaid calling cards."[48] The posters and calling cards at issue were in circulation, and cards were sold, well within the one-year statute of limitations period. In particular, the relevant marketing posters have printed expiration dates on or after September 2010 (i.e., less than one year before the date of the *STi NAL*).[49] STi does not dispute this fact. Indeed, STi has neither argued nor provided any evidence that it recalled from circulation the marketing posters or prepaid cards—or otherwise caused its distributors to remove such posters and cease selling the prepaid cards already distributed—prior to their expiration date, which extended beyond September 1, 2010. Thus, we reject the Company's argument that the violations occurred outside the statute of limitations.

14. Next, STi argues that the Commission is prohibited from imposing a forfeiture penalty against it because the *STi NAL* needs more specificity as to the dates of the violations in order to comply with Section 503(b)(4) of the Communications Act.[50] STi contends that the *STi NAL* "fails to specify the date or dates on which" the violations occurred and notes that the *STi NAL* "refers to the year-long period between 2009 and 2010 . . . ."[51] This argument is also unavailing because Section 201(b) states in relevant part that any "*practice* . . . that is unjust or unreasonable is declared to be unlawful . . . ."[52] As indicated by the conduct at issue here, the very nature of an unlawful "practice" under Section 201(b) is that it may include activities that are repeated over time and is not merely a discrete event on a single day.[53] The violations charged in this case included the unlawful *practices* of making deceptive

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[44] 47 U.S.C. § 503(b)(6)(B) ("No forfeiture penalty shall be . . . imposed . . . if the violation charged occurred more than 1 year prior to the date of" the NAL).

[45] NAL Response at 5.

[46] *Id*.

[47] *See STi NAL*, 26 FCC Rcd at 12815, para. 18 n.40.

[48] *Id*. at 12813–14, para. 15 (emphasis added).

[49] *See, e.g.*, Second Supplemental Response at EPN 000867–68, O.M.A.F. calling card and poster.

[50] *See* NAL Response at 2–3.

[51] *Id*.

[52] 47 U.S.C. § 201(b) (emphasis added).

[53] We further note that the dictionary definition of "practice" includes to "carry out or perform (a particular activity, method, or custom) *habitually or regularly*." Practice Definition, Oxford Dictionaries,

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misrepresentations and failing to disclose material information about rates, charges, and practices at the point of sale for each calling card sold.[54] Consistent with the Commission's interpretation of the statute and as discussed in the *STi NAL*, the Company's marketing materials contained deceptive representations regarding the number of minutes buyers of its cards could use to make calls, and did not include material information that would enable consumers to calculate the cost of calls. In the *NAL*, the Commission found that each card the Company marketed using deceptive advertising constitutes an independent violation of Section 201(b).[55] The NAL Response offers no evidence sufficient to overcome our finding that the marketing materials were deceptive.[56] And, STi never denies or even suggests in its NAL Response that it did not market and sell at least 125 cards in the year preceding the *NAL*'s release. In fact, it is not surprising that STi is silent regarding its sales during the prior year – the Company reported approximately $[redacted] in revenues during the one year prior to the release of the *NAL* from the sale of pre-paid calling cards.[57] The Company's cards were typically sold for $5 or less;[58] even if we assumed the cards averaged $10 each, $[redacted] in revenues 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, $3, or $2 card). Based on STi's failure to refute our findings in the *NAL* and considering the revenues it reported for prepaid card sales, 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. Thus, as we stated in the *STi NAL*, "[g]iven the thousands of cards that Epana appears to have marketed, there is an extensive number of apparent violations in this case for which the Commission is empowered to propose a penalty."[59]

15. In any event, the Commission has interpreted Section 503(b)(4) flexibly; it does not require exact dates in every context.[60] Accordingly, when a carrier engages in an unjust or unreasonable "practice" under Section 201(b), we interpret the language of Section 503(b)(4)—"the date on which such conduct occurred"—to refer to the *time period* during which the unlawful "practice" giving rise to the

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oxforddictionaries.com/definition/american_english/practice?q=practice (last visited Feb. 17, 2014) (emphasis added).

[54] *STi NAL*, 26 FCC Rcd at 12808, 12815, paras. 1, 18.

[55] *See id*. at 12811, 12813–14, 12815, paras. 7, 12, 15, 18.

[56] We also note that the NAL Response admitted that the Company "developed one set of marketing materials and disclosures . . . and placed those cards and posters in commerce" and that "there was no substantive variation in the materials Epana marketed, including the content and placement of the disclosures on the marketing materials." NAL Response at 27. Therefore every card and related poster the Company marketed and sold, not just the representative samples cited in the *NAL*, shared the same shortcomings.

[57] The Company reported a total of $[redacted] in gross-billed revenues on its four quarterly filing for Universal Service contributors spanning October 1, 2010, through September 30, 2011 (encompassing 11 of the 12 months considered in the *NAL*). *See* Epana February 2011 FCC Form 499-Q (reporting historical quarterly revenues of $[redacted] for October 1, 2010, to December 31, 2010); Epana May 2011 FCC Form 499-Q (reporting historical quarterly revenues of $[redacted] for January 1, 2011, to March 31, 2011); STi August 2011 FCC Form 499-Q (reporting historical quarterly revenues of $[redacted] for April 1, 2011, to June 30, 2011); STi 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* Epana 2010 FCC Form 499-Q.

[58] *See STi NAL*, 26 FCC Rcd at 12808–09, paras. 2, 5.

[59] *Id*. at 12815, para. 18 & n.42 (finding that the $5,000,000 penalty was "equivalent to applying a $40,000 penalty to only 125 apparent violations that occurred within one year of this NAL"); s*ee also id*. at para. 18 n.41 (citing Financial Tech Spotlight (Oct. 27, 2010) ("stating that once Group Marcatel acquired Epana 'the combined sales of both companies reach over 260 million cards per year'")).

[60] *See E. Carolina Broad. Co*., Memorandum Opinion and Order, 6 FCC Rcd 6154, 6155–56, para. 12 (1991); *see also WROV Broadcasters, Inc*., Memorandum Opinion and Order, 6 FCC Rcd 1421, 1422, para. 12 (1991).

violation occurred. Thus, an NAL satisfies Section 503(b)(4)'s date requirement if the NAL specifies the applicable time period within which the carrier engaged in the unlawful practice or conduct. This interpretation provides a practical reading of the statute and also gives effect to our interpretation of "practice" as used in Section 201(b),[61] while still providing sufficient information to satisfy the violator's due process rights. Further, given the inescapable inference that this practice resulted in the sale of [redacted] of cards on each of the 365 days prior to the *NAL*, and the Company's failure to offer any evidence refuting the *NAL*'s assertion that the Company sold at least 125 cards during the entire one-year period (as explained above), we find that the *NAL* adequately specified the dates for these violations as required by Section 503(b)(4). We therefore reject STi's argument and find that the *STi NAL* provided sufficient information regarding the specific provision of the Act that the Company violated, the nature of the Company's conduct that violated the Act, and the dates that such conduct occurred.

C. Section 201(b) Declares Unjust and Unreasonable Practices Unlawful Without the Aid of Implementing Regulations

16. While the Commission has broad authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act],"[62] this provision states only that the Commission "*may*" prescribe regulations, not that it must.[63] It is well-settled that agencies may choose between adjudication and rulemaking to develop the law.[64] As the U.S. Supreme Court has explained:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[65]

Section 201(b) prohibits carriers from engaging in unjust or unreasonable practices, whether pursuant to regulations or case-by-case adjudication. When carriers fail to meet this standard, they are subject to, among other things, forfeitures.

17. Ignoring both the Section's text and this precedent, STi argues that before it can be held liable under Section 201(b) of the Act, the Commission "must first show that it has promulgated clear rules explaining what constitutes 'unjust and unreasonable' advertising practices in accordance with the

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[61] *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citations omitted).

[62] 47 U.S.C. § 201(b).

[63] *Id*. (emphasis added).

[64] *See SEC v. Chenery Corp*., 332 U.S. 194, 202-03 (1947); *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, . . . and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking . . . .'"); *Am. Airlines, Inc. v. Dep't of Transp*., 202 F.3d 788, 797 (5th Cir. 2000) ("Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy."); *City of Chicago v. FCC*, 199 F.3d 424, 429 (7th Cir. 1999) ("An agency can, of course, promulgate its policy through individual adjudicative proceedings rather than rulemaking."); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990) ("[A]gency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication.").

[65] *Chenery*, 332 U.S. at 202.

[APA] and Section 201(b) . . . and, then, that Epana has violated these clear rules."[66] As discussed above, however, the Commission can develop the law on a case-by-case basis.

18. In any event, the Company was already on notice that deceptive marketing of telecommunications services is an unjust and unreasonable practice. As explained in the *STi NAL*, the Commission had previously articulated a clear standard regarding carriers' marketing practices for purposes of complying with Section 201(b).[67] Thus, the Company had been on notice at least since the issuance of *BDP* and *NOS* that deceptive marketing of its calling cards is an unjust and unreasonable practice under Section 201(b).

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

19. 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 "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."[68] We find that the Company violated this standard.

20. STi claims that its rate disclosures are sufficient, arguing that they: (1) are clear and conspicuous to the consumer;[69] (2) do not contradict, but qualify the number of minutes promised;[70] and (3) are adequate to explain how fees and surcharges affect the value of the card.[71] We disagree. As an initial matter, we reject STi's assertion that its disclosures were "clear and conspicuous to the consumer."[72] The disclosures are in small print and far from clear or conspicuous in relation to the claim of total available minutes on Epana's marketing posters. Again, Epana's "O.M.A.F." calling cards (as well as the poster used to market these cards[73]) read as follows:

> Card is for international calls only; may not be used for domestic calling in the USA. Maximum rate per minute is $5. A minimum rate of $0.001 per minute will apply. Up to $1.99 connection or disconnection fee will apply to certain destinations. Regional and local phone company charges may apply. Daily maintenance fee of up to $1.99 will apply. Calls may be rounded up to 3 minutes (except calls made from Florida, which may be rounded up to 1 minute only). Access from a payphone will incur an additional surcharge at a minimum of $0.99 per call. Calls to cellular phones, calls originating from outside the continental U.S., and calls using 800 numbers are billed at higher rates. Rates and fees are subject to change without notice. Announced minutes are based on use of entire card in a single call. Fees and surcharges shall affect actual number of minutes delivered, can equal the amount of the rate of a call, and can substantially reduce the gross minutes available. Advertised minutes are gross minutes based on initial promotional rates, which will change over time. Net

[66] NAL Response at 8–9.

[67] *See STi NAL*, 26 FCC Rcd at 12810, para. 6 & nn.12–13.

[68] *NOS*, 16 FCC Rcd at 8138, para. 9. For ease of reference, we refer to this colloquially below as the "*NOS* standard" or the like.

[69] *See* NAL Response at 12.

[70] *See id*.

[71] *See id*. at 14.

[72] NAL Response at 12.

[73] *See, e.g.*, Second Supplemental Response at EPN 000868, O.M.A.F. poster.

minutes equal gross minutes less deductions for service fees and surcharges. This card expires 30 days after the first use of the card.[74]

21. These "disclosures" are confusing and unclear. Indeed, in violation of the *NOS* standard, they omit important information and make it impossible to calculate the cost of almost any call. For example, a caller cannot tell:

- where in the range of $0.001 and $5 per minute the call will cost;
- whether there will be both a connection fee *and* disconnection fee for each call, and if so, how much it (or they) will be;
- how much of the card will be used up by regional and local phone company charges, daily maintenance fees, or special assessments for calls made from payphones or cellular phones, or to toll-free numbers;
- how long the "promotional rates"—i.e., the "[a]dvertised minutes"—will last;
- what "[a]nnounced minutes" means or what it means that such minutes are "based on" use of the entire card on a single call; or
- what the rates will change to once the "promotional rates" no longer apply.

In sum, as the Commission noted in the *STi NAL*, Epana's disclosures "do not provide the information necessary for a consumer to determine what fees apply, the amounts of those fees, and when and how they will affect the number of calling minutes offered."[75] Epana's disclosures include possible ranges of rates, but those rates are subject to change without notice, and the Company gives no meaningful explanation of how such ranges relate to the initial advertised rate. In addition to vague and misleading representations, Epana's disclosures omit key facts that consumers would need to understand the rate structure.

22. Further, we reject STi's argument that its disclosures simply qualify, rather than contradict, its representations about the number of minutes offered. For example, while the O.M.A.F. card advised buyers in large print—with no qualifications—that a $5 card could make 1305 minutes worth of calls to Guadalajara, only the fine print stated that the cost per minute would range between $0.001 and $5 per minute; these statements cannot be meaningfully reconciled. And even if Epana's disclosures were viewed as qualifications rather than contradictions, they must be presented clearly and conspicuously so that consumers can actually notice and understand them.[76] Yet here, Epana's disclosures were confusing and misleading, and the font size of the advertised minutes on Epana's posters completely dwarfed the disclosures.[77] As described above, Epana's posters typically advertised the

[74] Second Supplemental Response at EPN 000867, O.M.A.F. card.

[75] *STi NAL*, 26 FCC Rcd at 12812, para. 10.

[76] *See, e.g., Joint Policy Statement*, 15 FCC Rcd at 8662, para. 20 ("A fine-print disclosure at the bottom of a print ad [or] a disclaimer buried in a body of text unrelated to the claim being qualified . . . is not likely to be effective. To ensure that disclosures are effective, advertisers should use clear and unambiguous language, avoid small type, place any qualifying information close to the claim being qualified, and avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.").

[77] Both academic research and the Commission's experience with consumer issues have demonstrated that the manner in which providers display material information, including the charges, classifications, and terms of use, can have as much impact on a consumer's decision to make a purchase as the information itself. *See generally* Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PENN. L. REV. 1211 (2003) (surveying regulatory strategies to address problems arising from systematic errors in consumer decision-making); Richard H. Thaler & Cass R. Sunstein, NUDGE, Yale University Press 2008 (concluding that information buried deep in the "fine print" is far less useful to consumers than information displayed clearly and prominently);

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number of calling minutes offered to certain countries in large, colorful, simple text, which was prominently displayed at the top or center of the poster. This information was not qualified in any way—i.e., there was no suggestion that the consumer would receive "up to" the specified number of minutes, and no indication that the consumer must read the very small print at the bottom to determine what he or she was actually purchasing.[78] The disclosures' presentation did not lessen the deceptive nature of the advertisement. Furthermore, as we noted in the *NAL*, the minutes the cards claim to offer "are based on use of [the] entire card in a single call."[79] Almost no consumer is likely to make a single call of more than *thirteen hours*, so almost no one will get the advertised experience.[80]

23. The Company makes no attempt to argue that its advertising met the *NOS* standard (i.e., that consumers could calculate the cost of their calls), but simply asserts that the missing information was neither material nor harmful to consumers.[81] In particular, STi argues that, even assuming that the advertised minutes and disclosures are misleading, "the FCC cannot show that the minutes advertised are material to consumers of prepaid calling cards or that the consumer relied on them when deciding which calling card to purchase."[82] STi argues that the advertised minutes are immaterial because consumers are "focused on the number of minutes ***actually delivered*** by the card, as well as the clarity of the connection, and the connectivity of the card . . . . [A] calling card customer receives this information from word of mouth, his or her past experience, and/or the experience of friends and family, not from the calling card's advertisements or disclosures."[83]

24. These arguments are frivolous and, if adopted, would immunize most deceptive advertising from prosecution. We reject them. STi is essentially arguing that either its most prominent advertising message (in large font and/or bright colors) is legally irrelevant because advertising is not the sole influence of consumer choice or that its advertising cannot be deemed legally deceptive because consumers know that such advertising cannot be believed. These arguments belie the Company's own marketing strategy, for they would have us believe that the Company expended its resources to devise, print, and distribute advertising materials that it contends had no effect on consumers who considered buying Epana's products. We reject such arguments and hold prepaid carriers such as STi to the *NOS* standard. Whether a consumer can obtain information about a telecommunications service through alternative sources is irrelevant to a carrier's obligation under Section 201(b) to act in a just and reasonable manner when it promotes its services.

25. In addition, we reject STi's suggestion that the FCC must show actual harm to the purchasers of Epana's calling cards. Section 201(b) has no "actual harm" requirement.[84] Enforcement matters arising under Section 503 likewise have no "actual harm" requirement—all that is needed to

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see also Joint Advertising Statement, 15 FCC Rcd at 8654–55, para. 2 (finding that if consumers are deceived by advertising claims, they cannot make informed purchasing decisions); *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7494, para. 2 (1999) (noting that the "proper functioning of competitive markets . . . is predicated on consumers having access to accurate, meaningful information in a format that they can understand.").

[78] *See, e.g.*, Second Supplemental Response at EPN 000868, O.M.A.F. poster, EPN 000865, Las Gemelas poster, EPN 000860, Pedro Infante poster.

[79] *STi NAL*, 26 FCC Rcd at 12813, para. 13.

[80] *See id*.

[81] *See* NAL Response at 16–19.

[82] *Id*. at 16.

[83] *Id*. at 18.

[84] *See* 47 U.S.C. § 201(b).

support a forfeiture penalty in a Section 503 proceeding is a determination that the Company has willfully or repeatedly failed to comply with a provision of the Act or an FCC order.[85]

26. Finally, STi's various arguments are even more untenable when the *NOS* analysis is considered in conjunction with the *Joint Policy Statement*. The standard enunciated in 2001 by *NOS* (that consumers must be provided a "clear and conspicuous disclosure on how to calculate the total cost of a call"[86]) dovetails with the guidance provided in 2000 by the *Joint Policy Statement* (that "advertisers are responsible both for making any necessary disclosures and for ensuring that they are clear and conspicuous"[87]). What is more, the *Joint Policy Statement* drew clear parallels between the unjust and unreasonable practices contemplated by Section 201(b) and the unfair or deceptive acts laid out in Section 5 of the FTC Act.[88] In drawing these parallels, the Commission pointed to FTC cases involving deceptive and misleading advertising (especially in the context of prepaid calling cards) as both instructive and as sources of additional guidance to carriers regarding what types of practices will be considered unlawful under Section 201(b).[89] Such examples and guidance (related to the types of practices that would thus be unlawful under Section 201(b)) have not been difficult to find—the FTC has pursued, and prevailed in, a number of cases involving the deceptive or unfair marketing and advertising of prepaid calling cards, both in court and via settlements.[90]

27. These cases, the *Joint Policy Statement*, and especially the language of Section 201(b) and *NOS*, all combine to undercut STi's arguments. In sum, our finding that Epana's disclosures were neither clear nor conspicuous is fully supported by both the factual record and applicable legal precedent. Thus, we find that the Company violated the standard enunciated in *NOS*, and we affirm our finding in the *NAL*.

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[85] *See* 47 U.S.C. § 503(b)(1)(B); *Madison Commc'ns, Inc.*, Order, 8 FCC Rcd 1759, 1760, para. 7 (1993) ("The fact that no actual harm was demonstrated does not affect our determination that this was a serious violation justifying a significant forfeiture."). Moreover, analogous FTC cases involving deceptive practices have held that the government need not demonstrate actual deception, let alone harm, to establish a practice as deceptive. *See FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d. 520, 531 (E.D. Pa. 2013) (stating that "actual deception . . . need not be proven," that a practice is deceptive if the government shows that there was a material representation or omission that "was likely to mislead customers acting reasonably under the circumstances," and that "the likelihood of deception or the capacity to deceive is the criterion by which the advertising is judged") (citations omitted).

[86] *NOS*, 16 FCC Rcd at 8138, para. 9.

[87] *See Joint Policy Statement*, 15 FCC Rcd at 8657, para. 12.

[88] 15 U.S.C. § 45.

[89] *See Joint Policy Statement*, 15 FCC Rcd at 8655, para. 4 ("Principles of truth-in-advertising law developed by the FTC under Section 5 of the FTC Act provide helpful guidance to carriers regarding how to comply with section 201(b) of the Communications Act in this context.").

[90] *See, e.g.*, *FTC v. Millennium Telecard, Inc.*, Stipulated Final Order for Permanent Injunction and Monetary Judgment, No. 11-02479 (D.N.J. July 12, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2012/02/120201milleniumstip.pdf (settling a case where defendant marketed calling cards to consumers, many whom were recent immigrants, by misrepresenting number of minutes on calling cards); *FTC v. Diamond Phone Card, Inc.*, Stipulated Final Order for Permanent Injunction and Monetary Judgment, No. CV-09-3257 (E.D.N.Y. May 12, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/05/100520diamondstiporder.pdf (settling a case where defendant marketed prepaid calling cards, often to immigrants, and failed to clearly disclose fees related to the cards and advertised more minutes than the cards actually provided); *FTC v. DR Phone Commc'ns, Inc.*, Stipulated Order of Preliminary Injunction and Other Equitable Relief, Case No. C-12-2631-SC (N.D. Cal. 2012), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/05/130503drcommstip.pdf (court ordered settlement permanently barred defendant from making any material misrepresentations in connection with the sale of prepaid calling cards, including about the number of minutes delivered and per-minute rates; it also required defendant to enact procedures to ensure accuracy of marketing materials); *see also FTC v. EDebitPay, LLC*, 695 F.3d 938 (9th Cir. 2012).

E. State Regulations and Class Action Settlements Do Not Preclude this Proceeding

28. STi argues that it should not be subject to enforcement action by the Commission because of its compliance with state regulations and class action settlements.[91] STi's arguments again fail. STi does not and cannot identify any legal authority barring the Commission from acting concurrently with state authorities to address deceptive advertising practices of carriers within its jurisdiction. STi discusses its consent decrees with various state agencies and other class action settlements, but it cites no authority suggesting that compliance with state regulations shields it from Commission actions.[92] We find that the existence of state laws regulating advertising does not preclude the Commission from taking action to protect consumers from deceptive advertising on its own motion under the Act.[93]

F. The Assessment of the Forfeiture Under Section 503(b) Was Appropriate

29. Section 503(b)(1) of the Act provides, in relevant part, that any person who willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.[94] At the time the violations at issue in the instant case took place, Section 503(b)(2)(B) of the Act and Section 1.80 of the Commission's rules authorized the Commission to assess a forfeiture of up to $150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,500,000 for a single act or failure to act by common carriers.[95]

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[91] *See* NAL Response at 29–31. *See also* NAL Response, Ex.A (*Epana Networks, Inc.*, Assurance of Discontinuance Pursuant to Executive Law § 63(15), AOD #10-119 (Dec. 20, 2010) (entered into between Epana Networks, Inc., and the Attorney General of the State of New York, Bureau of Consumer Frauds & Protection)); Ex. B (*STi Phonecard, Inc., et al.*, Assurance of Voluntary Compliance, Case No. L07-3-1087 (June 6, 2008) (entered into among STi Phonecard, Inc., et al., and State of Florida, Office of the Attorney General, Department of Legal Affairs)); Ex. C (*Epana Networks, Inc.*, Assurance of Voluntary Compliance, Case No. L08-3-1107 (June 8, 2010) (entered into between Epana Networks, Inc., and State of Florida, Office of the Attorney General, Department of Legal Affairs)); Ex. D (Epana Networks, Inc., Settlement Agreement (filed Dec. 10, 2008) (entered into between Epana Networks, Inc., and New Jersey Division of Consumer Affairs)); Ex. E (*STi Prepaid, LLC*, Agreed Temporary Injunction, Cause No. 2010-CI-12841 (131st Jud. Dist., Bexar Cnty., Tex. Apr. 19, 2011) (entered into between STi Prepaid, LLC, and State of Texas)).

[92] If anything, the very existence of such settlements and consent decrees in other forums underscores that we are not alone in finding Epana's marketing practices deceptive and that such practices violate the laws of various jurisdictions.

[93] *See Bradshaw v. Twp. of Middleton*, 296 F. Supp. 2d 526, 550 (D.N.J. 2003) (defendants' argument that federal claim was preempted by state law was "far-fetched" and court held that "[s]tate law cannot preempt federal law"); *Little Co. of Mary Hosp. & Health Care Ctrs. v. Shalala*, 165 F.3d 1162, 1164 (7th Cir.1999) ("But of course state law cannot preempt federal law."); *BDP*, 15 FCC Rcd at 14468–69, para. 16; *Joint Policy Statement*, 15 FCC Rcd at 8657, para. 10.

[94] 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

[95] *See* 47 U.S.C. § 503(b)(2)(B); 47 C.F.R. § 1.80(b)(2). These amounts reflect inflation adjustments to the forfeitures specified in Section 503(b)(2)(B) ($100,000 per violation or per day of a continuing violation and $1,000,000 per any single act or failure to act). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321 (DCIA), requires the Commission to adjust its forfeiture penalties periodically for inflation. *See* 28 U.S.C. § 2461 note (4). The Commission most recently adjusted its penalties to account for inflation in 2013. *See Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 28 FCC Rcd 10785 (Enf. Bur. 2013); *see also* Inflation Adjustment of Monetary Penalties, 78 Fed. Reg. 49,370-01 (Aug. 14, 2013) (setting Sept. 13, 2013, as the effective date for the increases). However, because the DCIA specifies that any inflationary adjustment "shall apply only to violations which occur after the date the increase takes effect," we apply the forfeiture penalties in effect at the time the apparent violations took place. 28 U.S.C. § 2461 note (6). Here, because the violations at issue occurred before September 13, 2013, the applicable maximum penalties are based on the Commission's previous inflation

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30. In calculating the proposed forfeiture in the *STi NAL*, the Commission relied on *NOS*, which squarely addresses deceptive marketing practice violations.[96] In *NOS*, the Commission found that "*each* rate sheet sent to consumers constitutes a separate violation of Section 201(b)."[97] Thus, the Commission properly found here that the marketing of each prepaid calling card to consumers constitutes a separate apparent violation of Section 201(b).[98] Considering the thousands of prepaid calling cards Epana deceptively marketed and sold,[99] the Commission is well within its authority to impose the proposed forfeiture of $5,000,000. Notably, the $5,000,000 penalty is equivalent to applying a $40,000 penalty to only 125 apparent violations that occurred within one year of the *NAL*—far fewer than the actual number of prepaid cards sold by Epana through its deceptive advertising in the relevant time period.[100]

31. The Company contends that the *STi NAL* fails to provide a lawful basis for the $5,000,000 proposed forfeiture. First, STi argues that there was only a single ongoing violation and that the proposed forfeiture would exceed the statutory maximum for such a violation.[101] The Company relies on two unrelated and inapposite cases—one regarding the general principle that a one-time continuing violation is distinguishable from separate repeated actions, and the other assessing an apparent forfeiture for a single violation for failure to obtain an equipment authorization.[102] Neither case discusses the central issue here: deceptive marketing of telecommunications services. In fact, neither case touches upon Section 201(b) in general, nor unjust and unreasonable practices as described in that provision specifically. These cases are therefore inapplicable to the *STi NAL*. As explained above, each time a consumer purchases a card that a carrier has deceptively marketed, a separate violation under Section 201(b) takes place.[103]

32. Second, STi contends that because the *STi NAL* cites no consumer complaints, the Company should not be subject to forfeiture amounts higher than those imposed in cases like *NOS* and *BDP*.[104] This argument also lacks merit. The Commission is not required to rely on or refer to consumer complaints in order to investigate and impose forfeitures on common carriers. Section 403 of the Act grants the Commission "full authority and power at any time to institute an inquiry, *on its own motion* . . . relating to the enforcement of any of the provisions of this [Act]."[105] While complaints may be relevant in assessing a forfeiture, their absence in no way precludes the Commission from relying on its own investigation and concluding, based on the many other factors germane to a forfeiture determination, that a substantively higher forfeiture than those imposed in other cases where complaints are present is warranted.

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adjustment that became effective on September 2, 2008. *See* Inflation Adjustment of Maximum Forfeiture Penalties, 73 Fed. Reg. 44,663, 44,664 (July 31, 2008).

[96] *See STi NAL*, 26 FCC Rcd at 12814–15, paras. 17–18 & n.40.

[97] *NOS*, 16 FCC Rcd at 8141, para. 19 (emphasis added).

[98] *See STi NAL*, 26 FCC Rcd at 12815, para. 18 & n.40.

[99] *See id*. at 12815, para. 18. & n.41.

[100] *See id*. at 12815, para. 18 & nn.41–42.

[101] NAL Response at 26–28.

[102] *See id*. at 26–27 (citing *Centel Cellular Co. of N. Carolina LP*, Notice of Apparent Liability for Forfeiture, 11 FCC Rcd 10800, 10812, para. 17 (1996); *US Jetting, Inc.*, Notice of Apparent Liability, 27 FCC Rcd 338 (2012)).

[103] *See NOS*, 16 FCC Rcd at 8141, para. 19 ("Each rate sheet sent to consumers constitutes a separate violation of section 201(b).").

[104] *See* NAL Response at 20–26.

[105] 47 U.S.C. § 403 (emphasis added).

33. Third, the Company argues that the $5,000,000 proposed forfeiture is arbitrary and capricious because the forfeiture amount proposed in the instant case is not supported by Commission precedent.[106] This argument is also unpersuasive. Nothing in the APA or the Act requires the Commission to mechanically and inflexibly apply an identical methodology in all deceptive marketing cases. Likewise, the results of earlier enforcement adjudications do not automatically prescribe the outcome of all others that follow.[107] Rather, Section 503(b)(2)(E) of the Act gives the Commission discretion in determining the amount of a forfeiture to impose in any given situation, and directs the Commission to consider "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[108] Accordingly, the Commission noted in the *STi NAL* that while the proposed forfeiture was higher than the proposed forfeiture in *NOS*, the proposed amount was based on its consideration of the factors enumerated in Section 503(b)(2)(E).[109] After these considerations, the Commission finds that the magnitude of apparent violations, the extent and gravity of the Company's conduct, and information associated with the Company's revenues warrant the forfeiture amount.[110] The Commission also explained in the *STi NAL* that substantially larger forfeiture amounts were necessary to protect the interests of consumers and to deter entities from violating the Commission's rules.[111] By taking all of these factors into account, the Commission acted well within its authority under Section 503(b)(2)(E) of the Act and assessed a reasonable and appropriate forfeiture of $5,000,000.

34. Finally, STi requests a cancellation or reduction of the forfeiture amount, arguing that it is unable to pay the $5,000,000 forfeiture proposed in the *NAL*.[112] In its NAL Response, as well as in discussions between the Commission and STi, the Company provided financial information in an attempt to bolster its inability to pay argument.[113] We find the Company's arguments unavailing.

35. In general, the Commission has found that the use of gross revenues is the best indicator of a company's ability to pay a forfeiture.[114] STi provided the Commission with financial information

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[106] *See* NAL Response at 20–26.

[107] *See Globcom, Inc.*, Forfeiture Order, 21 FCC Rcd 4710, 4722, para. 34 (2006).

[108] 47 U.S.C. § 503(b)(2)(E).

[109] *See STi NAL*, 26 FCC Rcd at 12815, para. 18.

[110] *See id*. In the *STi NAL*, we noted that "[w]hile the proposed forfeiture is higher than the proposed forfeiture in *NOS*, weighing the facts before us, and taking into account the extent and gravity of Epana's egregious conduct, as well as its culpability and information in the current record about its revenues, we find that a total proposed forfeiture amount of $5,000,000 is appropriate under the specific circumstances of this case. The proposed forfeiture clearly must protect the interests of consumers and serve as an adequate deterrent. A lesser penalty would be inappropriate in light of Epana's failure to adequately provide material information about its rates to thousands of consumers who purchased the Company's prepaid cards . . . . While we could propose a higher forfeiture based on Epana's 2010 revenues, we believe the forfeiture we propose today is sufficient to protect the interests of consumers and serve as an adequate deterrent." *Id*. *See also id*. at 12815, para. 18 n.42. ("The $5 million penalty we propose is equivalent to applying a $40,000 penalty to only 125 apparent violations that occurred within one year of this NAL.")

[111] *Id*. at 12815, para 18. *See, e.g., Commission's Forfeiture Policy Statement and Amendment Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17097–98, paras. 19–20 (1997) (recognizing the relevance of creating the appropriate deterrent effect in choosing the amount of a forfeiture), *recon. denied*, 15 FCC Rcd 303 (1999).

[112] *See* NAL Response at 31–33.

[113] *See id*; *see also* Letter from David L. Nace, Telecommunications Counsel for STi Telecom Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 22, 2011) (Financial Statement Letter).

[114] *See PJB Commc'ns of Virginia, Inc.*, Notice of Apparent Liability for Forfeiture, 7 FCC Rcd 2088, 2089, para. 8 (1992).

about the Company and its parent corporation for the years 2008, 2009, and 2010.[115] This information shows that the ratio of the proposed forfeiture as a proportion of Epana's gross revenue falls well within ratios used in other cases.[116] Finally, the Commission is aware that the Company filed for bankruptcy protection,[117] and, as a result, the Commission has filed a Proof of Claim for the full amount of the proposed forfeiture in that bankruptcy proceeding.[118] Neither STi nor its Trustee has sought to amend the NAL Response or otherwise raise its pending bankruptcy in relation to its inability to pay argument. We note that the mere fact of a bankruptcy is not dispositive as to whether a party is able to pay a forfeiture.[119] In light of our Proof of Claim, the Commission will not cancel or reduce the forfeiture amount simply because the Company has declared bankruptcy. We therefore affirm the $5,000,000 forfeiture proposed in the *STi NAL*.

IV. CONCLUSION

36. We have reviewed STi's arguments and find no reason to cancel, withdraw, or reduce the proposed forfeiture. STi fails to rebut the overwhelming evidence that, during the 12 months prior to release of the *STi NAL*, it engaged in an unlawful practice by deceptively marketing thousands of prepaid calling cards. Accordingly, consistent with precedent, the Commission finds that the Company'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 *STi NAL*.

V. ORDERING CLAUSES

37. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,[120] and Section 1.80 of the Rules,[121] STi Telecom Inc. **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.

38. 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.[122] If the forfeiture is not

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[115] *See* Financial Statement Letter; Letter from David L. Nace, Telecommunications Counsel for STi Telecom Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 5, 2011) (Supplemental Financial Statement Letter).

[116] *See, e.g*., *Nievezquez Prods., Inc*., Forfeiture Order, 26 FCC Rcd 14178, 14180–81, paras. 8–10 (2011) (*Nievezquez Forfeiture Order*).

[117] *In re Vivaro Corp., et. al*, Case No. 12-13810 (Jointly Administered) (Bankr. S.D.N.Y. 2012).

[118] *In re STi Telecom Inc*., Case No. 12-13812 (Jointly Administered under Case No. 12-13810) (Bankr. S.D.N.Y. 2012) (Proof of Claim).

[119] In a number of forfeiture proceedings, the Commission has denied requests for both cancellation and reduction of forfeitures, imposing forfeiture amounts in full on parties involved in bankruptcy proceedings. *See, e.g*., *Nievezquez Forfeiture Order*, 26 FCC Rcd 14181, para. 9; *N. Am. Telecomms. Corp*., Forfeiture Order, 18 FCC Rcd 1868, 1869, para. 5 (2003) ("filing for bankruptcy does not preclude the Commission from issuing an order imposing a forfeiture . . . ."); *William Flippo*, Forfeiture Order, 15 FCC Rcd 23340, 23340, para. 3 (2000) ("we are not inclined to adjust the forfeiture amount even where the recipient has filed for bankruptcy protection"); *Coleman Enters., Inc*., Order of Reconsideration, 16 FCC Rcd 10016, 10027–28, para. 11 (2001) ("purported cooperation with the Commission after its violations, whether standing alone or coupled with its Chapter 11 bankruptcy filing, is not an adequate basis for reducing the forfeiture in this case.").

[120] 47 U.S.C. § 503(b).

[121] 47 C.F.R. § 1.80.

[122] *Id*.

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.[123]

39. 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. STi Telecom Inc. 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.[124] 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:

- 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 From 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.

40. 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.[125] 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.

41. **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 STi Telecom Inc., Attention: George Angelich and Catherine Mitchell, Arent Fox, LLP, 1675 Broadway Ave., New York, NY 10019; and to Erik Schmidt, Herrick Feinstein LLP, 2 Park Avenue, New York, NY 10016.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[123] 47 U.S.C. § 504(a).

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

[125] *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 have been capped at $1.575 million.[4] Instead, the Commission concludes that each company committed a

[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).

[4] *See* 47 C.F.R. § 1.80(b)(2).

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 cases[6] 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.

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[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 Plan,[3] and "almost 900" complaints regarding NOS and its related company.[4] Here, there was not a

[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)).

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

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

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

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[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.

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*.