

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Simple Network, Inc.) File No.: EB-TCD-12-000004061
) NAL/Acct. No.: 20113217029
) FRN: 0007921224
)

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 Simple Network, Inc. (Simple Network or Company) for deceptively marketing its prepaid telephone calling cards. The Company earned more than \$ [redacted] from [redacted] through [redacted] 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 of minutes. However, unless consumers used all of the hundreds of minutes in a single 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 any call. After reviewing Simple Network’s response to the Notice of Apparent Liability, we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the \$5,000,000 forfeiture the Commission previously proposed

II. BACKGROUND

2. The Federal Communications Commission (FCC or Commission) issued a Notice of Apparent Liability against Simple Network (NAL or Simple Network NAL) on November, 29, 2011.2 The Simple Network NAL sets forth in detail the facts and circumstances upon which this Forfeiture Order is based and need not be repeated here at length. Simple Network is a New Jersey limited liability company3 that provides long distance telecommunications service through the use of prepaid calling cards.4

1 This case was formerly assigned the file number EB-10-TC-398. In January 2012, the Telecommunications Consumers Division assigned the case a new file number.

2 Simple Network, Inc., Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16669 (2011) (NAL or Simple Network NAL). The Simple Network NAL is incorporated by reference.

3 Simple Network’s principal address is 25 Main Street, Edison, NJ 08837. Hemant Patel is the President of Simple Network, Inc. See e-mail from Susan Coleman, Esq., Counsel for Simple Network, Inc., to Kimberly Wild and Erica McMahon, Telecommunications Consumers Division, FCC Enforcement Bureau (Oct. 4, 2010, 18:08 EST) (on file in EB-TCD-12-00000406) (LOI Response).

4 See LOI Response at 1.

Simple Network sells its calling cards directly and through third party distributors and retailers.⁵ The retail vendors sell the cards to consumers using marketing posters that Simple Network designs and distributes.⁶ Simple Network's typical posters prominently represented that buyers of cards costing just several dollars could make hundreds of minutes of calls to various international destinations using the card.⁷ The Company had more than \$ [REDACTED] in "net sales" from [REDACTED] through [REDACTED].⁸

3. Based upon these and other facts in the record, the Commission found in the *Simple Network NAL* 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 violation of Section 201(b) of the Communications Act of 1934, as amended (Act).⁹ The Commission explained that Simple Network 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.¹⁰ The Commission concluded that the forfeiture amount must consider the extent and gravity of Simple Network's egregious conduct and must serve as an adequate deterrent against deceptive marketing practices.¹¹ The Commission also considered the Company's ability to pay and ultimately proposed a forfeiture of \$5,000,000.¹² On January 17, 2012, Simple Network responded to the *Simple Network NAL*.¹³

III. DISCUSSION

4. We have considered the Company's response to the *Simple Network 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 *Simple Network NAL*.

5. Simple Network argues that the Commission should withdraw the *Simple Network NAL* because: (1) Section 201(b) does not empower the Commission to regulate common carrier advertising;¹⁴ (2) the *NAL* violates Simple Network's constitutional due process rights;¹⁵ (3) the evidence discussed in the *NAL* is insufficient to demonstrate that Simple Network's rate disclosures are inaccurate or

⁵ *Simple Network NAL*, 26 FCC Rcd at 16670, para. 3.

⁶ *Id.*

⁷ *Id.* at 16670, para. 4.

⁸ See Simple Network, Inc.'s Response to Notice of Apparent Liability for Forfeiture (Jan. 17, 2012) (on file in EB-TCD-12-00000406) (NAL Response); *id.* at Exhibit to Declaration (stating that Simple Network had over [REDACTED] dollars in net sales in 2010 and 2011).

⁹ 47 U.S.C. § 201(b).

¹⁰ *Simple Network NAL*, 26 FCC Rcd at 16674, para. 14.

¹¹ *Id.* at 16674–76, paras. 15, 17.

¹² *Id.* at 16675–76, para. 17.

¹³ See NAL Response.

¹⁴ NAL Response at 9–10.

¹⁵ *Id.* at 3–5.

misleading;¹⁶ and (4) the Commission's findings were arbitrary and capricious and do not support the proposed forfeiture.¹⁷

6. We have already addressed and rejected Simple Network's first argument in our companion *STi Forfeiture Order*,¹⁸ which explains that Section 201(b) reaches deceptive marketing¹⁹ (including the types of practices engaged in by Simple Network) and that it does so even in the absence of implementing rules, and we therefore reject its first argument.²⁰ We reject those arguments from Simple Network for the same reasons. We address the Company's remaining arguments below.

A. Simple Network's Rate Disclosures Violated the Standard Enunciated by the Commission in *NOS*

7. Under our interpretation of Section 201(b), the Commission stated that advertising associated with telecommunications services must provide "clear and conspicuous disclosure on how to calculate the total cost of a call" and that "in the absence of clear and conspicuous disclosure regarding the nature and components of the rate structure," a carrier's marketing materials would "certainly be misleading to consumers . . ." ²¹ We find that, based on our review of Simple Network's rate disclosures, the Company violated this standard.

8. Simple Network argues that the *NAL* violates the Administrative Procedure Act²² because it fails to cite any "substantial evidence" that Simple Network's rate disclosures were inaccurate.²³ More specifically, it argues that the evidence discussed in the *NAL* is "plainly insufficient to demonstrate that the disclosures were inaccurate" or that such rate disclosures are "willfully" inaccurate, and suggests that the Commission's sole concern is with Simple Network's disclosure font size.²⁴ The Company concludes that if the Commission cites no consumer complaints and does not show that consumers received less

¹⁶ *Id.* at 10–12.

¹⁷ *Id.* at 5–8, 12–14.

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

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

²⁰ See *STi Forfeiture Order*, FCC 15-113 at paras. 16–18. Simple Network, unlike *STi Telecom, Inc.*, also argues that it had no fair warning or notice to ascertain with certainty the standard by which the Commission would judge its rate disclosures and therefore the *NAL* violates its constitutional due process rights. *NAL Response* at 3–5. The Commission can develop the law on a case-by-case basis; indeed, it can even announce new applications of law in adjudications. See, e.g., *AT&T v. FCC*, 454 F.3d 329, 332–34 (D.C. Cir. 2006) (upholding the Commission's order classifying prepaid calling cards as a telecommunications service for the first time in an adjudication). Moreover, as discussed in the *STi Forfeiture Order*, the Commission previously articulated a clear standard regarding carriers' marketing practices for purposes of complying with Section 201(b). *STi Forfeiture Order*, FCC 15-113 at para. 18; see also *Simple Network NAL*, 26 FCC Rcd at 16671, para. 6 & nn.14–15. Thus, in addition to the language of Section 201(b), Simple Network has 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).

²¹ *NOS*, 16 FCC Rcd at 8137–38, para. 9. For ease of reference, we refer to this colloquially below as the "*NOS* standard" or the like.

²² 5 U.S.C. § 706 (2)(E).

²³ *NAL Response* at 5–7.

²⁴ *NAL Response* at 5–8.

than the advertised minutes, then there is no basis in the record to conclude that its disclosures are inadequate or misleading.²⁵

9. Simple Network's arguments are misguided. First, as explained in the companion forfeiture order, the Commission does not need to cite consumer complaints in order to find violations of the Act.²⁶ Second, Simple Network mischaracterizes the *NOS* standard in arguing that the Commission must show evidence that Simple Network's calling cards failed to provide the advertised minutes.²⁷ Rather, *NOS* compels the Commission to review Simple Network's marketing practices to determine whether, based on the rate disclosures, consumers could calculate the cost of calls using the cards. Third, Simple Network is patently incorrect that the Commission's main focus was on the font size of its disclosures. While the size of the disclosures greatly reduced the likelihood that consumers would even read the disclosures, the resulting apparent violations were based not only on the font size of the disclosures, but also on the content of such disclosures. Finally, the Commission did rely upon substantial evidence²⁸—Simple Network's marketing posters and calling card disclosures, discussed more fully below—to determine that they violated the standard in *NOS*.

10. Simple Network makes no attempt to show that its disclosures are sufficient to allow a consumer to calculate the cost of a call. Instead, it simply says that the disclosures are produced in adequate font size and are "easily visible" on the posters.²⁹ As an initial matter, we reject Simple Network's assertion that its disclosures are "easily visible." As explained in the *NAL*, the disclosures are in small print and far from clear or conspicuous in relation to the claim of total available minutes on Simple Network's marketing posters. The number of calling minutes listed on Simple Network's posters usually appears in large font size and bright colors.³⁰ The main part of the poster stands in stark contrast to the disclosures regarding additional fees and surcharges, which are at the bottom of the posters in significantly smaller type and easily overlooked. As the Commission has previously stated:

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.³¹

We thus conclude that such disclosures are insufficient to satisfy Section 201(b).

11. While the relative font size is problematic and exacerbates the likelihood that consumers will be deceived, even if the disclosures were printed more prominently they would still be inadequate. For example, the disclosure on Simple Network's \$5 El Huevito calling card reads as follows:

In using this card you agree to: Announced minutes are based on the first call using local access numbers. Toll-free access will be charged at a higher rate. Calls placed from

²⁵ *Id.* at 6–7, 9.

²⁶ See *STi Forfeiture Order*, FCC 15-113 at para. 25.

²⁷ *NAL Response* at 6–8.

²⁸ See, e.g., *Kay v. FCC*, 396 F.3d 1184, 1188–89 (D.C. Cir. 2005) (noting that the test for "substantial evidence" is not that there may be evidence pointing against the Commission's decision, but whether a reasonable jury, instructed on the law, could reach the same conclusion as the Commission).

²⁹ *NAL Response* at 11–12.

³⁰ *Simple Network NAL*, 26 FCC Rcd at 16670, para. 4. Moreover, this information is not qualified in any way (i.e., there is no suggestion that the consumer will only receive "up to" the specified number of minutes).

³¹ *Joint FCC/FTC Policy Statement For the Advertising of Dial-Around and Other Long Distance Services to Consumers*, Policy Statement, 15 FCC Rcd 8654, 8662, para. 20 (2000) (*Joint Policy Statement*).

payphones using toll-free access will incur a surcharge of \$0.99 per call. Calls will be billed in 1 minute increments; partial minutes used are rounded up to the next full increment. Total charges for a call will be rounded up to the next full cent. Additional fees and/or surcharges will reduce minutes if all announced minutes are not used during the first call. A Maintenance fee of \$0.20/0.79 will be deducted after the first call and each 2nd/7th day thereafter. A disconnect fee of \$0.19-\$1.49 may be charged per call depending on the destination dialed. Mobile rates within a country may vary. Rates, fees, and, surcharges are subject to change without notice ... card expires 30 days after first use.³²

These “disclosures” are confusing and unclear. In violation of the *NOS* standard, they omit critical information and make it impossible to calculate the cost of almost any call. For example, a caller cannot tell:

- what the higher per-minute rate is when using one of the toll-free access numbers on the card;
- what the amount of the maintenance fee is and when such fee will be deducted from the card; or
- where in the range of \$.19 and \$1.49 the disconnect fee will be and how the consumer can determine the precise fee based on the destination called.

12. In sum, as the Commission noted in the *NAL*, Simple Network’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.”³³ Simple Network’s disclosures include a list of fees and surcharges that may reduce the value of the card, but those rates are subject to change without notice, and the Company gives no meaningful explanation of how such fees and charges relate to the initial advertised rate. In addition to vague or incomplete representations, Simple Network’s disclosures omit key facts that consumers would need to understand the rate structure.

13. Finally, Simple Network argues that it did not willfully or intentionally mislead consumers.³⁴ To find a carrier’s actions willful, however, the Commission need not show that the Company intended to violate the law or, in this case, to deceive consumers. Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.³⁵ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,³⁶ and the Commission has so interpreted the term in the section 503(b) context.³⁷ Simple Network does not dispute that it establishes

³² See E-mail from Silsa Menendez, Administrative Assistant to Counsel, Simple Network, Inc., to Richard Hindman, Kimberly Wild, Erica McMahon, and David Marks, Telecommunications Consumers Division, FCC Enforcement Bureau (May 27, 2011, 20:31 EDT), attachment, El Huevito calling card. We note that while the El Huevito prepaid card states that calls will be billed in one minute increments, the El Huevito poster supplied by Simple Network states that calls will be billed in one or three minute increments.

³³ *Simple Network NAL*, 26 FCC Rcd at 16673, para. 10.

³⁴ *NAL Response* at 7 (pointing to the Declaration of Hemant Patel in which he denies any intent to mislead consumers).

³⁵ 47 U.S.C. § 312(f)(1).

³⁶ H.R. Rep. No. 97-765, at 50–51 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2294–95.

³⁷ See, e.g., *Application for Review of S. California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991).

the rates for its calling cards and designs and distributes the posters used to market its calling cards.³⁸ In so doing, Simple Network willfully made disclosures to consumers about its rates that we find to be insufficient and deceptive.

14. Our findings that Simple Network'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's rate disclosures violated the standard delineated in *NOS*, and we affirm our findings in the *Simple Network NAL*.

B. The Standard Enunciated in *NOS* Meets the Test for Due Process

15. In order to satisfy the due process requirements of the Fifth Amendment when a punishment is being imposed, the statute or regulation in question must include standards that can be enforced equitably, as well as "provide a person of ordinary intelligence fair notice of what is prohibited . . ." ³⁹ Simple Network contends that the Commission failed to provide adequate notice of marketing disclosure requirements and that, as a result, applying Section 201(b) to deceptive marketing practices deprives the Company of its due process rights under the Constitution.⁴⁰ However, the Commission did not rely solely on the language of Section 201(b) in the *NAL*. Instead, the Commission applied the *NOS* standard interpreting Section 201(b) of the Act, as informed by *Joint Policy Statement*.⁴¹ Namely, pursuant to the *NOS* standard, a carrier must provide a "clear and conspicuous disclosure on how to calculate the total cost of a call."⁴² We find that this standard provides "a person of ordinary intelligence" with "fair notice of conduct that is . . . required."⁴³ Thus, we find that the *NOS* standard satisfies due process requirements, giving fair notice to all carriers (including Simple Network) of their disclosure obligations.

C. The Assessment of the Forfeiture Under Section 503(b) was Appropriate

16. 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.⁴⁴ Section 503(b)(2)(B) of the Act and Section 1.80 of the Commission's rules authorize the Commission to assess a forfeiture against Simple Network 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.⁴⁵

³⁸ *Simple Network NAL*, 26 FCC Rcd at 16670, para. 3.

³⁹ *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

⁴⁰ *NAL Response* at 3–5, 8 (citing *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

⁴¹ *See Simple Network NAL*, 26 FCC Rcd at 16674, para. 13.

⁴² *NOS*, 16 FCC Rcd at 8137–38, para. 9.

⁴³ *FCC v. Fox*, 132 S. Ct. at 2317.

⁴⁴ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

⁴⁵ *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

17. In calculating the proposed forfeiture in the *Simple Network NAL*, the Commission relied on *NOS*, which squarely addresses deceptive marketing practice violations.⁴⁶ In *NOS*, the Commission found that “each rate sheet sent to consumers constitute[d] a separate violation of Section 201(b).”⁴⁷ 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).⁴⁸ Considering the thousands of prepaid calling cards Simple Network deceptively marketed and sold,⁴⁹ 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 Simple Network through its deceptive advertising in the relevant time period.⁵⁰

18. The Company argues that the \$5,000,000 proposed forfeiture is arbitrary and capricious because the Commission failed to consider the factors enumerated in Section 503(b)(2)(E).⁵¹ We disagree. Section 503(b)(2)(E) of the Act gives the Commission broad 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.”⁵² The Commission made clear in the *Simple Network NAL* that the proposed forfeiture was based on its consideration of the factors enumerated in Section 503(b)(2)(E).⁵³ After reviewing these factors again, we reaffirm that the nature and magnitude of the apparent violations, the extent and gravity of the Company’s conduct, and the size of the Company’s revenues justify a \$5,000,000 forfeiture. By

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 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).

⁴⁶ See *Simple Network NAL*, 26 FCC Rcd at 16675, paras. 16–17 & n.40.

⁴⁷ *NOS*, 16 FCC Rcd at 8141, para. 19 (emphasis added).

⁴⁸ See *Simple Network NAL*, 26 FCC Rcd at 16675, para. 17 & n.40.

⁴⁹ See *id.* at 16675, para. 17. Commissioner Pai’s dissent argues that it is unclear on which dates prepaid calling cards were sold and, in some instances, whether any cards at all were sold in the year preceding the release of the *NAL*. However, Simple not only reported approximately \$ [REDACTED] in revenues during [REDACTED] and [REDACTED] (see *supra* note 8), but also stated that it activated [REDACTED] prepaid calling cards in the approximately seven months between November 1, 2010, and May 27, 2011. Letter from Neil S. Ende, Esq., Counsel for Simple Network, Inc., to Kimberly A. Wild, Assistant Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, at Confidential Attachment (May 27, 2011) (on file in EB-TCD-12-00000406). Even if we assumed that the Company only sold [REDACTED] cards in the entire year preceding the *NAL*’s release (which is fewer than the number of cards activated in less than seven months), this would still equate to an average of [REDACTED] cards each day. 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.

⁵⁰ See *Simple Network NAL*, 26 FCC Rcd at 16675, para. 17 & nn.40–42.

⁵¹ See *NAL Response* at 12–14.

⁵² 47 U.S.C. § 503(b)(2)(E).

⁵³ In the *Simple Network 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 Simple Network’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 Simple Network’s failure to adequately provide material information about its rates to thousands of consumers who purchased the Company’s prepaid cards.” 26 FCC Rcd at 16675, para. 17.

taking all of these factors into account, the Commission acts well within its authority under Section 503(b)(2)(E) of the Act to assess a forfeiture of \$5,000,000.

19. The NAL notified Simple Network that, if the Company was unable to pay the forfeiture, it could submit the requisite documentation and the Commission would consider reducing or cancelling the forfeiture altogether.⁵⁴ Simple Network claims that it is [REDACTED] and [REDACTED].⁵⁵ However, the Company failed to provide any federal tax returns, financial statements prepared according to generally accepted accounting practices, or any other reliable documentation reflecting its current financial status.⁵⁶ We therefore affirm the \$5,000,000 forfeiture proposed in the *Simple Network NAL*.

IV. CONCLUSION

20. We have reviewed Simple Network's arguments and find no reason to cancel, withdraw, or reduce the proposed forfeiture. Simple Network fails to rebut the overwhelming evidence that, during the 12 months prior to release of the *Simple Network 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 *Simple Network NAL*.

V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,⁵⁷ and Section 1.80 of the Rules,⁵⁸ Simple Network, 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.

22. 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.⁵⁹ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁶⁰

23. 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. Simple Network, 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.⁶¹ 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

⁵⁴ See *id.* at 16677, para. 23.

⁵⁵ NAL Response at 14.

⁵⁶ With its NAL Response, Simple Network attached "Balance Sheets" and "Statements of Income" with no evidence that such documents were prepared by an accounting firm or according to generally accepted accounting practices. As such, they do not satisfy the standard laid out in the *Simple Network NAL*. See *Simple Network NAL*, 26 FCC Rcd at 16677, para. 23.

⁵⁷ 47 U.S.C. § 503(b).

⁵⁸ 47 C.F.R. § 1.80.

⁵⁹ *Id.*

⁶⁰ 47 U.S.C. § 504(a).

⁶¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Communications Commission. Such payments (along with completed Form 159) must be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

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

24. 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 20554.⁶² 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.

25. **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 Simple Network, Inc., Attention: Neil Ende and Susan E. Colman, Counsel for Simple Network, Inc., Technology Law Group, L.L.C., 5335 Wisconsin Avenue, NW, Suite 440, Washington, DC 20015.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶² See 47 C.F.R. § 1.1914.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

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

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

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

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

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

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

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

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

² See 47 U.S.C. § 503(b)(4).

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

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

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

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

* * *

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

⁴ See 47 C.F.R. § 1.80(b)(2).

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

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

⁷ See 47 U.S.C. § 503(b)(6)(B).

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

DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵ *Id.*, para. 1.

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

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

⁸ *STi Forfeiture Order*, paras. 2-3.

⁹ *Id.*, para. 21.

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

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

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

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

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

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

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

¹¹ *Id.*