

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
NobelTel, LLC) File No.: EB-TCD-12-000004121
)
) NAL/Acct. No.: 201232170011
)
) FRN: 0018234609
)
)

FORFEITURE ORDER

Adopted: September 14, 2015

Released: October 21, 2015

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

I. INTRODUCTION

1. We impose a penalty of \$5,000,000 against NobelTel, LLC (NobelTel or Company), for deceptively marketing its prepaid telephone calling cards. The Company earned more than \$ [REDACTED] in 2011 driven by claims that, for a card costing just a few dollars, buyers could make international phone calls for hundreds or thousands of minutes. However, unless consumers used all of the hundreds or thousands of minutes in a single telephone call, they could make calls for only a small fraction of the advertised time. Although the Company included lengthy “disclosures” in fine print, the terms were misleading, confusing, and inadequate; indeed, the Company’s descriptions of its multiple fees and surcharges were so unclear that it would be impossible to calculate the cost of almost any call. After reviewing NobelTel’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 (Commission) issued a Notice of Apparent Liability against NobelTel (NAL or NobelTel NAL) on September 28, 2012.2 The NobelTel NAL sets forth in detail the facts and circumstances upon which this Forfeiture Order is based and need not be repeated here at length. NobelTel is a California limited liability company that provides long distance telecommunications service through the use of prepaid calling cards; the Company establishes the rates for its prepaid cards, including the rates, terms and conditions for which minutes are deducted from the cards.3 [REDACTED]

1 This case was formerly assigned the file number EB-11-TC-131. In January 2012, the Telecommunications Consumers Division assigned the case a new number.

2 NobelTel, LLC, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 11760 (2012) (NAL or NobelTel NAL). The NAL is incorporated by reference.

3 See Letter from Robert J. Aamoth and Barbara A. Miller, Counsel for NobelTel, LLC, to Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau at 3, 6 (Feb. 3, 2012) (on file in EB-TCD-12-00000412) (LOI Response).

██████████.⁴ The Company's typical posters prominently represented that buyers of cards costing just several dollars could make hundreds of minutes of calls to various international destinations using the card.⁵ The Company earned more than \$██████████ in 2011 and more than \$██████████ in 2012.⁶

3. Based upon these and other facts in the record, the Commission issued the *NobelTel NAL* on September 28, 2012, and found that the Company's practice of using misleading and deceptive marketing materials to sell its prepaid calling cards apparently constituted an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, as amended (Act).⁷ The Commission explained that NobelTel made apparently deceptive representations regarding the number of minutes buyers of its cards could use to make calls to foreign countries and failed to disclose, in any meaningful way, material information about its rates, charges, and practices that would enable consumers to calculate the cost of certain international or interstate calls, and thus substantially harmed persons who purchased its calling cards.⁸ The Commission concluded that the forfeiture must consider the extent and gravity of NobelTel's egregious conduct and must serve as an adequate deterrent against deceptive marketing practices.⁹ The Commission also considered the Company's ability to pay and ultimately proposed a forfeiture of \$5,000,000.¹⁰ On November 19, 2012, NobelTel responded to the *NobelTel NAL*.¹¹

III. DISCUSSION

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

5. NobelTel argues that the Commission should rescind the *NobelTel NAL* because: (1) Section 201(b) does not regulate advertising;¹² (2) the "Joint FCC-FTC Policy Statement"¹³ is not binding;¹⁴ (3) the Commission has not created a standard that satisfies due process;¹⁵ (4) the Commission

⁴ *Id.* at 3.

⁵ *NobelTel NAL*, 27 FCC Rcd at 11761-62, para. 4.

⁶ See NobelTel, LLC, 2012 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2011 Revenues)); NobelTel, LLC, 2013 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2012 Revenues)).

⁷ 47 U.S.C. § 201(b).

⁸ *NobelTel NAL*, 27 FCC Rcd at 11766, para. 13.

⁹ *Id.* at 11767-68, paras. 15, 17.

¹⁰ *Id.* at 11766-67, para. 14.

¹¹ NobelTel USA, LLC's Response to Notice of Apparent Liability for Forfeiture (Nov. 19, 2012) (on file in EB-TCD-12-00000412) (NAL Response).

¹² See *id.* at 3-5.

¹³ See *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*).

¹⁴ See NAL Response at 5-6.

¹⁵ See *id.* at 7-15.

did not cite any complaints¹⁶ or provide proof that any consumers were actually misled;¹⁷ (5) the Commission did not identify specific dates of violations as required by Section 503(b)(4) of the Act;¹⁸ (6) the *NAL* violates the statute of limitations;¹⁹ (7) NobelTel's advertisements and disclosures were clear and complete;²⁰ and (8) the amount of the forfeiture is arbitrarily high and unsupported.²¹

6. We have already addressed and rejected most of NobelTel's arguments in our companion forfeiture orders.²² Specifically, the *STi Forfeiture Order* explains that Section 201(b) reaches deceptive marketing²³ (including the types of practices engaged in by NobelTel) and that it does so even in the absence of implementing rules.²⁴ That Order also explains how the *STi NAL* and its companion NALs (including the *NobelTel NAL*) comply with the statute of limitations, providing sufficient specificity as to dates of violations.²⁵ In addition, the *STi Forfeiture Order* explains that the Commission does not need to base its forfeiture orders on complaints²⁶ or a showing of actual consumer harm.²⁷ Finally, in another companion forfeiture order, the Commission has explained how the *Joint Policy Statement* informed its analysis and application of Section 201(b) in its prepaid calling card NALs, including the *NobelTel NAL*.²⁸ We reject those arguments from NobelTel for the same reasons. We address each of NobelTel's remaining arguments below.

A. The Company Violated the Standard the Commission Enunciated in *NOS*

7. Under our interpretation of Section 201(b), advertising associated with telecommunications services must provide "clear and conspicuous disclosure on how to calculate the total cost of a call" and "in the absence of clear and conspicuous disclosure regarding the nature and

¹⁶ See *id.* at 11–12.

¹⁷ See *id.* at 13, 16–19.

¹⁸ See *id.* at 12–15.

¹⁹ See *id.* at 15–16.

²⁰ See *id.* at 19–20.

²¹ See *id.* at 22–24. NobelTel also makes the frivolous argument that because it is a non-dominant carrier that its rates are presumptively reasonable in a competitive market. See NAL Response at 17–18. NobelTel's citation of a 1979 Notice of Inquiry and Proposed Rulemaking into the ratemaking procedures and methods applied to competitive carriers is of no precedential value; nor is its citation of the proposition that non-dominant carriers need not file tariffs. See NAL Response at 18.

²² See *STi Telecom Inc.*, File No. EB-TCD-12-00000453, Forfeiture Order, FCC 15-113 (rel. Oct. 21, 2015) (*STi Forfeiture Order*); *Lyca Tel LLC*, File No. EB-TCD-12-00000403, Forfeiture Order, FCC 15-116 (rel. Oct. 21, 2015) (*Lyca Tel NAL*).

²³ See *STi Forfeiture Order*, FCC 15-113 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)").

²⁴ See *STi Forfeiture Order*, FCC 15-113 at paras. 16–18.

²⁵ See *id.* at paras. 12–15.

²⁶ See *id.* at para 32.

²⁷ See *id.* at para 25.

²⁸ See *Lyca Tel Forfeiture Order*, FCC 15-116 at para. 8.

components of the rate structure,” a carrier’s marketing materials would “certainly be misleading to consumers”²⁹ We find that the Company violated this standard.

8. We reject NobelTel’s assertion that its advertisements and disclosures are clear and complete.³⁰ NobelTel’s disclosures are in small print, are far from clear or conspicuous in relation to the claim of total available minutes on the Company’s marketing posters, and fail to meet the standard established by the Commission in *NOS*. For example, NobelTel’s “iCARD ” calling card (as well as the poster used to market the card) is illustrative and reads as follows:

A HIGHER RATE MAY APPLY TO CALLS TO WIRELESS RECEIVERS OR SPECIAL SERVICE NUMBERS A \$0.69 DAILY FEE MAY APPLY AFTER INITIAL USE. A \$0.04 PER MINUTE CHARGE . . . WILL APPLY FOR TOLL FREE ACCESS. CALLS ARE BILLED IN 2-MINUTE INCREMENTS. A HANG UP FEE OF \$0.69 MAY APPLY PER CALL. RATES FOR SUBSEQUENT CALLS MAY BE 100% HIGHER THAN THE RATE OF THE INITIAL CALL NOBEL MAY CHANGE TERMS AND CONDITIONS AND/OR THE PRICES CHARGED AT ANY TIME WITHOUT NOTICE³¹

9. These “disclosures” are unclear and confusing, and thus violate the *NOS* standard. They omit important information and make it impossible to calculate the cost of almost any call. For example, a caller cannot tell:

- what “higher rate” may apply to calls to wireless phones and special service numbers;
- whether a daily fee may apply after initial use;
- whether a hang up will fee will apply per call; and
- whether rates for subsequent calls will or will not be 100% higher

10. In sum, as the Commission noted in the *NAL*, “NobelTel’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.”³² NobelTel’s disclosures include possible ranges of fees, but those fees are subject to change without notice, and the Company gives no meaningful explanation of how such ranges relate to the initial advertised rate. Thus, in addition to vague and misleading representations, NobelTel’s disclosures omitted key facts that consumers need in order to understand the rate structure and calculate the cost of a call. Accordingly, we affirm our *NAL* finding that NobelTel’s disclosures do not satisfy the *NOS* standard (i.e., that consumers could calculate the cost of their calls).

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

11. 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”³³ NobelTel contends that the standard applied in the *NAL* is too vague to meet the standard for due process, and thus cannot be used to support the apparent violations in the *NAL*.³⁴ However, the Commission in *NOS*

²⁹ *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.

³⁰ *NAL* Response at 19–20.

³¹ *LOI* Response, attachment, iCARD \$2 calling card.

³² *NobelTel NAL*, 27 FCC Rcd at 11765, para. 10.

³³ *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

³⁴ *See NAL* Response at 8–10.

articulated a standard interpreting Section 201(b) under which a carrier must provide a “clear and conspicuous disclosure on how to calculate the total cost of a call.”³⁵ We find that this standard provides “a person of ordinary intelligence” with “fair notice of conduct that is . . . required.”³⁶ Thus, we find that the *NOS* standard satisfies due process requirements, giving fair notice to all carriers (including NobelTel) of their disclosure obligations.

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

12. 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.³⁷ 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 NobelTel 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.³⁸

13. NobelTel 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) of the Act and that the forfeiture amount proposed in the instant case is not supported by FCC precedent.³⁹ Section 503(b)(2)(E) states the Commission must take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, . . . ability to pay, and such other matters as justice may require.”⁴⁰ NobelTel is wrong that we have not taken these factors into account. The Commission noted in the *NAL* that the forfeiture amount was based on these very factors.⁴¹ Moreover, we have reiterated the *NAL*’s discussion of the nature, circumstances, degree of culpability,

³⁵ *NOS*, 16 FCC Rcd at 8137–38, para. 9. NobelTel also argues that the *Joint Policy Statement* is not binding. However, as we explained in one of our companion forfeiture orders, such an argument is misplaced—the Commission based its finding of apparent liability on Section 201(b) of the Act, as informed by the *Joint Policy Statement* and the standard enunciated in *NOS* (not on the *Joint Policy Statement* alone). See *Lyca Tel Forfeiture Order*, FCC 15-116 at para. 8; see also *NobelTel NAL*, 27 FCC Rcd at 11766, para. 12.

³⁶ *FCC v. Fox*, 132 S. Ct. at 2317.

³⁷ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

³⁸ 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 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).

³⁹ See *NAL* Response at 22–24.

⁴⁰ 47 U.S.C. § 503(b)(2)(E).

⁴¹ See *NobelTel NAL*, 27 FCC Rcd at 11767–68, para 17. In the *NAL*, the Commission looked directly at NobelTel’s reported revenue to determine its ability to pay. See *id.* at 11767–68, para. 17 & n.67.

and gravity of the violations above.⁴² We also note that NobelTel engaged in [REDACTED] of violations;⁴³ had the Commission assessed a forfeiture taking into account the full extent of the Company's apparent violations, the resulting forfeiture would have been much higher than that proposed.⁴⁴ In the *NAL*, the Commission instead assessed a penalty that is the equivalent of applying a \$40,000 fine to only 125 of the apparent violations—far fewer than the actual number of prepaid cards sold using deceptive advertising during the relevant time period.⁴⁵ As such, we find that the Commission acted well within its authority under Section 503(b)(2)(E) of the Act and that the \$5,000,000 forfeiture amount is both reasonable and appropriate.

IV. CONCLUSION

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

V. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,⁴⁶ and Section 1.80 of the Rules,⁴⁷ NobelTel, LLC, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of five million dollars (\$5,000,000) for willfully and repeatedly violating Section 201(b) of the Act.

⁴² See *supra* paras. 8–10.

⁴³ 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, NobelTel stated that it "sold approximately [REDACTED] pre-paid calling cards in 2011." Letter from Robert J. Aamoth and Barbara A. Miller, Esq., Counsel to NobelTel, LLC, to Kimberly A. Wild, Assistant Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, at 13 (Feb. 3, 2012) (on file in EB-TCD-12-0000412). The Company also reported more than \$ [REDACTED] in revenues during 2011 and more than \$ [REDACTED] during 2012. See *supra* note 6. Finally, between October 1, 2011, and September 30, 2012 (a time period that shares 363 days with the year preceding the *NAL*'s release), NobelTel reported approximately \$ [REDACTED] in gross-billed revenues. See NobelTel February 2012 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for October 1, 2011, to December 31, 2011); NobelTel May 2012 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for January 1, 2012, to March 31, 2012); NobelTel August 2012 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for April 1, 2012, to June 30, 2012); NobelTel November 2012 FCC Form 499-Q (reporting historical quarterly revenues of \$ [REDACTED] for July 1, 2012, to September 30, 2012). NobelTel's cards were typically sold for \$5 or less. See *NAL*, 27 FCC Rcd at 11760–62, paras. 2, 4–5. Even if we assumed the cards averaged \$10 each, and calculated based on the 2012 revenues of \$ [REDACTED] (less than the actual revenues in the year preceding the *NAL*), it would still equate to the sale of at least [REDACTED] cards in a year, or an average of [REDACTED] cards each day (and even more if the calculation was made based on a \$5 or \$2 card). It is a logical and reasonable inference that at least one card (and likely [REDACTED] of cards) were sold on each of the 365 days preceding the *NAL* – far more than the mere 125 needed to support the forfeiture amount.

⁴⁴ In *NOS*, the Commission found that "each rate sheet sent to consumers constitutes a separate violation of Section 201(b)." *NOS*, 16 FCC Rcd at 8141, para 19 (emphasis added).

⁴⁵ See *NobelTel NAL*, 27 FCC Rcd at 11767–68, para. 17 & n.66.

⁴⁶ 47 U.S.C. § 503(b).

⁴⁷ 47 C.F.R. § 1.80.

16. 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.⁴⁸ 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.⁴⁹

17. 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. NobelTel, LLC, shall send electronic notification of payment to Johnny Drake at johnny.drake@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁵⁰ 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 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.

18. 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 20554.⁵¹ 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.

⁴⁸ *Id.*

⁴⁹ 47 U.S.C. § 504(a).

⁵⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁵¹ *See* 47 C.F.R. § 1.1914.

19. **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 NobelTel, LLC, Attention: Robert J. Aamoth and Barbara A. Miller, Kelley Drye & Warren LLP, 3050 K Street, NW, Suite 400, Washington, DC 20007.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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.*