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 single

[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).

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.*