

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

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

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

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

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

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

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

Were the Commission finding here that these six companies had each committed a single continuing violation of Section 201(b) in the form of an unlawful practice, then I could understand the argument that the facts set forth in the Notices of Apparent Liability were sufficiently specific. However, the Commission does not make such a finding, probably because each company's liability then would have been capped at \$1.575 million.⁴ Instead, the Commission concludes that each company committed a

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

² See 47 U.S.C. § 503(b)(4).

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

⁴ See 47 C.F.R. § 1.80(b)(2).

separate violation of Section 201(b) each time that a consumer purchased a misleading and deceptive prepaid calling card—but fails to specify the basic facts underlying even a single sale, including (as noted above) the “date on which such conduct occurred.” This is not legally permissible.⁵

This lack of specificity leads to another problem. Neither the Notices of Apparent Liability nor the Forfeiture Orders in at least two of these 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.

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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.

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.

