Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	File No.: EB-TCD-12-00003409
	)	
Preferred Long Distance, Inc.	)	NAL/Acct. No.: 201332170008
	)	
	)	FRN: 0003757473
	)	

FORFEITURE ORDER

Adopted: October 28, 2015 **Released: November 18, 2015**

By the Commission: Commissioner Pai approving in part, dissenting in part and issuing a statement; Commissioner O'Rielly dissenting and issuing a separate statement.

I. INTRODUCTION

1. We impose a penalty of $1,440,000 against Preferred Long Distance, Inc. (Preferred or Company), for changing the long distance telephone carriers of 14 consumers without proper authorization, a practice commonly known as "slamming." Further, when speaking to 11 of those consumers, Preferred's telemarketers misrepresented that that they were calling on behalf of the consumers' current carriers when, in fact, they were not. Companies that engage in slamming and deceit, commit unjust and unreasonable practices that usurp consumer choice, and cause consumers to expend significant time and effort to attempt to return to their preferred carriers, including by filing complaints with law enforcement agencies for help. The Federal Communications Commission (FCC or the Commission) is committed to protecting consumers against slamming and misrepresentations and will take aggressive action against carriers that perpetrate these unjust, unreasonable, and deceptive acts. After reviewing Preferred's response to the *Notice of Apparent Liability* (*NAL*), we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the $1,440,000 forfeiture the Commission previously proposed.

II. BACKGROUND

2. The FCC's Enforcement Bureau (Bureau) initiated an investigation of Preferred[1] after reviewing numerous complaints from consumers alleging they had been slammed by the Company. The Commission's Consumer & Governmental Affairs Bureau (CGB) had already served numerous slamming complaints on Preferred and issued orders granting the complaints (and directing Preferred to remove all charges incurred for service provided to the complainants for the first thirty days after the alleged unauthorized changes) after finding that Preferred failed to show that it had properly verified consumers' authorization to change carriers, and therefore was in violation of Section 258 of the Communications Act of 1934, as amended (Communications Act or Act), and Section 64.1120 of the Commission's rules (Rules).[2]

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[1] Preferred is a non-facilities based interexchange carrier with offices at 16830 Ventura Blvd., Suite 350, Encino, CA 91436.

[2] 47 U.S.C. § 258; 47 C.F.R. § 64.1120; *see, e.g.*, *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 14822 (CGB 2012) (granting slamming complaints filed by G. Busch, B. Littmann, and J. Dyer); *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 13381 (CGB 2012) (granting slamming complaint filed by M. Tice); *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 13333 (CGB 2012) (granting two slamming complaints, including the complaint filed by

(continued…)

3. On December 20, 2012, the Commission issued the *NAL*, proposing a $1,440,000 forfeiture against Preferred for its apparent willful and repeated violation of Sections 201(b) and 258 of the Act,[3] and Section 64.1120 of the Rules[4] for changing the long distance telephone carriers of 14 consumers without proper authorization (i.e., slamming).[5] The forfeiture proposed in the *NAL* relied upon 14 complaints that had been granted by CGB. The Commission found that the Company had apparently changed the preferred carriers of those 14 consumers to itself without proper verification of their authorization. In addition, the Commission found that, in 11 of those cases, the telemarketers the Company hired apparently misrepresented in their telephone calls to consumers that their current carriers were affiliated with Preferred. The Commission found that these misrepresentations constituted an unjust and unreasonable practice in violation of Section 201(b) of the Act.[6] The Commission proposed a $40,000 forfeiture for each of the 14 instances of slamming and an upward adjustment of $80,000 for each of the 11 slams involving misrepresentations, resulting in a total proposed forfeiture of $1,440,000.[7] The *NAL* ordered Preferred, within thirty (30) days, to either pay the proposed forfeiture amount or submit evidence or arguments in response to the *NAL* that no forfeiture should be imposed or that some lesser amount should be assessed.[8]

4. On February 22, 2013, Preferred filed a response to the *NAL*.[9] The Company argues that the *NAL* should be rescinded or reduced for three overarching reasons, namely: (1) it did not violate Section 258 of the Act or Section 64.1120 of the Rules because the *NAL*'s findings are not based on the "actual substance of the 14 consumer complaints" and, in any event, Preferred materially complied with the rules;[10] (2) it did not violate Section 201(b) of the Act because no misrepresentations were made,[11] and even if they were Section 201(b) does not reach advertising claims in the absence of implementing rules;[12]

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W. Legler); *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 13328 (CGB 2012) (granting slamming complaints filed by B. Schneider, J. Ariza, and P. Almon); *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 9026 (CGB 2012) (granting six slamming complaints, including the complaint filed by A. Russo); *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 9021 (CGB 2012) (granting 21 slamming complaints including the complaints filed by A. Burton, D. Smith, J. Slotnick, F. Littleton, and D. Williams).

[3] 47 U.S.C. §§ 201(b), 258.

[4] 47 C.F.R. § 64.1120.

[5] *Preferred Long Distance, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 16489, 16489, para. 1 (2012) (*NAL*). The *NAL* is incorporated by reference.

[6] 47 U.S.C. § 201(b).

[7] *NAL*, 27 FCC Rcd at 16494–95, paras. 14–15.

[8] *Id.* at 16495, para. 18.

[9] *See* Preferred Long Distance, Inc.'s Response to Notice of Apparent Liability for Forfeiture (Feb. 22, 2013) (on file in EB-TCD-12-00003409) (NAL Response). Preferred filed a supplemental response to the *NAL* on April 29, 2013. *See* Letter from Michael B. Hazzard, Arent Fox, to Marlene Dortch, Secretary, FCC Office of the Secretary (Apr. 29, 2013) (on file in EB-TCD-12-00003409) (Supplemental NAL Response). Preferred filed a second supplemental response to the NAL on May 21, 2013. *See* Letter from Michael B. Hazzard, Arent Fox, to Marlene Dortch, Secretary, FCC Office of the Secretary (May 21, 2013) (on file in EB-TCD-12-00003409) (Second Supplemental NAL Response). Preferred did not offer new legal arguments in its supplemental responses, but rather reiterated Preferred's telemarketing and TPV processes and repeated claims (found in the NAL Response) that AT&T personnel had directed consumers to complain about misrepresentations.

[10] NAL Response at 25–29.

[11] NAL Response at 15–21.

[12] NAL Response at 15–16, 21–25.

and (3) the "Commission should radically reduce" the forfeiture in light of Preferred's "history and culture of compliance . . . ."[13]

III. DISCUSSION

5. As discussed below, we have fully considered Preferred's responses to the *NAL*, which includes a variety of legal and factual arguments, but we find none of them persuasive. We therefore affirm the $1,440,000 forfeiture proposed in the *NAL*.

A. Preferred Violated Section 258 of the Act and Section 64.1120 of the Rules

6. As described in the *NAL*, Preferred violated Section 258 of the Act and Section 64.1120 of the Rules by failing to follow the Commission's third party verification requirements with respect to 14 consumers.[14] Specifically, in 13 of the 14 slams on which the *NAL* is based the third party verifier (TPV) failed to confirm the telephone numbers to be switched, as required by the Rules,[15] and in the case of the fourteenth slam the TPV failed to obtain separate authorizations for each service sold.[16] Preferred does not rebut these charges but instead argues, first, that it did not violate Section 258 of the Act or Section 64.1120 of the Rules because such finding was not based "on the actual substance of the 14 consumer complaints," and, second, that the Commission's "hyper-technical" reading of the rule "manufactures an issue where none existed."[17]

7. In regards to Preferred's first argument, Section 403 of the Act gives the Commission "full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing" connected to enforcement of the Act, and further states that the Commission "shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint … including the power to make and enforce any order or orders in the case…."[18] Accordingly, the *NAL* is not required to be based on the content of consumer complaints. As we discussed in the *NAL*, CGB initially reviewed the consumer complaints at issue, served the complaints on Preferred, and then issued orders granting the complaints based not only on the substance of the

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[13] NAL Response at 29–30.

[14] *NAL*, 27 FCC Rcd 16494, para. 12. *See also, e.g., New Century Telecom, Inc.*, Order, 25 FCC Rcd 5911, 5913, para. 4 (CGB 2010) (finding violations where TPV recordings did not include references to intrastate interLATA service and concluding that verifier did not obtain authorization to switch interLATA service); *United Telecom, Inc.*, Order, 27 FCC Rcd 5758 (CGB 2012).

[15] 47 C.F.R. § 64.1160(c)(3). In these 13 cases, Preferred merely verified the telephone numbers that were associated with the business or residence when, under the Rules, the Company was required to elicit the telephone numbers to be switched.

[16] *NAL*, 27 FCC Rcd at 16492-93, para. 10. Additionally, one of the 13 TPVs not only failed to confirm the telephone numbers to be switched, but failed to include any form of verification of the switch. *Id.* at 16493, para. 10 & n. 26.

[17] NAL Response at 25–29. The Company also argues that the Commission's finding of a slam "as it relates to the Littleton complaint in particular" is contrary to relevant case law because "requiring a carrier to guarantee that the person granting authorization for a service change is, in fact, authorized to do so is not only 'impossible,' but also exceeds the Commission's statutory authority." *Id.* at 27–28. This argument misconstrues the facts on which the violation is based. The *NAL* does not find that Preferred violated the slamming rules by failing to guarantee that the person authorizing the carrier change had the power to do so. Rather, the *NAL* found that the Littleton TPV failed to confirm the telephone number to be switched, in violation of Section 64.1120 of the Commission's rules. *NAL*, 27 FCC Rcd at 16493, para. 10 & n.27. Further, as the *NAL* explains, one of the complainants stated that the person with whom the Company's telemarketer spoke specifically stated to the telemarketer that he *did not* have authority to authorize a change in long distance carrier. *NAL*, 27 FCC Rcd. at 16493, para. 11. The Company made the change nonetheless.

[18] 47 U.S.C. § 403.

consumer complaints but also on the TPVs provided by Preferred.[19] The Bureau reviewed the complaints and the TPVs provided by Preferred, found that the TPVs did not satisfy the requirements of the rule, and properly issued the *NAL*.[20] Therefore, we reject Preferred's argument.

8. The Company's second argument is equally flawed. Preferred's characterization of the violations as "hyper-technical"[21] does not change the fact that the TPVs did not comply with the Act and the Rules. As we stated in the *Silv NAL*, "[w]hile these violations may appear to be technical in nature in this case where the complainants contend that they did not intend to change carriers at all, this rule is crucial to protect consumers."[22] Bureau staff independently reviewed complaints made against Preferred (including the 14 complaints that served as the basis for the *NAL*) and relevant TPVs in order to determine whether Preferred's actions violated the Act or the Commission's rules. Our rules require that the TPV specifically elicit the "telephone numbers to be switched," rather than merely verifying numbers associated with a business or residence, or for what purpose the numbers are used.[23] As discussed in the *NAL*, review of the TPVs (provided by Preferred) demonstrated that these verifications failed to comply with Section 64.1120 of our rules.[24] The *NAL* concluded that Preferred apparently violated Section 258(a) of the Act and Section 64.1120(c)(3) of the Rules by failing to follow all of the Commission's third party verification requirements with respect to all 14 complainants,[25] and we affirm this conclusion. Based on the Bureau's review of the record, we uphold the *NAL* and find that Preferred violated Section 258 of the Act and Section 64.1120 of the Rules.[26]

B. Preferred Violated Section 201(b) of the Act

9. As stated in the *NAL*, the Commission found that the telemarketers the Company hired apparently misrepresented in their telephone calls to 11 consumers that their current carriers were affiliated with Preferred.[27] The Commission found that these misrepresentations constituted an unjust and unreasonable practice in violation of Section 201(b) of the Act.[28] In its NAL Response, Preferred argues that it did not violate Section 201(b) because: (1) Section 201(b) does not reach advertising claims in the

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[19] *NAL*, 27 FCC Rcd at 16489–90, para 2; *see also supra* note 2 (listing CGB orders finding against Preferred).

[20] *Id.* at 16492–93, para 10.

[21] NAL Response at 26.

[22] *Silv Commc'n Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 5178, 5184, para. 12 (2010) (*Silv NAL*).

[23] 47 C.F.R. § 64.1120(c)(3)(iii).

[24] *NAL*, 27 FCC Rcd at 16492–95, paras. 8–12. For example, one complainant's TPV revealed that Preferred failed to obtain separate authorizations for each service sold. *See* Complaint from A. Russo; *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 9026, 9028, para. 4 (CGB 2012). Another complainant's TPV included only the call-back portion of the recording, but failed to include any form of verification of the switch. *See* Complaint from D. Williams. Thirteen TPVs failed to confirm the telephone numbers to be switched. *See* Complaint from P. Almon; Complaint from J. Ariza; Complaint from A. Burton; Complaint from G. Busch; Complaint from J. Dyer; Complaint from W. Legler; Complaint from F. Littleton; Complaint from B. Littmann; Complaint from B. Schneider; Complaint from J. Slotnick; Complaint from D. Smith; Complaint from M. Tice; Complaint from D. Williams. *See also supra* note 2 (listing the CGB Orders).

[25] *NAL*, 27 FCC Rcd 16494, para. 12; *see also, e.g., New Century Telecom, Inc*., Order, 25 FCC Rcd 5911, 5913, para. 4 (CGB 2010) (finding violations where TPV recordings did not include references to intrastate interLATA service and concluding that verifier did not obtain authorization to switch interLATA service); *United Telecom, Inc*., Order, 27 FCC Rcd 5758 (CGB 2012).

[26] *See NAL*, 27 FCC Rcd at 16494, para. 12.

[27] *NAL*, 27 FCC Rcd at 16490–91, paras. 4–5 & n.15.

[28] 47 U.S.C. § 201(b).

absence of implementing rules;[29] (2) even if Section 201(b) applied, no misrepresentations were made to consumers;[30] and (3) if any misrepresentations were made, they were made by third parties outside the scope of any agreement with, or the knowledge of, Preferred.[31] We reject these arguments for the reasons discussed below.

1. Preferred's misrepresentations to consumers violated Section 201(b).

10. Preferred incorrectly argues that the *NAL* failed to "state a claim for a Section 201(b) violation" because the Commission cannot enforce Section 201(b) generally, or enforce it with respect to advertising specifically, without first adopting rules.[32] In further support of this faulty argument, Preferred attempts to dismiss the cases cited in the *NAL* that declare deceptive marketing an unjust and unreasonable practice in violation of Section 201(b) by arguing that they are not "binding precedent."[33] We reject Preferred's mistaken view of our authority under Section 201(b) and reaffirm the precedent cited in the *NAL*.

11. The Communications Act is the law. It was duly enacted by Congress and its provisions apply to carriers whether or not the Commission has adopted implementing regulations. Section 201(b) is no exception. It is well-settled that the Commission may choose between adjudication and rulemaking to develop the law.[34] As the Supreme Court has explained:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[35]

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

12. The Supreme Court also stated that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[36] Further, in the Communications Act, Congress delegated to the Commission specific authority

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[29] NAL Response at 15–16, 21–25.

[30] *Id.* at 15–21.

[31] *Id.* at 9–11, 17–18, 20.

[32] *Id.* at 21, 23.

[33] *Id.* at 21–25.

[34] *See SEC v. Chenery*, 332 U.S. 194, 202–03 (1947) (*Chenery*); *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, . . . and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking . . . .'"); *Am. Airlines, Inc. v. Dep't of Transp*., 202 F.3d 788, 797 (5th Cir. 2000) ("Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy."); *City of Chicago v. FCC*, 199 F.3d 424, 429 (7th Cir. 1999) ("An agency can, of course, promulgate its policy through individual adjudicative proceedings rather than rulemaking."); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990) ("[A]gency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication."). *See also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978) ("[F]ormulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

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

[36] *Id*. at 203.

to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[37] Thus, we are not required to adopt rules in order to take action under Section 201(b) with respect to a particular carrier's advertising practices "in connection with" a communications service.[38]

13. Moreover, the principal Supreme Court case Preferred cites to support its "rules only" theory actually supports the Commission's position, not Preferred's. In *Global Crossing*, the Court noted that "[h]istory [ ] makes clear that the FCC has long implemented § 201(b) through the issuance of rules and regulations."[39] But the Court also stated that "Congress, in § 201(b), delegated to the agency authority to 'fill' a 'gap,' *i.e.*, to apply § 201 through regulations *and orders* with the force of law."[40] Indeed, *Global Crossing* favorably cited the *NOS Communications, Inc.*, Notice of Apparent Liability as one of many examples of the proper exercise of the Commission's discretion to declare practices unjust and unreasonable.[41] Further, that Notice of Apparent Liability is cited by the Court as an example where the Commission found specifically "deceptive marketing an unreasonable practice" under Section 201(b) of the Act.[42] Thus, the very case Preferred cites directly contradicts its argument.[43]

14. As Preferred implicitly acknowledges,[44] the Commission has previously held that unjust and unreasonable telemarketing practices violate Section 201(b).[45] Nonetheless, Preferred attempts to set

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[37] 47 U.S.C. § 154(j).

[38] 47 U.S.C. § 201(b). Indeed, when initially implementing Section 258 of the Act, the Commission expressly declined to adopt rules at that time to govern "deceptive or abusive sales tactics" given its "authority under section 201(b) to prohibit all carrier practices that are unjust and unreasonable," citing by way of example its BDP enforcement proceeding. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1554-55, para. 77 (1998) (*Section 254 Second R&O*). Our continued use of case-by-case evaluations thus accords with that historical decision to exercise our discretion to proceed via adjudication rather than rulemaking. To the extent that Preferred seeks the adoption of rules in this regard, it is free to file a petition for rulemaking. *See* 47 C.F.R. § 1.401.

[39] *See* NAL Response at 23 n.89 (quoting *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007)).

[40] *Global Crossing*, 550 U.S. at 58 (emphasis added). In fact, in *Global Crossing*, the Supreme Court found that "the FCC's § 201(b) 'unreasonable practice' determination [was] a reasonable one; hence it [was] lawful." *Id.* at 55 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843–44 (1984)). In the underlying case, the Commission made that determination in an order accompanying the payphone compensation rulemaking implementing a separate section of the Communications Act—the determination *never* appeared in any rule and was not a rulemaking implementing Section 201(b).

[41] *Global Crossing*, 550 U.S. at 53–54 (citing *NOS Commc'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd. 8133, 8136, para. 6 (2001) (*NOS*)).

[42] *Id*.

[43] Preferred also cites to a Ninth Circuit case in an attempt to support its argument. *See N. Cty. Commc'ns Corp. v. California Catalog*, 594 F.3d 1149, 1158–61 (9th Cir. 2010). However, this case relies on *Global Crossing* and we have already explained in paragraph 11 through 13, above, that Preferred has misinterpreted that case and that it does not support Preferred's position.

[44] *See* NAL Response at 22 (discussing two cases in which the Commission found that companies' misrepresentations to consumers that they were affiliated with the consumers' preferred carriers to be an unjust and unreasonable practice in violation of Section 201(b) of the Act, and a third case in which the Common Carrier Bureau found a company's failure to convey sufficient information about their rates, practices, and range of services to be unjust and unreasonable in violation of Section 201(b).).

[45] *Bus. Disc. Plan*, Order of Forfeiture, 15 FCC Rcd 14461 (2000) (*BDP*), *aff'd in relevant part on reconsideration*, 15 FCC Rcd 24396 (2000) (*BDP Order on Reconsideration).*

apart this case from prior Commission precedent.[46] Preferred attempts to distinguish the *Business Discount Plan* Forfeiture Order (*BDP*) on the facts, arguing that this case is distinguishable because there were many more consumer complaints at issue in *BDP* and because the company in that case provided no evidence to counter consumer complaints.[47] We dismiss these arguments out of hand. First, as discussed above, the Commission may investigate and impose forfeitures on common carriers even in the complete absence of consumer complaints.[48] Second, while Preferred did provide the Commission with TPVs, as discussed at length in the *NAL* and above, those TPVs failed to satisfy the requirements of Section 64.1120 of the Rules. We accordingly reject these arguments.[49]

15. Preferred then argues that *BDP* is inapplicable by referencing a number of cases involving state preemption to argue that the Commission cannot pursue deceptive telemarketing practices as violations of Section 201(b).[50] However, we have previously considered and rejected the notion that state preemption cases undermine the Commission's jurisdiction under Section 201(b) over fraudulent and deceptive telemarketing and advertising practices.[51] The holdings of these decisions merely stand for

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[46] Preferred incorrectly claims that none of the authority cited in the *NAL* has precedential value. *See* NAL Response at 21. The Company argues that one case cited in the *NAL* is non-binding because it is a bureau, rather than a Commission, order "and certainly cannot now be used as a stand in for a properly adopted rule or regulation the violation of which results in Section 201(b) liability." *Id*. at 21–22 (discussing *Telecomms. Research & Action Ctr. & Consumer Action*, Memorandum Opinion and Order, 4 FCC Rcd 2157 (Com.Car.Bur. 1989)). Preferred also dismisses outright the *Silv NAL*, which the *NAL* also cited as authority for finding a Section 201(b) violation. Preferred argues that the *Silv NAL* is "merely a *notice*" with "no precedential value at all." NAL Response at 22. We reject Preferred's argument and find that the *NAL* properly relied on the authority cited. *BDP* was a Commission-level forfeiture order, and is directly relevant precedent for the reasons stated in the text. In addition, while *Telecomms. Research & Action Ctr. & Consumer Action* was a Bureau-level decision, and thus not binding on the full Commission, absent Commission reversal it nonetheless "shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission." 47 U.S.C. § 155(c). As described above, moreover, the Commission has cited its Section 201(b) authority to address deceptive telemarketing as needed via enforcement actions in declining to adopt specific rules in that regard. *See supra* note 38. This interpretation of Section 201(b) has been reinforced in NALs, as well. *See supra* para. 13 & n.40 (discussing the Supreme Court's citing to an NAL finding of a Section 201(b) unreasonable practice related to deceptive marketing in *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007)); *infra* n.53 (discussing the *Silv NAL*).

[47] NAL Response at 23–24.

[48] *See* 47 U.S.C. § 403 (granting the Commission "full authority and power at any time to institute an inquiry, *on its own motion*, . . . relating to the enforcement of any of the provisions of" the Act) (emphasis added). A single violation of the Act is one violation too many and we are not constrained to take action only where complaints have been filed. The number of complaints is irrelevant to our findings in both cases and not a distinguishing fact.

[49] Preferred also cites (but does not discuss in any way) two other Supreme Court cases involving private rights of action that have nothing to do with the Communications Act or the FCC. *See* NAL Response at 23 n.89. But Preferred never explains (even by analogy) how these cases apply here, and we find they do not. Similarly, Preferred cites a Ninth Circuit private right of action case. *Id*. (citing *N. Cnty. Comm. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149 (9th Cir. 2010)). To the extent that case has any relevance here, the notable discussion is the Ninth Circuit's deference to the Commission. The court concluded that Section 201(b) alone did not create a private right of action, but rather "a more reasonable interpretation [of Congress' intent with respect to Section 201(b)] is that it is within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation." *Id.* at 1158 (citations omitted).

[50] *See* NAL Response at 23 n.88 (citing *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 439 (D.N.J. 1996) (*Weinberg*), *appeal after remand*, 173 N.J. 233, 801 A.2d 281 (2002); *Marcus v. AT&T Corp*., 938 F. Supp. 1158, 1173 (S.D.N.Y. 1996), *aff'd Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998)).

[51] *See BDP*, 15 FCC Rcd at 14468–69, paras. 14–16; *BDP Order on Reconsideration*, 15 FCC Rcd at 24398, para. 6. Specifically, the Commission stated that it had considered and rejected "BDP's reliance on state preemption

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the proposition that the Communications Act does not indicate a uniquely federal interest in common carriers' unfair and deceptive telemarketing practices and, therefore, that state efforts to address these practices are not preempted, and nothing more.[52] In sum, although the states share our interest in preventing deceptive marketing practices, we are not barred from addressing these fraudulent practices under our own authority over telecommunications.

16. Accordingly, consistent with our analysis in the *NAL*,[53] we conclude that "unfair and deceptive marketing practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b) of the Act."[54] In particular, "a carrier violates Section 201(b) by effectuating a change to a consumer's preferred carrier through deception about its identity, or the nature of its service."[55] Further, "[t]he 'reasonableness' determination required under § 201(b) must be made in the first instance by the FCC, and not by [a] court or any other."[56]

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analyses to support its claim that its marketing practices do not constitute unjust and unreasonable practices under section 201(b) . . . ." *BDP*, 15 FCC Rcd at 14468, para. 16.

[52] *See Weinberg*, 165 F.R.D. at 439 (federal magistrate judge granting plaintiff's motion to remand action to state court and holding that the court "lack[ed] the authority to recharacterize plaintiff's claims as exclusively federal . . . ."); *Marcus*, 138 F.3d at 54 (finding that, with respect to a carrier's marketing disclosures, Congress never intended the Communications Act or federal common law to preempt state law).

[53] Preferred discounts the *Silv NAL* as having "no precedential value at all" as, according to Preferred, "it is merely a *notice* . . . 'alleging the violation of the Commission's rules and requesting payment from the alleged violator.'" NAL Response at 22. To the extent that Preferred is raising a fair notice argument, we reject that claim. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). There is ample Commission precedent providing fair notice of the Commission's application of Section 201(b) to deceptive marketing, as discussed above. *See supra* note 46. In addition to, and consistent with, prior Commission precedent, the full Commission adopted the *Silv NAL* on May 12, 2010, which included the relevant discussion of both slamming and unjust and unreasonable marketing practices—including misrepresentation—under Sections 201(b) and 258 of the Communications Act, as well as Commission precedent. *See Silv NAL*, 25 FCC Rcd at 5180–85, paras. 5–14. In addition to providing "notice" to Silv of a specific apparent violation on their part, the Commission's prior determinations, reinforced by the statements in the *Silv NAL* that changing a consumer's preferred carrier through deception is a Section 201(b) violation, collectively provided fair notice to the public including Preferred regarding the Commission's interpretation of section 201(b). Here, Preferred cannot complain that it lacked fair notice that its deceptive conduct is a violation of section 201(b). To the contrary, the *Silv NAL* (coming against the backdrop of other Commission decisions) provided the requisite fair notice at least a year and a half before the violations at issue in this case took place (beginning in January 2012).

[54] *NAL*, 27 FCC Rcd at 16490, para. 3; s*ee also NOS*, 16 FCC Rcd at 8136, para. 6. We further find that our Section 201(b) authority relevant here to address the telemarketing practices of an interexchange carrier for or in connection with its telecommunications service is not limited by the enactment of Section 258 of the Act, consistent with prior Commission decisions. *See, e.g.*, *Section 254 Second R&O*, 14 FCC Rcd at 1554-55, para. 77 (in the context of a rulemaking implementing Section 258, interpreting Section 201(b) authority to remain available to address deceptive sales tactics).

[55] *NAL*, 27 FCC Rcd at 16490, para. 3 (citing *Silv NAL*); s*ee also BDP*, 15 FCC Rcd at 14469, para. 17; *U.S. Telecom Long Distance, Inc*., Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 823, 825–26, para. 7 (2014) (*USTLD NAL*); *Consumer Telcom, Inc*., Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17196, 17198–99, para. 7 (2013) (*CTI NAL*); *Advantage Telecomms., Corp.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 6843, 6849, para. 16 (2013) (*Advantage NAL*); *United Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 16499, 16502, para. 9 (2012) (*United NAL*).

[56] *Long Distance Telecomm. Litig.*, 612 F. Supp. 892, 899 (E.D. Mich. 1985), *aff'd in relevant part, rev. in part* 831 F.2d 627, 631 (6th Cir. 1987) (holding that companies' alleged failure to disclose certain billing policies for long distance calling was "clearly" within the Commission's primary jurisdiction under section 201(b)).

2. Preferred violated Section 201(b) of the Act by misrepresenting itself to consumers.

17. As discussed above and in the *NAL*, the Company engaged in deceptive practices in connection with changes to the preferred long distance carriers of 11 consumers.[57] Preferred attempts to refute this finding by making a number of arguments. The Company offers two arguments that are irrelevant to our finding that these 11 misrepresentations actually occurred: (1) transcripts of the calls between the consumers and TPVs[58] demonstrate that consumers were not deceived;[59] and (2) Preferred's other efforts to stop misrepresentations and slamming bear on whether such misrepresentations actually occurred.[60] Additionally, Preferred contends that AT&T convinced consumers, including those whose complaints are cited in the *NAL*, to file untrue slamming complaints against Preferred.[61] Finally, the Company argues that the evidence is unreliable and that only a few complaints have been filed against it since the *NAL* was issued.[62] We reject these arguments. We specifically find that the complainants' statements constitute credible evidence of Preferred's misrepresentations resulting in the Section 201(b) violations and further determine that both older complaints (pre-dating the release of the *NAL*) and new complaints (received after the release of the *NAL*) corroborate this finding. Accordingly, we affirm the findings of the *NAL.*

18. First, we find that Preferred's telemarketers misrepresented Preferred's affiliation with the consumers' then-current carriers, and that the quickly posed questions during the TPV process did not provide enough information to consumers to make clear that Preferred was actually a separate entity from those providers.[63] Preferred explains that it hired telemarketers to solicit consumers to switch from their current carrier to Preferred.[64] After the telemarketer allegedly received the consumers' consent for a switch in carrier, the call was transferred to a TPV to verify the switch.[65] Preferred contends that the recordings and transcripts of the TPVs demonstrate "without question that the customers were well informed that they were agreeing to have their service provider changed to Preferred and that Preferred is a separate company" from their then-current carrier.[66] We find that the opposite is true and confirm our *NAL* finding that Preferred's "telemarketer claimed to be, or be affiliated with, the complainant's current long distance carrier."[67] As discussed in the *NAL*, the content of consumer complaints demonstrates that

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[57] *NAL*, 27 FCC Rcd at 16490–91, paras. 4–5.

[58] After a telemarketer convinces the consumer to change his or her long distance carrier, a third party verifier gets on the phone to "verify" that the consumer has in fact agreed to the change.

[59] *See* NAL Response at 3, 5.

[60] *Id.* at 6–14.

[61] *See, e.g., id*. at 18–20. Preferred repeatedly implies that AT&T somehow convinced these consumers to file slamming complaints. *Id*. However, such allegations are not only wholly unsupported by evidence, but also irrelevant to the issue of whether Section 201(b) violations occurred.

[62] *See* NAL Response at 15 ("[T]here is no reliable evidence that Preferred or anyone acting on Preferred's behalf made misrepresentations to consumers."); *see id.* at 20 ("[T]here is no evidence other than bare allegations in a modest number of consumer complaints . . . .").

[63] Preferred also argues that its call-back procedures and welcome letters should have clarified its identify to consumers. *Id.* at 17. For the reasons set forth below, we find this contention unconvincing and irrelevant to the Section 201(b) issue.

[64] *Id.* at 9.

[65] *Id*. at 11.

[66] *Id*. at 16; Supplemental NAL Response at 1–2.

[67] *NAL*, 27 FCC Rcd at 16490, para 4.

consumers were misinformed about the carrier change and not "well informed."[68] Complainants detailed such misinformation, with one explaining that Preferred "stated and reiterated multiple times that they were partnered with AT&T"[69] and another stating that she "was [c]alled by [Preferred] Long Distance who claimed they were now the authorized billing agent for [AT&T]."[70] Other complaints listed in the *NAL* contain similar descriptions of misrepresentation.[71] Moreover, these types of misrepresentations are ongoing, as evidenced by consumers complaints filed as recently as 2015 against Preferred with the FCC (as well as with other regulatory agencies and the Better Business Bureau) describing similar misrepresentations.[72]

19. Further, the evidence demonstrates that the telemarketers even misrepresented what the TPV's questions would mean and told consumers how to answer the questions. One complainant explained that, after being told by the telemarketer that they were "in partnership with AT&T," to "simply reply yes to any and all questions."[73] Another complainant sums up this misrepresentation tactic and demonstrates how the process was deliberately misleading, explaining that the Preferred telemarketer "stated that they were a sub-division of AT&T."[74] The telemarketer went on to tell the complainant that "during the verification process the [verifier] would say that [Preferred] is an independent company not

[68] *Id*. at 16490–91, para. 5.

[69] Complaint from J. Slotnick.

[70] Complaint from A. Russo.

[71] *See* Complaint from P. Almon ("This company represented themselves as our carrier, AT&T."); Complaint from A. Burton ("A representative called saying she was with AT&T and since we only had one line they had a separate company called Preferred that would be taking over small business accounts with less than 45 lines."); Complaint from G. Busch ("Carrier deceived me by misstating their association with AT&T."); Complaint from J. Dyer ("Preferred called and said they were a division of AT&T."); Complaint from W. Legler (stating that a telemarketer said they were "associated with AT&T."); Complaint from B. Schneider ("Preferred Long Distance called on behalf of AT&T."); Complaint from D. Smith ("I received a phone call on February 28, 2012 from a representative of Preferred Long Distance, Inc. He identified himself as representing AT&T."); Complaint from D. Williams ("I was told by Preferred that they were with AT&T."). The Commission has reviewed additional, similar complaints during the course of this investigation. *See, e.g.*, Complaint from M. Carter ("Preferred Long Distance called to offer discounts to [my] phone bill. Caller identified himself as Jason with AT&T . . . . I asked many times 'You're with AT&T' and Jason replied 'Yes.'"); Complaint from B. Jellinek (stating that the telemarketer "stated they were chosen by AT&T to be [her] local & long distance provider.").

[72] *See, e.g.*, Complaint from W. Felter ("Preferred fraudulently represented themselves as AT&T's selected partner to take over AT&T's fulfillment of local and long distance."); Complaint from C. Walton (explaining that Preferred "stated that they were affiliated with AT&T"); Complaint from L. Black ("I received a call . . . informing me that our phone bills could be lowered by having the billing done by Preferred Long Distance. I believed this call was on behalf of Century Link since I was told that all services would still be handled through Century Link. Only the billing would change to Preferred Long Distance."); Complaint from J&B Distributing Co. ("In January [2015] our company has been called from what they said was AT&T about the lower rates . . . . We didn't have any idea that we are switching."); Complaint from D. Kincaid ("I am now 82 years old and . . . asked . . . 'are you AT&T' I was assured that this was the AT&T."); Complaint from M & T Leo Associates ("This [Preferred] representative stated that an AT&T representative would come in on a 3 way call and confirm this information. This AT&T 'representative' confirmed the first representative's claims."); Complaint from L. Atkins ("[Preferred] calls and states 'this is AT&T calling and is urgent we discuss an important billing issue with the responsible person.'"); Complaint from J. Quinto ("[T]he rep indicated he was acting on behalf of AT&T to offer better prices to AT&T customers."); Complaint from N. Fecteau ("Preferred Long Distance [p]resented themselves as part of CenturyLink."); Complaint from S. Pouw ("[Preferred was [r]epresenting themselves as ATT and [misleading] our company to switch."); Complaint from P. Ford (stating that his phone carrier was changed without authorization and that Preferred Long Distance "call and act like they are the current phone system.").

[73] Complaint from L. Cohen.

[74] *See* Complaint from M. Tice.

affiliated with AT&T . . . . [and] this was true only in the fact that they were separate yet still part of AT&T—a sub-department—and that this was just a technicality required by the FCC."[75] We find that the statements made by the complainants to the Commission constitute credible evidence of Preferred's misrepresentations. For all of these reasons, we reject Preferred's argument that TPV transcripts demonstrate that consumers were not deceived and find, in fact, that the record demonstrates precisely the opposite.[76]

20. We also find that the TPV recordings of consumers have no bearing on whether a misrepresentation was made in the first instance (i.e., the initial call prior to the consumer being connected to the TPV). First, and most importantly, this argument suggests that a misrepresentation (or any practice found to be unjust or unreasonable) under Section 201(b) constitutes a violation only if a consumer is actually deceived or harmed. Section 201(b), however, has no requirement that a practice must create actual deception or harm in order to find that it is unjust and unreasonable.[77] All that is required to find a violation of Section 201(b) is an unjust or unreasonable practice made (in the instant case, that a misrepresentation was made) "in connection with" a communications service.[78] Second, even if the TPV calls cleared up misrepresentations that the Preferred telemarketers had sowed in the consumers' minds as to the identity of the carrier, the preceding violation of the Act could not be "cured" by the subsequent TPV. Regardless, the record in this case underscores that the TPV calls did not clear up the initial misrepresentation. Specifically, we find that the complaints themselves demonstrate that the TPVs did not cure or clarify the misrepresentations in the consumers' minds. In their complaints, the consumers allege that their carriers had been changed based on Preferred's misrepresentations and the recordings contain no evidence that consumers believed Preferred to be a separate entity. Accordingly, we reject the argument that the TPVs prove that the Company did not misrepresent itself to consumers or cure any misrepresentations that were made.

21. Second, we also reject Preferred's claims that its marketing practices, telemarketing safeguards, anti-slamming policies, and telemarketer contracts prevented misrepresentations and slamming, or in any way alleviated Preferred of its statutory and rule obligations.[79] Despite any alleged safeguards Preferred put in place, the facts demonstrate that these safeguards failed, and Preferred slammed 14 consumers, and made misrepresentations to 11 of those 14 consumers. When Preferred's rhetoric is removed, all that remains is an argument that its telemarketers allegedly violated a contract requiring them not to slam or make misrepresentations.[80] We find this argument unpersuasive and address it more fully below.

[75] *Id.*

[76] *See* NAL Response at 3 ("Preferred's telemarketing scripts, compliance plans, and third-party verification ('TPV') recordings demonstrate that it would be virtually impossible for a consumer to form a belief that Preferred is in any way affiliated with AT&T or any other telecommunications provider."); *see id.* at 5 ("[T]he TPVs provided by Preferred demonstrate that no such actual customer confusion existed at the time of the service change.").

[77] *See* 47 U.S.C. § 201(b).

[78] Moreover, enforcement matters arising under Section 503 likewise have no "actual harm" requirement—all that is needed to support a forfeiture penalty in a Section 503 proceeding is a determination that the Company has willfully or repeatedly failed to comply with a provision of the Act or an FCC order. *See* 47 U.S.C. § 503(b)(1)(B); s*ee also Madison Commc'ns, Inc*., Order, 8 FCC Rcd 1759, 1760, para. 7 (1993) ("The fact that no actual harm was demonstrated does not affect our determination that this was a serious violation justifying a significant forfeiture."). Furthermore, we note that forfeiture proceedings are distinct from complaint proceedings. The issue of whether consumers are deceived by a misrepresentation may be relevant in a complaint proceedings in determine the amount of damages, but that issue is not necessarily relevant in the enforcement context. In the enforcement context fines for wrongful conduct are assessed to protect the public, as opposed to damages assessed in the complaint context to make a particular member of the public whole.

[79] *See* NAL Response at 6–15.

[80] *See id*. at 9–11.

22. Third, we reject Preferred's argument that the complaints were instigated by AT&T in connection with its "winback" program and therefore not due to any fault of Preferred.[81] Preferred contends that, in each of the 11 complaints alleging misrepresentation, "it is only after [the complainants] have spoken with an AT&T winback representative and switch away from Preferred's service that they decide to file an informal complaint."[82] Preferred concludes that because the 14 complaints that form the basis of the *NAL* are all from former AT&T customers, not CenturyLink customers,[83] they are "inconsistent with widespread misrepresentation."[84] We disagree. As an initial matter, Preferred itself admits that this theory "is difficult to prove," and notes that it has only "anecdotal evidence of such efforts by winback personnel working on behalf of AT&T."[85] Anecdotal evidence does not undercut the substance of the complaints. Namely, while each of the 11 of the complaints alleging misrepresentation involve AT&T customers, each complaint is not only detailed, but consistent without being duplicative. For example, complainants described misrepresentations that Preferred was "AT&T,"[86] a "sub-division" or "division" of AT&T,[87] "partnered" with AT&T,[88] "associated" with AT&T,[89] and the "billing agent" for AT&T.[90] Besides which, in other complaints against Preferred, [some/all] of which were served on Preferred by CGB but which are not included in the *NAL*, the misrepresentation involved CenturyLink customers, not AT&T customers.[91] Preferred's allegation that AT&T encouraged the complainants to file complaints is not supported by the evidence in the record or the consumers' characterizations in the complaints. Finally, even if true, AT&T's encouragement after the fact does not refute evidence that Preferred misrepresented its identity or the purpose of its sales call.[92]

23. Fourth and finally, Preferred's argument about the relative number of complaints against it is not relevant to whether the complaints that support the *NAL* are reliable.[93] The *NAL* addresses 11 complaints in which Preferred's telemarketers misrepresented their identity during the sales call.[94] As

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[81] NAL Response at 18–21.

[82] Second Supplemental NAL Response at 2. Preferred also speculates that AT&T "has a practice of encouraging consumers to file complaints with the Commission alleging 'misrepresentation' in order to get refunds." NAL Response at 18.

[83] Preferred contends that "roughly 20% of Preferred's customer base emanates in the CenturyLink LEC footprint." NAL Response at 19.

[84] *Id.* at 19.

[85] Supplemental NAL Response at 3.

[86] Complaint from P. Almon; Complaint from A. Burton; Complaint from B. Schneider; Complaint from D. Smith; Complaint from D. Williams.

[87] Complaint from J. Dyer; Complaint from M. Tice.

[88] Complaint from J. Slotnick.

[89] Complaint from G. Busch; Complaint from W. Legler.

[90] Complaint from A. Russo.

[91] *See, e.g.*, Complaint from J. St. Hilaire; Complaint from C. Wagner; Complaint from L. Diel; Complaint from L. Black; Complaint from N. Fecteau.

[92] Preferred contends that it would owe AT&T $150 for each slamming complaint. NAL Response at 20. We recognize that in the slamming contractual relationship, the third party (i.e., Preferred), its billing aggregator, and the billing LEC all are compensated when a consumer is slammed, and the billing LEC may also charge the third party for each slamming complaint, as Preferred has alleged. While this may provide financial incentive for the billing LEC to encourage slammed consumers to file complaints, there is no evidence that AT&T engaged in misrepresentation or that the consumer complaints are not valid.

[93] NAL Response at 14–15, 20.

[94] *NAL,* 27 FCC Rcd at 16490–91, para. 5.

discussed above, these 11 complaints are detailed, consistent but not duplicative, and specific. In addition to these 11 complaints, other complaints that predate the adoption of the *NAL* further corroborate the *NAL* complaints. While these other slamming complaints did not form the basis for the proposed forfeiture (because the alleged slams took place more than 12 months prior to adoption of the *NAL*[95]), they nonetheless demonstrate Preferred's longstanding deceptive practices and involved both AT&T and Century Link customers.[96] Preferred had been served with all of those complaints and filed responses to them.

24. Moreover, there is no evidence that Preferred's use of misrepresentations to slam consumers has abated since the issuance of the *NAL*. Even though Preferred knew about the pre-*NAL* complaints and has been informed of all of the complaints cited in the *NAL*, additional consumers have complained *after* the release date of the *NAL*. These consumers allege similar misrepresentations by Preferred and demonstrate that Preferred persisted in engaging in deceptive practices after the date of the *NAL*.[97] Despite Preferred's claims to the contrary, stating that, since it changed its TPV scripts it has received only one complaint after the *NAL* was issued,[98] these more recent complaints suggest that Preferred's telemarketers continue to engage in the misrepresentations discussed in the *NAL*. As Complainant Schaefer explains in a 2013 complaint: "They attempt to present themselves as AT&T (the representatives have even gone so far as to say that they ARE, in fact, AT&T employees) and attempt to harvest information, such as names, number of lines, location, etc."[99] Accordingly, we reject Preferred's arguments that no misrepresentations were made to consumers, and affirm the findings in the *NAL*.

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[95] Section 503(b)(6) empowers the Commission to propose a forfeiture penalty for violations that occurred within one year preceding the issuance of an NAL.

[96] *See, e.g*., Complaint from L. Black ("I received a call . . . informing me that our phone bills could be lowered by having the billing done by Preferred Long Distance. I believed this call was on behalf of Century Link since I was told that all services would still be handled through Century Link. Only the billing would change to Preferred Long Distance."); Complaint from M. Carter ("Preferred Long Distance called to offer discounts to [my] phone bill. Caller identified himself as Jason with AT&T . . . . I asked many times 'You're <u>with</u> AT&T' and Jason replied 'Yes.'"); Complaint from B. Jellinek (Telemarketer "stated they were chosen by AT&T to be [her] local & long distance provider.").

[97] *See, e.g*., Complaint from C. Altier ("[I]n the sales portion of the call I was told that they were calling on behalf of AT&T."); Complaint from T. Benecke ("I received a call from this company stating they were AT&T and they reviewed our accounts."); Complaint from L. Cohen (Preferred's telemarketer said they were "in partnership with AT&T" and instructed the manager "to simply reply yes to any and all questions."); Complaint from L. Diel (telemarketer represented himself "as an authorized Century Link company."); Complaint from B. DeGrazio (in Nov. 2012 she was contacted by "AT&T for preferred customers."); Complaint from E. Jefferson ("contacted by someone who said they were working with ATT long distance called Preferred Long Distance."); Complaint from R. Mayfield ("Preferred told her they were with AT&T and we were such good customers that they were going to lower our bill."); Complaint from C. Owens (telemarketers stated "they were with my current company, AT&T."); Complaint from R. Weeks (telemarketer "stated that he was with AT&T and was calling to verify the changes we had just made with AT&T."); Complaint from J. St. Hilaire ("The rep led me to believe that she was representing Century Link . . . . [S]he instructed me that a person would block her from the call and ask me questions and that they would be confusing and I should only say yes to everything or we would have to start the whole process over.").

[98] NAL Response at 14–15.

[99] Complaint from N. Schaefer (filed Apr. 18, 2013). *See also* Complaint from P. Ford (filed Mar. 17, 2015) (stating that his phone carrier was changed without authorization and that Preferred Long Distance "call and act like they are the current phone system."); Complaint from S. Swibel (filed May 1, 2015) (stating he was "contacted by an organization that claimed to be AT&T," but later discovered he "was not speaking with AT&T" when he received a bill with "unexpected charges from Preferred Long Distance").

3. Preferred is responsible for violations of Section 201(b) committed by third parties acting on its behalf.

25. Preferred's final argument in support of its claim that it did not violation Section 201(b) is that if any misrepresentations were made, those misrepresentations were made by third parties outside the scope of their contracts. We reject this argument.

26. As a carrier, Preferred is responsible for the conduct of third parties acting on its behalf, including third-party marketers.[100] Licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors.[101] However, the Company has been on notice of various shortcomings in the actions of third parties acting on its behalf—shortcomings that have resulted in slams—prior to being served the complaints that support this *NAL*.[102] Moreover, Preferred's misrepresentations have continued in the years following the *NAL*.[103] The Company has been on notice of such misrepresentations and cannot continue to claim that it was unaware of its telemarketers' misrepresentations or that such misrepresentations are outside the scope if its contracts. Given this notice prior to the *NAL*, if Preferred's telemarketers breached their contract, that is a dispute between Preferred and its telemarketers,[104] and not a defense to a statutory or rule violation.

C. The Forfeiture Amount Proposed in the *NAL* is Appropriate

27. Finally, Preferred argues that, in the alternative and because of the "great lengths" the company goes to in order to comply with Commission rules, the Commission should "radically reduce any proposed forfeiture to the extent the Commission truly believes that Preferred has inappropriately changed a consumer's service (which it has not)."[105] We reject this argument and affirm the full proposed forfeiture of $1,440,000.

28. 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.[106] At the time the violations at issue in the instant case took place, Section 503(b)(2)(B) of the Act and Section 1.80 of the Commission's rules authorized the Commission to assess a forfeiture of up to $150,000 for each violation, or each day of

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[100] *See* 47 U.S.C. § 217 (". . . the act, omission, or failure of any . . . agent [ ] or other person acting for or employed by any common carrier . . . , acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier . . . ."); *see also Long Distance Direct, Inc*., Memorandum Opinion and Order, 15 FCC Rcd 3297, 3300–01, para. 9 (2000); *Silv NAL*, 25 FCC Rcd at 5180, para. 5 & n.18.

[101] *See Eure Family Ltd. P'ship*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863–64, para. 7 (2002) (citing *Am. Paging, Inc. of Virginia*, Memorandum Opinion and Order, 12 FCC Rcd 10417, 10420, para. 11 (Wireless Bur. 1997) (quoting *Triad Broad. Co., Inc*., Memorandum Opinion and Order, 96 FCC 2d 1235, 1244, para. 21 (1984))). *See also Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, et al*., Declaratory Ruling, 28 FCC Rcd 6574 (2013) (clarifying that, in the TCPA context, a non-common carrier seller may be held vicariously liable under federal common law principles of agency for violations of Sections 227(b) and (c) of the Act that are committed by third-party telemarketers).

[102] *See, e.g*., *Preferred Long Distance, Inc*., Order, 27 FCC Rcd 9016 (CGB 2012); *Preferred Long Distance, Inc*., Order, 26 FCC Rcd 6265 (CGB 2011); *Preferred Long Distance*, Order, 24 FCC Rcd 5063 (CGB 2009).

[103] *See supra* para. 15.18. *See also, e.g*., Complaint from R. Mentzel, filed Nov. 2, 2011 (Preferred "called claiming to be AT&T Preferred . . . so I thought it was AT&T. I asked them and they said they were part of AT&T . . . . [After receiving a bill] I then realized they were not AT&T.").

[104] *See* NAL Response, Exh. B, Preferred Long Distance, Inc.'s Standard Telemarketing Contract, para. 8 ("TM agrees to indemnify and hold harmless Preferred . . . from any losses, claims, damages, judgment . . . .").

[105] *Id.* at 29-30.

[106] 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

a continuing violation, up to a statutory maximum of $1,500,000 for a single act or failure to act by common carriers.[107] In exercising our forfeiture authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[108]

29. As stated in the *NAL*, we find Preferred's actions egregious, as evidenced by the fact that it repeatedly engaged in misrepresentation and changed consumers' preferred long distance providers without properly verifying their authorization.[109] Preferred failed to follow the Commission's TPV requirements in 14 cases, and for 11 of those 14 cases Preferred misled consumers into believing that the company was calling on behalf of their current carrier. This is the same type of misrepresentation we have found to be particularly egregious in other investigations.[110] Carriers have long been on notice that such misrepresentations to consumers may result in substantial forfeiture amounts.[111] While Preferred has argued that its marketing practices, telemarketing safeguards, anti-slamming policies, and telemarketer contracts prevented misrepresentations and slamming, [112] we find that its alleged safeguards were ineffective. Preferred's claims do not outweigh the weight of evidence, and are further undercut by the ongoing slamming complaints made by consumers; as such, they do not lessen Preferred's degree of culpability or warrant reduction of the forfeiture amount. We find that the proposed forfeiture of $40,000 for each of the 14 unauthorized carrier changes and an upward adjustment to $120,000 for each of the 11

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[107] *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).

[108] 47 U.S.C. § 503(b)(2)(E). *See also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17100, para. 27 (1997), *recon denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

[109] *NAL*, 27 FCC Rcd at 16495, para. 15.

[110] *See, e.g.*, *BDP*, 15 FCC Rcd at 14462, para. 3 (finding that telemarketer told consumers that it was affiliated with the consumers' existing carrier); *Silv NAL*, 25 FCC Rcd at 5182, para. 7 (stating that telemarketer told consumers that they were changing to another plan offered by their current carrier or that they were just verifying information about the current account). *See also USTLD NAL*, 29 FCC Rcd at 836, para. 25 (stating that telemarketer claimed to be, or be affiliated with, the consumer's current carrier); *CTI NAL,* 28 FCC Rcd at 17208, para. 27 (same); *Advantage NAL*, 28 FCC Rcd at 6856, para. 30 (same); *United NAL*, 27 FCC Rcd at 16506, para. 18 (same).

[111] *See Central Telecom Long Distance, Inc*., Notice of Apparent Liability, 29 FCC Rcd 5517, 5531, para. 28 (2014); *USTLD NAL*, 29 FCC Rcd at 837, para. 27; *Advantage NAL*, 28 FCC Rcd at 6855–56, para. 30; *Silv NAL*, 25 FCC Rcd at 5186 ("The Commission has warned carriers that it would take swift and decisive enforcement action, including the imposition of substantial monetary forfeitures, against any carrier found to have engaged in slamming."); *Brittan Commc'ns Intern. Corp*., Notice of Apparent Liability, 15 FCC Rcd 4852, 4855, para. 8 (2000) ("We seek to deter companies from engaging gin the illegal act of slamming and will employ the necessary forfeiture penalties to encourage compliance with Commission rules and orders.").

[112] *See* NAL Response at 6–14.

unauthorized changes involving misrepresentation was appropriate given the nature, circumstances, extent, and gravity of the violations.

30. Accordingly, we affirm the forfeiture of $1,440,000 proposed in the *Preferred NAL* for Preferred's willful and repeated violations of Sections 201(b) and 258 of the Act and Section 64.1120 of the Commission's rules.

IV. CONCLUSION

31. We have reviewed Preferred's arguments and find no reason to cancel, withdraw, or reduce the proposed forfeiture. Not only has Preferred failed to rebut the evidence against it upon which the *NAL* is based, but recent complaints from consumers also indicate that the egregious conduct at issue in the *NAL* is continuing. Based on the record before us and in light of the applicable statutory factors, we conclude that Preferred willfully and repeatedly violated Sections 201(b) and 258 of the Act and Section 64.1120 of the Commission's rules and we therefore affirm the $1,440,000 forfeiture proposed in the *NAL*.

V. ORDERING CLAUSES

32. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,[113] and Section 1.80 of the Rules,[114] that Preferred Long Distance, Inc., **IS LIABILE FOR A MONETARY FORFEITURE** in the amount of one million four hundred forty thousand dollars ($1,440,000) for willfully and repeatedly violating Sections 201(b) and 258 of the Act and Section 64.1120 of the Rules.

33. 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.[115] 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.[116]

34. 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. Preferred Long Distance, 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.[117] 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.

[113] 47 U.S.C. § 503(b).

[114] 47 C.F.R. § 1.80.

[115] *Id.*

[116] 47 U.S.C. § 504(a).

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

- Payment by credit card must be made by providing the required credit card information on FCC From 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

35. Any request for making 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.[118] 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.

36. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Michael B. Hazzard, Attorney for Preferred Long Distance, Inc., Arent Fox, LLP, 1717 K Street, NW, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[118] *See* 47 C.F.R. § 1.1914.

STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART

Re: *Preferred Long Distance, Inc.*, File No.: EB-TCD-12-00003409.

The evidence in front of the Commission indicates that Preferred Long Distance, Inc., as part of its efforts to convince consumers to switch telephone carriers, misrepresented its relationship with their local telephone company. The Commission should take such deception seriously, and as a result, I agree with our decision to impose a forfeiture of $880,000 for violations of section 201(b) of the Communications Act.

However, I cannot support levying an additional $560,000 forfeiture for purported violations of our slamming rules. The Commission complains that Preferred's third-party verifier (TPV) "merely verified the telephone numbers that were associated with the business or residence when, under the Rules, the company was required to elicit the telephone numbers to be switched."[1] But the TPV did more than that. Not only did the TPV ask the customer to verify the relevant telephone number, it then asked the customer whether he or she authorized Preferred to switch his or her "telephone service for this one number."[2] And given that the telephone number verified by the customer, up to that point, was the *only* number that had been mentioned during the conversation with the TPV, I can't see how there was any confusion about the phone number for which the consumer was consenting to switch service.

To the extent that the Commission is arguing that the TPV did not have the consumer recite the telephone number to be switched but instead asked him or her to confirm the number to be switched, I have my doubts that this distinction matters for purposes of our slamming rules. But assuming for the sake of argument that it does, I do not believe that such conduct warrants the amount of the forfeiture that the Commission imposes here. It is not appropriate to assess $40,000 per violation both when companies switch consumers' telephone service *without any consent whatsoever* and when they ask consumers to confirm the phone number to be switched (rather than having consumers to spell out the relevant digits). The former "violation" is much more serious than the latter.

[1] *See Order* at note 15.

[2] *See, e.g.*, TPV Recording of A. Burton (File No. 12-s3321288).

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: Preferred Long Distance, File No. EB-TCD-12-00003409

Today the Commission adds another layer to its dubious wall of precedent that uses section 201 as an independent basis to regulate conduct that is already covered by a specific provision of the Act. Not surprisingly, these additions are often done through enforcement actions, which are less likely to be challenged by the target. Moreover, by proceeding in this manner, the Commission is counting on the fact that most companies will not even be aware that this wall is being constructed until they run into it. By that time, the Commission will have a string of citations ready to deploy to "prove" that section 201 covers whatever conduct is disfavored at that time.

In this particular Forfeiture Order, the Commission penalizes a company for slamming, which is changing a person's long distance carrier without the person's authorization. Congress generally prohibited that conduct in section 258 and directed the Commission to adopt rules for verifying that carrier changes are authorized. To be sure, this item briefly concludes that the company did not follow those rules, but I disagree with that assessment.

The recordings of the Third Party Verification (TPV) process show that the verifications were not rushed and quite clear. Subscribers are told that they could speak up at any time if anything they are hearing is incorrect or does not match what Preferred Long Distance's representative previously stated. And the verifier pauses between each step to elicit a clear response. In several cases, the subscribers do speak up to correct a name or to ask for something to be repeated.

Critically, while the exact wording varies slightly each time, the verifiers plainly state that Preferred Long Distance is not affiliated with the local telephone company and is separate from and/or competes with the local telephone company. This information is repeated again during the callback to complete the verification. Moreover, where only long distance service is being changed, the verifiers take care to note that while long distance charges will be added to the local provider's bill, the two companies are not related.

The only conceivable flaw is that section 64.1120(c)(3)(iii) requires the verifier to elicit the telephone numbers to be switched. Here the verifiers confirm, several times, that the telephone numbers to be transferred are the numbers or lines "associated with your business". The subscribers do not state the actual digits, but it is not clear that is required by the rule. Since it seems clear that the subscribers knew which lines were being transferred, I do not find this to be a violation.

Most of the analysis, and the resulting fine, however, is attributable to supposed violations of section 201. There is no good reason for that. If a company violated section 258, which was not the case here, then it should be fined as appropriate under that section. Layering on further penalties, as if that somehow makes a company extra guilty, or to achieve a bigger penalty, should not be the goal. Rather, the purpose of enforcement is to achieve compliance with the rules, and that can be done without this surplusage.

It would seem to me that if a company misrepresents itself, then the change is not properly authorized. Moreover, the purpose of adopting the detailed TPV requirements was to correct any misrepresentations that may have been made by a provider or its telemarketer. But if some are concerned that misrepresentations made during the course of a slam are somehow not covered by the Commission's slamming rules, or that the TPV process is not performing as intended, then the Commission has the authority to do that through a rulemaking proceeding. There is no need to invoke section 201's prohibitions on unjust and unreasonable practices to boot.

Indeed, invoking section 201 directly causes more problems for the Commission because it has to defend, rather weakly, why it has no rules. And it has had to do this time and time again. It seems like it would be less of burden to simply conduct a rulemaking to put in place whatever regulations the Commission thinks may be necessary.

But, of course, that is not actually the point of this exercise. The Commission simply wants to preserve its right to use section 201 at any time and for any reason. Today it is supposed misrepresentation associated with slamming. Tomorrow it could be alleged misrepresentation connected with terms and conditions or privacy and security. I object to this charade and I must dissent.