

**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 a 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 to be 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.