

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Locus Telecommunications, Inc.)	File No.: EB-TCD-12-00000452
)	NAL/Acct. No.: 201132170025
)	FRN: 0010729515

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 2016

Released: October 28, 2016

By the Commission: Chairman Wheeler issuing a statement; Commissioners Pai and O’Rielly dissenting and issuing separate statements.

I. INTRODUCTION

1. We dismiss in part and deny in part the Petition for Reconsideration filed by Locus Telecommunications, Inc. (Locus) seeking reconsideration of a Forfeiture Order issued by the Commission. In the Forfeiture Order, the Commission imposed a forfeiture of \$5,000,000 against Locus for deceptively marketing its prepaid telephone calling cards through misleading, confusing, and inadequate disclosures of its rates and charges that made it impossible for consumers to calculate the actual cost of a call.

2. Upon review of the Petition for Reconsideration¹ and the entire record,² we find no basis for reconsideration. A petition for reconsideration that relies on facts or arguments that have been fully considered and rejected by the Commission within the same proceeding may be dismissed.³ Locus’s Petition for Reconsideration fails to present new facts or arguments warranting reconsideration, and we do not find that reconsideration is otherwise required in the public interest. As explained below, we dismiss Locus’s arguments to the extent they were previously raised and rejected by the Commission in the Forfeiture Order and deny Locus’s other arguments on their merits for failing to demonstrate a material error or omission. We therefore dismiss in part and deny in part Locus’s Petition.

¹ Locus Telecommunications, Inc., Petition for Reconsideration (Nov. 20, 2015) (on file in EB-TCD-12-00000452) (Petition).

² The Forfeiture Order and Notice of Apparent Liability for Forfeiture include more complete discussions of the facts and history of this case and are incorporated herein by reference. *Locus Telecommunications, Inc.*, Forfeiture Order, 30 FCC Rcd 11805 (2015) (Forfeiture Order); *Locus Telecommunications, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12818 (2011) (NAL).

³ 47 CFR § 1.106(p) (providing that petitions for reconsideration of a Commission action that “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding” may be dismissed because they “plainly do not warrant consideration by the Commission”); *see also* 47 CFR § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257, para. 2 (EB 2000). A Petition for Reconsideration may be granted when the Commission determines that consideration of the facts or arguments raised by the petitioner is in the public interest. 47 CFR § 1.106(c)(2). However, unless a petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters, a petition for reconsideration may be dismissed. *See* 47 CFR § 1.106(c).

II. DISCUSSION

A. The Commission Properly Exercised Jurisdiction over Locus's Prepaid Calling Card Marketing Practices

3. In its Petition,⁴ Locus reprises arguments it previously raised with the Commission in response to the Notice of Apparent Liability for Forfeiture (NAL)⁵ that the Commission lacks jurisdiction over its marketing practices under Section 201(b) of the Communications Act of 1934, as amended (Act).⁶ Locus again contends that Section 201(b)'s prohibition on unjust and unreasonable practices does not cover marketing of prepaid calling cards.⁷ In addition, Locus repeats its claim that the Commission cannot impose liability against it in the absence of specific Commission rules regarding prepaid calling card marketing.⁸ Locus also rehashes its argument that it did not sell its prepaid calling cards on a common carriage basis and, consequently, falls outside the scope of Section 201(b).⁹

1. Section 201(b) and Commission Rules

4. These arguments were already considered by the Commission and rejected in the Forfeiture Order. In the Forfeiture Order, we stated not only that "Section 201(b) reaches deceptive marketing – including the practices Locus engaged in,"¹⁰ but also that Section 201(b) extends to Locus's actions "even in the absence of implementing rules."¹¹ Locus contends that the Commission erred in the Forfeiture Order by "merely referr[ing]" to its rationale in rejecting jurisdictional claims raised by STi Telecom Inc. (STi) in a contemporaneous proceeding to reject Locus's comparable arguments.¹² Locus suggests that referencing the STi proceeding shows the Commission "failed to consider the unique arguments Locus raised in challenging the FCC's exercise of jurisdiction."¹³ We disagree. The Forfeiture Order appropriately relied on the explanation in the companion STi Order, which reached certain generally applicable legal conclusions regarding the application of Section 201(b) to deceptive marketing.

⁴ Many of Locus's jurisdictional arguments overlap with the due process challenges made in its Petition. *Compare* Petition at 6-16, *with id.* at 16-21. We address Locus's arguments related to the Commission's authority over its marketing practice under the Act in this section and address Locus's claim that it lacked fair notice of the marketing disclosures required from prepaid calling card providers along with its other due process claims below. *See infra* Section II.B.

⁵ *See* Locus Telecommunications, Inc., Request for Rescission of Notice of Apparent Liability (Oct. 21, 2011) (on file in EB-TCD-12-00000452) (NAL Response).

⁶ *See* Petition at i, 6-16; 47 U.S.C. § 201(b).

⁷ Petition at 6-12; NAL Response at 15-19.

⁸ Petition at 6, 8; NAL Response at 16-18.

⁹ Petition at 12-16; NAL Response at 3-15. The dissenters raise the same or similar arguments that they raised in response to the Forfeiture Order. Those arguments were addressed in the Forfeiture Order, as supplemented by this item. In addition, we note that there is no merit to the claim that it was "arbitrary" for the Commission to have "settled on 125 cards and 5 million dollars" in each of the four forfeiture orders addressed, collectively, in the dissent. Even if the four relevant companies were of different sizes and sold different cards in different numbers, the Commission assessed the specific record before it in each case, and in each case reasonably inferred that the company committed at least 125 violations; the Commission then calculated a forfeiture amount equivalent to a base forfeiture applied to 125 violations. *See, e.g.*, Forfeiture Order, 30 FCC Rcd at 11813, para. 19 & n.68. Far from being arbitrary, this was a lawful exercise of the Commission's discretion that was grounded in the specific record before it in each case.

¹⁰ Forfeiture Order, 30 FCC Rcd 11807, para. 6.

¹¹ *Id.* (citing *STi Telecom Inc. (formerly Epana Networks, Inc.)*, Forfeiture Order, 30 FCC Rcd 11742 (2015) (*STi*)).

¹² Petition at 6-7.

¹³ *Id.* at 7.

Most of Locus's jurisdictional arguments (excepting only its common carrier status argument, discussed below), including its claims that Section 201(b) does not apply to prepaid calling card marketing and that the Commission must promulgate specific rules in order to take enforcement action, are not unique and were raised by a number of other prepaid calling card providers (including STi) and rejected by the Commission.¹⁴ In addition, these jurisdictional arguments represent generic, non-party-specific questions of law that were already addressed in the Forfeiture Order, not fact-specific determinations based on Locus's particular marketing practices.¹⁵ Thus, the Commission validly concluded in *STi* that Section 201(b) addresses deceptive marketing practices by providers of prepaid calling cards. The fact that Locus did not have access to STi's NAL Response does not disturb this precedent. As a result, the references to the STi proceeding in the Forfeiture Order served to explain the Commission's jurisdiction over deceptive advertising practices under Section 201(b), not supplant our consideration of the NAL Response, and addressed Locus's comparable jurisdictional arguments.¹⁶

2. Common Carrier Status

5. The only jurisdictional argument presented by Locus that arguably implicates "unique" facts relating to its business practices is its claim that it did not sell its prepaid calling cards on a common carriage basis.¹⁷ However, Locus previously made this argument in response to the NAL¹⁸ and, as Locus recognizes in its Petition,¹⁹ the Commission already fully addressed this argument in the Forfeiture Order and rejected it.²⁰ The Commission found that "Locus is a common carrier engaged in the business of providing telecommunications service to consumers in the form of prepaid calling cards and, therefore, its advertising for such calling cards is subject to Section 201(b) of the Act."²¹ Locus set destination rates, controlled "the number of minutes for which the cards [could] be used," designed the cards and contracted with printers to print cards and advertising posters, retained final approval of designs and marketing materials, operated the customer service center, and issued "refunds and credits directly to customers who purchase[d] the cards."²² While an entity "can be a common carrier with regard to some activities but not others,"²³ we found that Locus's sale of "prepaid calling cards through a national distributor network"²⁴ constituted a common carrier service and "d[id] not change Company's legal

¹⁴ See *Touch-Tel USA, LLC*, Forfeiture Order, 30 FCC Rcd 11730, 11732, para. 6 & nn.19-20 (2015) (citing *STi*); *Simple Network, Inc.*, Forfeiture Order, 30 FCC Rcd 11765, 11767, para. 6 & nn.19-20 (2015) (same); *NobelTel, LLC*, Forfeiture Order, 30 FCC Rcd 11779, 11781, para. 6 & nn.23-24 (2015) (same); *Lyca Tel, LLC*, Forfeiture Order, 30 FCC Rcd 11792, 11794, para. 6 & nn.18-19 (2015) (same).

¹⁵ See *NOS Commc'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133, 8136, para. 6 (2001) (finding deceptive marketing can "constitute unjust and unreasonable practices under [S]ection 201(b)") (*NOS NAL*); *STi*, 30 FCC Rcd at 11750-51, paras. 16-18 (finding Section 201(b) declares unjust and unreasonable marketing practices unlawful without the need for implementing regulations).

¹⁶ See Forfeiture Order, 30 FCC Rcd at 11807, para. 6 (citing *STi*, 30 FCC Rcd at 11744-47, 11750-51, paras. 7-11, 16-18).

¹⁷ Petition at 12-16.

¹⁸ NAL Response at 3-15 (arguing both that its distributors were not its agents and that it did not offer prepaid calling cards on a common carriage basis).

¹⁹ Petition at 6.

²⁰ Forfeiture Order, 30 FCC Rcd at 11807-09, paras. 7-9 & n.42 (finding that Locus's agency argument failed and that it exerted sufficient control over minutes, designs, access numbers, and marketing materials such that, even though using distributors, it was in a common carrier relationship with the consumers of its prepaid calling cards).

²¹ *Id.* at 11809, para. 9.

²² *Id.* at 11808-09, para 9.

²³ *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976); Petition at 13.

²⁴ Forfeiture Order, 30 FCC Rcd at 11806, para. 2.

status” as a common carrier.²⁵ Locus states that the Commission erred by finding that its sale of calling cards directly to consumers through its website was “dispositive” of its common carrier status.²⁶ However, the Commission also stated that it still would have concluded that Locus operated as a common carrier “[e]ven if the Company did not sell cards directly to the public on its website”²⁷ Moreover, the prepaid calling cards at issue in this case provided international toll voice service – a service that has long been understood to require Section 214 authorization because it may be offered only on a common carriage basis.²⁸ We therefore find no basis to reconsider our prior determinations and find that the Commission properly exercised jurisdiction over Locus’s prepaid calling card marketing practices under Section 201(b) of the Act.

B. The Forfeiture Order Satisfied Due Process Requirements

6. Locus also repeats the argument it raised with the Commission in response to the NAL that the Commission denied it due process by relying on purportedly “non-binding precedent” when assessing the marketing disclosures required from prepaid calling card providers.²⁹ Locus asserts that the joint FCC/FTC Policy Statement regarding telecommunications offerings and the standard articulated by the Commission in the *NOS NAL* (and applied to it in the NAL) – that advertising denoting applicable rates associated with telecommunications services violates Section 201(b) where it does not include clear and conspicuous disclosures that allow consumers to calculate the cost of a call – did not provide notice to Locus of what marketing activities were prohibited.³⁰

²⁵ *Id.* at 11808-09, para. 9.

²⁶ Petition at 12, 19.

²⁷ Forfeiture Order, 30 FCC Rcd at 11808, para. 9 & n.42. Indeed, the Commission referenced numerous indicia of control exercised by Locus over its calling cards that supported its common carrier status. *See id.* (noting that Locus exercised “ultimate control” over the number of minutes for which its cards could be used and the marketing materials for its cards).

²⁸ *See, e.g., Unipoint Techs., Inc.*, Forfeiture Order, 29 FCC Rcd 1633, 1637-38, paras. 14-16 (2014) (citing *Time Machine, Inc.*, 11 FCC Rcd 1186, 1190, para. 25 (Com. Car. Bur. 1995)); *see generally Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531 (D.C. Cir. 2007); *Regulation of Int’l Common Carrier Servs.*, Report and Order, 7 FCC Rcd 7331 (1992); *Cincinnati Bell Tel. Co. Tariff FCC No. 35*, Memorandum Opinion and Order, 6 FCC Rcd 3501 (1991). The prepaid calling card services at issue in this case remain a common carrier service, even when sold through resellers. *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, Report and Order, 60 FCC2d 261 (1976). The Commission has explained that “resale of communications service is a common carrier activity” and that “an entity engaged in the resale of communications service is a common carrier” that is “fully subject to the provisions of Title II of the Communications Act.” *Id.* at 265, 308, paras. 8, 102. The Commission went so far as to state that, “with the exception that some resellers may not own any transmission plant, we perceive no difference between resale and traditional communications common carriage.” *Id.* at 308, para. 101. In finding that resellers were also common carriers, the Commission contemplated a host of brokers and other “middlemen” who buy common carrier services and then sell them on a resale basis, including middlemen like Locus. *See id.* at 272, para. 19.

²⁹ Petition at 8-12, 16-21; NAL Response at 16-22, 25-29. Locus also states that other Commission precedent cited in support of the NAL is distinguishable from its conduct. *Id.* at 11-12. Locus is mistaken. Attempts to distinguish the cases are unavailing because the Commission’s findings did not hinge on any differences in the industries involved or the services offered, but rather focused on whether sufficient information was provided to consumers. *See NAL*, 26 FCC Rcd at 12820, para. 7 & n.13 (citing *NOS NAL*; *Telecomms. Research & Action Ctr. & Consumer Action*, Memorandum Opinion and Order, 4 FCC Rcd 2157 (Com.Car. Bur. 1989); *Bus. Disc. Plan, Inc.*, Order of Forfeiture, 15 FCC Rcd 14461 (2000), *recon. granted in part and denied in part*, 15 FCC Rcd 24396 (2000)). Thus, the focus of the conduct at issue in these cases was whether or not the content of marketing and advertising information provided accurate information to consumers, not on any potentially unique aspects of post-paid services. As such, we reject Locus’ attempt to distinguish these cases.

³⁰ Petition at 16-18 (citing *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long Distance Services to Consumers*, Policy Statement, 15 FCC Rcd 8654 (2000); *NOS NAL*).

7. As an initial matter, we note that the Commission did not base its violation findings on the Policy Statement. Instead, the Commission based its violation findings on Section 201(b) of the Act, *as informed by* the Policy Statement and the *NOS NAL*.³¹ As stated above, the Commission has jurisdiction to enforce the Act’s deceptive marketing prohibition on prepaid calling card providers like Locus under Section 201(b).³² Moreover, we are not persuaded by Locus’s argument that the *NOS NAL* “carries absolutely no precedential weight” because the Commission ultimately resolved the matter through settlement. The relevant legal issue here is not the “precedential weight” of the *NOS NAL*, but rather whether it provided fair notice to Locus. As we explained in the Forfeiture Order, the Commission clearly set forth the advertising requirements associated with telecommunications services in the *NOS NAL* – including the importance of not misleading consumers about the applicable rates for telecommunications services by ensuring that service providers include “clear and conspicuous disclosure on how to calculate the total cost of a call.”³³ The mere fact that the Commission ultimately resolved the *NOS NAL* through settlement “does not undermine the value of [it] in providing fair notice.”³⁴ The Commission previously determined that the finding in the *NOS NAL*, coupled with the language of Section 201(b), “provides a person of ordinary intelligence with fair notice of the conduct that is required” from calling card providers.³⁵ We find no basis to reconsider our prior findings here.³⁶ We therefore find that the Commission’s investigation of Locus for deceptive marketing of prepaid calling cards did not violate due process requirements.³⁷

C. The Commission Provided Sufficient Specificity as to Locus’s Violations and Support for the Forfeiture Amount

8. Locus concludes its Petition with a laundry list of repetitive arguments challenging the sufficiency of the evidence supporting the Commission’s violation findings and the forfeiture amount.³⁸ Locus argues that the *NAL* and Forfeiture Order lacked the requisite specificity under Section 503(b)(4)

³¹ See *NAL*, 26 FCC Rcd at 12820, 12823, paras. 7 & nn.13-14; Forfeiture Order, 30 FCC Rcd at 11809-11, paras. 10-15.

³² See *supra* Section II.A.

³³ Forfeiture Order, 30 FCC Rcd at 11809, para. 10 (citing *NOS NAL*, 16 FCC Rcd at 8137-38, para. 9).

³⁴ *Lyca Tel*, 30 FCC Rcd at 11795, para. 5 & n.14. See also *Preferred Long Distance, Inc.*, Forfeiture Order, 30 FCC Rcd 13711, 13718, para. 16 & n.53 (2015) (finding that an *NAL*, with other Commission decisions, “provided the requisite fair notice”).

³⁵ *Lyca Tel*, 30 FCC Rcd at 11796, para. 15 (citations omitted). We also underscore that *NALs*, Forfeiture Orders, and rulemakings are not the only ways in which the Commission can put regulatees on notice of their obligations. See, e.g., *Star Wireless, LLC v. FCC*, 522 F.3d 469, 474 (D.C. Cir. 2008) (noting that an official interpretation issued by the Commission’s staff on delegated authority, such as a public notice or letter, has the same force and effect as other actions of the Commission).

³⁶ 47 CFR § 1.106(p).

³⁷ Locus also asserts that the Commission’s application of Section 201(b) to its marketing practices “created a standard akin to tariffing.” Petition at 23 & n.97. The findings in the *NAL* and Forfeiture Order do not institute a tariff approval process. To the contrary, the underlying findings in this case hinge upon consumer-facing misleading or deceptive marketing and advertising, not the manner in which Locus sets its prices. The Commission’s actions in this case do not second-guess carrier pricing, but rather ensure that carriers who advertise rates provide consumers with the information they need to calculate the cost of a call. In the current post-tariff environment (where consumers do not have one centralized place to access pricing information), it is all the more crucial that carriers fulfill their responsibilities to customers by providing transparent pricing information. See *Boomer v. AT&T Corp.*, 309 F.3d 404, 421-22 (7th Cir. 2002) (noting that tariffs served as a mechanism to assure compliance with Sections 201 and 202 of the Act, and that “[f]ollowing detariffing, those goals remain”).

³⁸ Petition at 21-25.

of the Act regarding the “act or omission charged,” including the dates on which violations occurred.³⁹ Locus again suggests that the Commission must identify specific complaints or consumers harmed by its prepaid calling card practices in order to assess a forfeiture.⁴⁰ But we previously stated in the Forfeiture Order that “the Commission is not required to rely on or refer to consumer complaints in order to investigate and impose forfeitures on common carriers.”⁴¹ The Act empowers the Commission to “investigate and impose forfeitures on common carriers even in the complete absence of consumer complaints.”⁴² We also reminded Locus that “the Commission need not demonstrate actual harm to consumers to find violations of Section 201(b).”⁴³ Instead, all that is needed to support an enforcement action “is a determination that the Company has willfully or repeatedly failed to comply with a provision of the Act or an FCC order.”⁴⁴ Under Section 201(b), Locus committed an unreasonable practice because its cards and advertising posters were misleading and Locus did not disclose sufficient countervailing information on its prepaid calling cards and associated advertising materials to allow a customer to calculate the cost of a call.⁴⁵ Finally, Locus states that the Commission based its forfeiture amount “on an arbitrary 125 cards apparently sold during the year preceding the issuance of the NAL.”⁴⁶ Locus misinterprets the Commission’s findings – the Commission was merely noting that the amount of the forfeiture was equivalent to a base forfeiture applied to 125 violations, not that only 125 violations occurred.⁴⁷

9. In any event, the Commission has interpreted Section 503(b)(4) flexibly and we previously noted that the statute “does not require exact dates in every context.”⁴⁸ As in the present case, when a carrier engages in an unjust or unreasonable “practice” under Section 201(b), we interpret the language of Section 503(b)(4)—“the date on which such conduct occurred”—to refer to the *time period* during which the unlawful “practice” giving rise to the violation occurred.⁴⁹ Thus, an NAL satisfies Section 503(b)(4)’s date requirement if it specifies the applicable time period within which the carrier

³⁹ *Id.* at 21-22. We note that the requirements of Section 503(b)(4) only extend to the NAL issued in a proceeding. See 47 U.S.C. § 503(b)(4) (requiring the “notice” to provide information regarding the specific provision(s) of the law violated, what conduct violated the law, and when such violative conduct occurred). However, as Locus argues that the Forfeiture Order also contained insufficient information, we deny these claims on their merits below.

⁴⁰ Petition at 23; NAL Response at 36, 40.

⁴¹ Forfeiture Order, 30 FCC Rcd at 11813, para. 20.

⁴² *Preferred Long Distance*, 30 FCC Rcd at 13717, para. 14.

⁴³ Forfeiture Order, 30 FCC Rcd at 11807, para. 6.

⁴⁴ *STi*, 30 FCC Rcd at 11754, para. 25.

⁴⁵ Forfeiture Order, 30 FCC Rcd at 11811, para. 14 (“In addition to vague or incomplete representations, Locus’s disclosures omit key facts that consumers would need to understand the rate structure.”); NAL, 26 FCC Rcd at 12822-23, para. 12 (finding Locus’s disclosures “are inadequate to inform consumers fully about the possible reduction in the number of advertised minutes, the circumstances under which those minutes will not be received, or how to calculate the actual number of minutes provided”). Cf. *NOS NAL*, 16 FCC Rcd at 8137-38, para. 9 (concluding that a misleading rate structure “would almost certainly be misleading to consumers in the absence of . . . clear and conspicuous disclosure on how to calculate the total cost of a call”).

⁴⁶ Petition at 21.

⁴⁷ Forfeiture Order, 30 FCC Rcd at 11813, para. 19 & n.68; NAL, 26 FCC Rcd at 12825, para. 18 & n.40. See also *infra* para. 10 (discussing the forfeiture calculation).

⁴⁸ *STi*, 30 FCC Rcd at 11749, para. 15 (citing *E. Carolina Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 6154, 6155-56, para. 12 (1991); *WROV Broadcasters, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1421, 1422, para. 12 (1991)).

⁴⁹ *Id.* at 11749-50, para. 15.

engaged in the unlawful practice or conduct.⁵⁰ This interpretation provides a practical reading of the statute and also gives effect to our interpretation of “practice” as used in Section 201(b),⁵¹ while still providing sufficient information to satisfy Section 503(b)(4) of the Act. As such, the Commission satisfied the notice requirements of Section 503(b)(4) by identifying: (1) the specific provision of the Act that Locus violated (Section 201(b)); (2) the nature of Locus’s conduct that violated the Act (deceptive marketing of prepaid calling cards); and (3) the time period during which such conduct occurred (the year preceding the NAL’s release).⁵² Accordingly, Locus’s Section 503(b)(4) claims are without merit and denied.

10. We also reject Locus’s repeated claim that that Commission failed to justify the forfeiture amount.⁵³ The Commission issued the forfeiture in this case in accordance with Section 503(b) of the Act,⁵⁴ Section 1.80 of the Commission’s rules (Rules),⁵⁵ and the Commission’s *Forfeiture Policy Statement*.⁵⁶ When we assess forfeitures, Section 503(b)(2)(E) requires that we 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.”⁵⁷ In this case, the Commission considered each of these factors and determined that a \$5,000,000 forfeiture took into account “the extent and gravity of Locus’s egregious conduct, as well as its culpability.”⁵⁸ The Commission further determined that the forfeiture must be significant enough to “protect the interests of consumers and serve as an adequate deterrent,” while recognizing “Locus’s failure to adequately provide material information about its rates to thousands of consumers who purchased the Company’s prepaid cards.”⁵⁹ Also pursuant to such considerations, the Commission exercised its discretion in setting the forfeiture amount at the equivalent of only 125 violations, rather than applying the base forfeiture amount to every one of the hundreds of Locus cards sold each day.⁶⁰ Having considered such factors in both the NAL and Forfeiture Order, we find the forfeiture assessment proper and see no reason to reconsider it here.

⁵⁰ *Id.* at 11750, para. 15.

⁵¹ See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”) (citations omitted).

⁵² See NAL, 26 FCC Rcd at 12824-25, para. 18; Forfeiture Order, 30 FCC Rcd at 11814, para. 23. See, e.g., *Travelcomm Indus., Inc.*, Forfeiture Order, 26 FCC Rcd 6476, 6481, para. 12 (2011) (rejecting Section 503(b)(4) notice claim where NAL “described in detail the evidence upon which the proposed forfeiture was based”).

⁵³ Petition at 24-25; NAL Response at 38-41.

⁵⁴ 47 U.S.C. § 503(b).

⁵⁵ 47 CFR § 1.80.

⁵⁶ *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 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

⁵⁷ 47 U.S.C. § 503(b)(2)(E).

⁵⁸ NAL, 26 FCC Rcd at 12825, para. 18. See Forfeiture Order, 30 FCC Rcd at 11813-14, para. 21 (noting forfeiture amount was based on Section 503 factors). Locus shares a close corporate relationship with Total Call Mobile, which is the target of a \$51 million Notice of Apparent Liability for Forfeiture for Lifeline-related violations. *Total Call Mobile, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd 4191 (2016). For example, both companies have the same corporate parent, KDDI America, and both have overlapping corporate officers, such as the chief executive officer and general counsel.

⁵⁹ NAL, 26 FCC Rcd at 12825, para. 18.

⁶⁰ Forfeiture Order, 30 FCC Rcd at 11813, para. 19 & n.68; NAL, 26 FCC Rcd at 12825, para. 18 & n.40.

11. Locus also argues that if the Commission can base its violation findings on a time period during which deceptive marketing occurred, it cannot find that “each alleged card sale constituted a separate violation of Section 201(b).”⁶¹ However, Locus offers no legal support for this proposition and we find nothing to suggest that identifying the relevant time period during which violations took place in accordance with Section 503(b)(4) precludes us from assessing a forfeiture for each calling card sold. As we previously stated:

[T]he very nature of an unlawful ‘practice’ under Section 201(b) is that it may include activities that are repeated over time and is not merely a discrete event on a single day. The violations charged in this case included the unlawful *practices* of making deceptive misrepresentations and failing to disclose material information about rates, charges, and practices at the point of sale for each calling card sold.⁶²

Likewise, in the present case, the violations involved inadequate advertising disclosures in connection with transactions that occurred with multiple consumers in multiple locations on multiple days; the violations were not a discrete event. Accordingly, the Commission made clear that each card sold involved the same deceptive marketing practice (misleading cost disclosures that presented insufficient information to calculate the cost of a call) that violated the Act.⁶³ Thus, the Commission found that Locus’s deceptive marketing of each prepaid calling card to consumers constituted a separate violation of Section 201(b) and properly calculated the forfeiture to account for the violations’ egregiousness, Locus’s culpability, and the need to ensure that deceptive marketing forfeitures “are not considered merely an affordable cost of doing business.”⁶⁴ Locus advances no argument or new fact that warrants reconsideration of these findings.⁶⁵

III. CONCLUSION

12. Based on the record before us and in light of the applicable statutory factors, we affirm our conclusion that Locus willfully and repeatedly violated Section 201(b) of the Act by deceptively marketing its prepaid telephone calling cards, making it impossible for consumers to calculate the cost of a call.⁶⁶ We further affirm our decision not to cancel or reduce the \$5,000,000 forfeiture.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act and Section 1.106 of the Rules, the Petition for Reconsideration filed by Locus Telecommunications, Inc., is hereby **DISMISSED IN PART AND**, in remaining part, **DENIED**.⁶⁷

⁶¹ Petition at 24-25.

⁶² *STi*, 30 FCC Rcd at 11748-49, para. 14 (citations omitted) (emphasis original).

⁶³ *See* NAL, 26 FCC Rcd at 12824, para. 18; Forfeiture Order, 30 FCC Rcd at 11812-13, para. 19.

⁶⁴ NAL, 26 FCC Rcd at 12825, para. 18.

⁶⁵ 47 CFR § 1.106(b), (p) (Petitions for Reconsideration that fail to rely on new facts or changed circumstances may be dismissed). Locus once again argues that the Commission neglected to consider Locus’s purported compliance with state laws as evidence that its marketing practices were not deceptive when assessing the forfeiture. Petition at 24; NAL Response at 22-25. But we already determined that “the existence of state laws regulating advertising does not preclude the Commission from taking action to protect consumers from deceptive advertising on its own motion under the Act” and concluded that Locus’s marketing practices were deceptive under Section 201(b). Forfeiture Order, 30 FCC Rcd at 11809-12, paras. 10-17. We find no basis to depart from our earlier findings here. 47 CFR § 1.106(p).

⁶⁶ 47 U.S.C. § 201(b).

⁶⁷ 47 U.S.C. § 405; 47 CFR § 1.106.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules, Locus Telecommunications, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** of five million dollars (\$5,000,000) for willfully and repeatedly violating Section 201(b) of the Act.⁶⁸

15. 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 date of this Memorandum Opinion and Order.⁶⁹

16. 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. Locus Telecommunications, Inc., shall send electronic notification of payment to Lisa Williford at Lisa.Williford@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.⁷⁰ When completing the FCC 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 the completed Form 159) must 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.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

17. 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 20554.⁷¹ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

⁶⁸ 47 U.S.C. §§ 201(b), 503(b); 47 CFR § 1.80.

⁶⁹ 47 CFR § 1.80. The Department of Justice (DOJ) has filed a Complaint for Recovery of the forfeiture against Locus in the United States District Court for the District of New Jersey. The court has granted the DOJ leave to file a motion requesting that the case be held in abeyance until such time as the Commission decides Locus’s Petition for Reconsideration.

⁷⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁷¹ See 47 CFR § 1.1914.

18. **IT IS FURTHER ORDERED** that a copy of this Memorandum Opinion and Order shall be sent by first class mail and certified mail, return receipt requested, to Locus Telecommunications, Inc., Attention: Yasunori Matsuda, Chief Executive Officer; Andrew Miesiak, Chairman/Senior Officer; and Michael Morrissey, President/Senior Officer, 2200 Fletcher Avenue, Suite 600, Fort Lee, NJ, 07024; and to Jonathan S. Marashlian, Esq., Marashlian & Donahue, PLLC, 1420 Spring Hill Road, Suite 401, McLean, Virginia, 22102.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
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

The FCC has a statutory mandate to protect consumers who rely on our nation's networks, and meeting this responsibility is one of the Commission's top priorities. A key component of our consumer protection strategy has been smarter, tougher enforcement of our rules. In recent years, our Enforcement Bureau has ramped up its efforts to ensure companies follow the rules and consumers get what they pay for. We've taken actions and levied fines to crack down on a series of anti-consumer practices, from cramming to Wi-Fi blocking to failure to protect consumer data.

Today, the Commission votes on a series of petitions to hold companies accountable for deceptively marketing prepaid calling cards.

In October 2015, the Commission fined six companies that falsely advertised that their low-cost prepaid calling cards could allow consumers far more calling minutes than were in fact being sold. In each case, the company marketed its cards in a way that promised hundreds or thousands of minutes of calling time for only a few dollars. However, unless used in a single call, various fees and surcharges would diminish the minutes available and consumers would only receive a fraction of the promised minutes. The marketing materials for the prepaid cards deceived consumers by failing to clearly or conspicuously disclose or explain the fees and surcharges that applied to the calling cards. Many of the disclosures were also vague, offering only potential charges and ranges of fees. Some disclosures even said that the charges, fees, or minutes could be changed without notice.

The 2015 Forfeiture Orders all underscored the common sense notion that a company must provide sufficient information to consumers so that they can reasonably determine the actual cost of a call.

Today, the Commission considers four petitions for reconsideration. They largely rely on arguments that have already been considered and rejected by the Commission. To the extent that the companies raised new arguments at this late stage, they were without merit.

Since the Commission issued the forfeiture orders, the companies have failed to pay them as ordered, and the FCC has referred these matters to the U.S. Department of Justice, which has begun to file the appropriate proceedings in federal court. Resolution of these petitions today will aid the expeditious prosecution of these cases by the Justice Department and facilitate collection efforts in federal court, promoting judicial efficiency.

Today's actions send two key messages to two key audiences. To consumers, rest assured that the FCC has got your back. To companies who would defraud consumers, please know that the FCC will hold you accountable and that if we levy fines, we will see that they are collected.

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
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

I agree with the Commission that the four companies at issue here used blatantly misleading and deceptive marketing materials to sell prepaid calling cards. This behavior should not be tolerated, especially when it involves preying upon vulnerable populations, such as immigrants.

Unfortunately, the Commission's ability to lawfully impose forfeitures upon these companies has been fatally compromised by its inadequate and incomplete investigation into their conduct. That's why I dissented from the Forfeiture Orders imposed upon these companies last year, and that's why I must dissent from these *Orders* denying their petitions for reconsideration.

Section 503(b)(4) of the Communications 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."¹ In each of the cases here, the Commission has found that "a separate violation of section 201(b) occurred each time a consumer purchased" a misleading and deceptive prepaid calling card.

That raises a number of questions pertaining to each purported violation (*i.e.*, each purchase of a prepaid calling card). On which dates did the purchases of prepaid calling cards take place? Who purchased them? Where did these sales take place? And which type of card was purchased?

The four underlying Notices of Apparent Liability did not answer *any* of these questions with respect to even a single purchase of a prepaid calling card. The four Forfeiture Orders did not answer *any* of these questions. And the four *Orders* we are voting on today still do not answer *any* of these questions. Why is this information missing? Because the Enforcement Bureau didn't bother to ask for it. To say the least, this is a problem.

To use an analogy, it's as if a prosecutor decided to charge a suspect with robbing a whole bunch of people, and then at trial, failed to identify any of the victims, when they were robbed, where they were robbed, or what was stolen. Regardless of the defendant's guilt, there is no way that anyone could be convicted of robbery with such a lack of specific evidence.

As a result of the obvious deficiencies in the investigation, I 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 has claimed that it was not required to include any of this specific information, including particular dates, in the Notices of Apparent Liability. Instead, it contends that the companies were engaging in an unlawful "practice" that included activities repeated over time. Therefore, for example, the Commission argues that 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."²

Had the Commission found that these four companies had each committed a single continuing violation of section 201(b) in the form of an unlawful practice, then I could perhaps understand the argument that the facts set forth in the Notices of Apparent Liability were sufficiently specific. However,

¹ See 47 U.S.C. § 503(b)(4).

² *Locus Telecommunications, Inc. Order* at para. 9 (emphasis in original).

the Commission makes no such finding—probably because each company’s liability then would have been capped at \$1.575 million.³ Instead, the Commission has concluded that each company committed a separate violation of section 201(b) each time that a consumer purchased a misleading and deceptive prepaid calling card. At the same time, it’s failed to specify the basic facts underlying even a single sale. This is not legally permissible.

When it comes to enforcement, I have many times expressed the concern that the Commission is more interested in seeking headlines than respecting the rule of law. These four *Orders* represent just the latest examples of this problem. Here, the Commission appropriately identified four companies engaging in deeply problematic conduct. But because its investigation of these companies was deeply flawed, I do not believe that it has lawfully imposed forfeitures on them. These *Orders* will certainly generate some good press for the Commission, but I’m skeptical that a court will ever require these companies to pay these penalties.

³ See 47 C.F.R. § 1.80(b)(2).

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
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

Since the Commission has done absolutely nothing to bolster the Forfeiture Orders, nothing in these latest orders on reconsideration persuades me that these companies should be subjected to unjustifiably large fines for conduct that is not covered by the Act, was not deceptive in any event, and did not actually harm a single consumer. I dissent on each.

Fundamentally, I continue to object to the notion that the Commission has authority under section 201(b) to regulate “deceptive marketing”. In the underlying Forfeiture Orders, the Commission claimed that deceptive marketing is an unjust and unreasonable practice. However, as a former Commissioner noted, “if ‘practices’ includes advertising, then it is hard to imagine what it does not include.”¹ Under this formulation, the Commission’s interpretation of section 201 is so boundless that such roving authority, if further embraced, will become the provision that swallows the rest of the Act. And, in the hands of an Enforcement Bureau eager to expand the Commission’s reach, it’s beyond dangerous.

Because the Commission does not have rules on deceptive marketing and refuses to adopt any to everyone’s detriment, in my opinion, it continues to point to the 2001 *NOS Communications Notice of Apparent Liability (NOS NAL)*. I remain opposed to using adjudications to adopt new policy positions because there is no notice and no opportunity for all potentially impacted companies to provide comment. An NAL is not even a final decision of the Commission. Indeed, when I first joined the Commission I was urged to support NALs even if I had concerns about the preliminary positions advanced in them, because I was told that parties would have a full and fair opportunity to rebut them in their responses, and the Commission would render a final decision on the merits at the forfeiture stage. Now the Commission is trying to have it both ways. If NALs do not represent the Commission’s final determinations, then they cannot and do not provide notice of how the Commission might act in a future case. That is particularly true where the Commission never issues a forfeiture order, but instead settles with the party, as was the case with NOS.

Even if one believes that an NAL does provide some degree of notice, which I don’t concede, the facts underlying the *NOS NAL* are so dissimilar that it could not have provided notice to these prepaid calling card providers that their markedly different advertisements would be considered problematic. In the *NOS NAL*, the companies used a pricing methodology that “appear[ed] to be unique to these companies” and was so “complicated” and “confusing” that, even though the companies provided verbal and written instructions on how to calculate the rates, almost 900 consumers filed complaints.² In contrast, these providers, who used standard advertisements and disclosures, would have had no basis to suspect that their marketing materials would be treated like those in the *NOS NAL*.

To start, the disclosures at issue here are neither “complicated” nor “confusing”. They alert buyers to the fact that a specific set of fees could or would apply. In some cases, the cards indicated that there would be a fee of “up to” a certain amount or that a “maximum” specified fee would apply. In other instances, the cards noted that rates could be higher, for example, when calling wireless numbers. I fail to see how a card could be considered deceptive when all categories of charges are spelled out with enough

¹ *Business Discount Plan*, Forfeiture Order, 15 FCC Rcd 14461, 14475 (2000) (dissenting statement of Commissioner Furchtgott-Roth)

² *NOS Communications, Inc.*, Notice of Apparent Liability, 16 FCC Rcd 8133, 8134, 8136, 8137 (2001).

detail to enable a consumer to decide whether the card, overall, is a good deal. A reasonable amount of imprecision should be considered acceptable when the companies do not control and cannot foresee exactly how consumers will choose to use the cards. That's not deceptive – it's necessary for reasonable and flexible consumer usage. And it is certainly distinctive from the *NOS NAL* where the companies provided customers with a specific formula that they falsely claimed would enable customers to easily calculate the exact charges.

Moreover, these practices are far from being “unique” compared to those of other calling card providers, as advertisements and disclosures at issue here appear to be commonplace elsewhere. A quick search of other well-known prepaid calling card providers turned up disclosures with very similar qualifications. In fact, 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. In addition, posters with disclosures in smaller print on the bottom seem to be the norm. If the *NOS NAL* articulated a clear standard that provided companies with fair notice of the conduct required, as the Commission continues to allege, then why doesn't anybody seem to know it? As I said before, selective application of penalties when nobody appeared to be on notice is abusive.

Finally, not a single consumer filed a complaint. If the advertisements were so unclear, you wouldn't know it from the deafening silence of the public. In fact, these cases demonstrate the complete absence of consumer harm. The Commission responds that it is empowered by the Act to initiate enforcement on its own motion. However, in an area as completely subjective as deceptive advertising, a vital factor must be whether anyone in the real world was actually deceived. Seeing a null set should be telling to my colleagues and the general public.

Even though I would not have pursued enforcement actions against these companies in these instances, I would be remiss if I did not comment on the arbitrary approach the Commission used to calculate their fines, and which it refuses to reconsider. Because there were no instances of actual consumer complaints, the Commission had to find a way to approximate the supposed harm to consumers. It did so by guessing how many cards might have been sold during the relevant timeframe and then assumed that all of those supposed sales involved deceptive marketing. Using its discretion, however, the Commission has limited the fine in each item to 125 cards or 5 million dollars. I'm supposed to believe that the Commission took into account the unique facts, circumstances, and egregiousness of each case but miraculously settled on 125 cards and 5 million dollars in each item? It is simply not credible that four companies of different sizes that sold different cards in different numbers would end up with the exact same fines. Once again, the fines seem to be calculated to achieve a preordained result and headline, with no basis in fact or law.

As I said at the Forfeiture Order stage, some might dismiss these actions as an effort to clean up the backlog of items concerning an industry that is fading away. However, providers of all types should be troubled by the Commission's expansive reading of the statute, coupled with assertions that companies that were trying to follow the rules, followed standard industry practices, and never had any complaints lodged against them can nonetheless be fined millions of dollars.