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 detail to enable a consumer to decide whether the card, overall, is a good deal. A reasonable amount of

[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).

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.