Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Touch-Tel USA, LLC	)	File No.: EB-TCD-12-00000409
	)	NAL/Acct. No.: 201132170027
	)	FRN: 0018234609

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 Touch-Tel USA, LLC (Touch-Tel) seeking reconsideration of a Forfeiture Order issued by the Commission. In the Forfeiture Order, the Commission imposed a forfeiture of $5,000,000 against Touch-Tel for deceptively marketing its prepaid telephone calling cards through misleading, confusing, and inadequate disclosures of rates and charges that made it impossible for consumers to calculate the actual cost of a call.

2. Upon review of the Petition for Reconsideration[1] and the entire record,[2] we find no basis for reconsideration. A petition for reconsideration may be dismissed if, for example, it relies on facts or arguments that have been fully considered and rejected by the Commission within the same proceeding, or facts or arguments previously known but not timely raised.[3] Touch-Tel's Petition fails to present new facts, arguments, or changed circumstances that were previously unknown to it that would warrant reconsideration, and we do not find that reconsideration is otherwise required in the public interest. Thus, as explained below, we dismiss Touch-Tel's arguments to the extent they were previously raised and rejected by the Commission in the Forfeiture Order or untimely raised in its Petition, and deny Touch-Tel's other arguments on their merits for failing to demonstrate a material error or omission. Accordingly, we dismiss in part and deny in part Touch-Tel's Petition.

[1] Touch-Tel USA, LLC, Petition for Reconsideration of Forfeiture Order (Nov. 20, 2015) (on file in EB-TCD-12-00000409) (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. *Touch-Tel USA, LLC*, Forfeiture Order, 30 FCC Rcd 11730 (2015) (Forfeiture Order); *Touch-Tel USA, LLC*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12836 (2011) (Touch-Tel 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 Forfeiture Order Satisfied Due Process Requirements

3. In its Petition, Touch-Tel reprises arguments it previously raised with the Commission in response to the Notice of Apparent Liability for Forfeiture (Touch-Tel NAL)[4] that the Commission did not provide fair notice or guidance regarding what disclosures are required from prepaid calling card providers in their marketing materials.[5] Specifically, Touch-Tel repeats its claim[6] that the Commission cannot find it liable in the absence of specific Commission rules regarding prepaid calling card marketing or specific consumer complaints about its marketing practices.[7] Touch-Tel also repeats its argument[8] that the standard established by the Commission in the *NOS NAL* (and applied to it in the Touch-Tel 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 Touch-Tel of what marketing activities were prohibited.[9] Touch-Tel further claims that the Commission's actions constitute discriminatory enforcement because many other prepaid calling card providers used similar marketing disclosures without being penalized by the Commission.[10]

[4] *See* Touch-Tel USA, LLC, Opposition to Apparent Liability for Forfeiture, at 3-5, 9-10 (Oct. 11, 2011) (on file in EB-TCD-12-00000409) (NAL Response).

[5] Petition at 3-8. We also note that Touch-Tel's reliance on cases like *Fox* and *General Electric* is misplaced. *See FCC v. Fox Television Stations, Inc*., 132 S.Ct. 2307 (2012) (*Fox*); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (*General Electric*). While both discuss due process, we find that the facts of each case are distinguishable. In *General Electric*, the conduct at issue was highly technical in nature, involving specific guidelines for the disposal of toxic materials – something that required explicit instructions. *See General Electric*, 53 F.3d at 1326. Moreover, the applicable standard was changed, causing confusion. *See id*. *Fox* is likewise distinguishable. In that case, the court found that broadcasters did not have fair notice of what was required because of a change of policy and interpretation. Specifically, under a prior policy and precedent, a fleeting expletive or brief shot of nudity was not considered a violation, but under a newer interpretation, such content would be considered a violation. *See Fox*, 30 FCC Rcd at 2318-19. In the present case there is no complex rubric of technical requirements or a change in policy. Instead, based on past precedent, the Commission determined that Touch-Tel had fair notice that when advertising rates, it was prohibited from misleading customers about applicable rates and was required to provide disclosures sufficient to allow consumers to calculate the total cost of a call. *See* Forfeiture Order, 30 FCC Rcd at 11733, para. 9.

[6] NAL Response at 2-4.

[7] Petition at 3-4, 6-8.

[8] NAL Response at 4-5.

[9] Petition at 4-6 (citing *NOS Commc'ns Inc*., Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133 (*NOS NAL*)).

[10] *Id.* at 5-6. 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 11735, para. 13 & n.39. 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.

1. Commission Rules and Consumer Complaints

4. Nearly all of these arguments (excepting the claim of discriminatory enforcement) were considered by the Commission and rejected in the Forfeiture Order. As we stated in the Forfeiture Order, the prohibition on unjust or unreasonable practices contained in Section 201(b) of the Communications Act of 1934, as amended (Act), "reaches deceptive marketing (including the types of practices engaged in by Touch-Tel) and . . . does so even in the absence of implementing rules."[11] We also explained that "the Commission does not need to base its forfeiture orders on complaints or a showing of actual consumer harm."[12] We find no reason to reconsider those prior determinations here.[13]

2. Precedential Value of the *NOS NAL*

5. We similarly find no reason to reconsider our conclusion that the standard established by the Commission in the *NOS NAL* "applies to the Commission's evaluation of Touch-Tel's advertising and marketing of prepaid calling cards under Section 201(b)."[14] Touch-Tel suggests that Commission NALs lack any precedential value because they "may lead to a Consent Decree or other type of settlement."[15]

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[11] Forfeiture Order, 30 FCC Rcd at 11732, para. 6 (citing *STi Telecom Inc. (formerly Epana Networks, Inc.)*, Forfeiture Order, 30 FCC Rcd 11742 (2015) (*STi*)).

[12] *Id.* (citing *STi*, 30 FCC Rcd at 11753-54, 11756, paras. 25, 32). The Act empowers the Commission to "investigate and impose forfeitures on common carriers even in the complete absence of consumer complaints." *Preferred Long Distance, Inc.*, Forfeiture Order, 30 FCC Rcd 13711, 13717, para. 14 (2015). *See* 47 U.S.C. § 403 ("The Commission shall have 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 this Act.") (emphasis added).

[13] 47 CFR § 1.106(p)(3) (Petitions for reconsideration "plainly do not warrant consideration by the Commission" where such petitions "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding"). Touch-Tel also makes a convoluted argument that the Commission's examination of its marketing materials absent consumer complaints amounts to "the Commission [] instituting a *de facto* tariff approval process, whereby the Commission is approving and accepting a carrier's terms and conditions of service, rather than letting the competitive marketplace dictate what is reasonable and what is unreasonable." Petition at 7. The findings in the Touch-Tel 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 Touch-Tel 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 peruse 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").

[14] Forfeiture Order, 30 FCC Rcd at 11733, para. 9. Touch-Tel makes a misplaced argument that "NALs are not generally reviewed or voted upon by the entire Commission, but rather are issued by a bureau" and thus the *NOS NAL* lacks any precedential value. Petition at 4. In making this argument, Touch-Tel again sidesteps the fact that the *NOS NAL* was adopted by the Commission. *See NOS NAL*, 16 FCC Rcd at 8142, para. 20. Even if an NAL is adopted by a bureau, bureaus can issue NALs on delegated authority from the Commission. *See, e.g.*, 47 CFR § 0.311 (empowering Enforcement Bureau to issue NALs on delegated authority under certain circumstances); *see also infra* note 18. As the Commission indicated when it first rejected this argument, the standard established in the *NOS NAL* applies in this case. Forfeiture Order, 30 FCC Rcd at 11733, para. 9.

[15] Petition at 5. Touch-Tel also contends that, even if the *NOS NAL* provided notice of the relevant standard for its marketing disclosures, the precedential value of the *NOS NAL* is diminished due to the time elapsed since the *NOS NAL*'s release. *Id*. Touch-Tel's argument is unsupported and untimely. First, Touch-Tel cites no support for the proposition that Commission precedent has an expiration date, or that Commission precedent attenuates over time. As the Commission confirmed in the Forfeiture Order and as restated above, the standard adopted in the *NOS NAL* applies in this case. *Supra* para. 5. Second, these claims fail to "rais[e] additional facts not known or not existing until after the petitioner's last opportunity to present such matters." *Supra* para. 2. Touch-Tel was aware of the time elapsed since the *NOS NAL*'s release after the Commission issued the Touch-Tel NAL in 2011. But Touch-Tel

(continued….)

The relevant legal issue here is not the "precedential value" of the *NOS NAL*, but rather whether it provided fair notice to Touch-Tel. As we explained at length in the Forfeiture Order, the Commission previously determined that the *NOS NAL* provided sufficient notice to telecommunications service providers that they "must provide clear and conspicuous disclosure on how to calculate the total cost of a call" in their marketing materials.[16] The mere fact that the Commission subsequently resolved the *NOS NAL* through settlement "does not undermine the value of [it] in providing fair notice."[17] Due process requires fair notice and the Commission 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.[18] Touch-Tel points out that the *NOS NAL* settlement states that it is not "an adjudication of the merits, or any factual or legal finding."[19] However, Touch-Tel fails to mention that this limiting language only applied to the Commission's "determination of noncompliance by the companies with the requirements of the Act," not whether the underlying deceptive marketing standard adopted in the *NOS NAL* provided fair notice.[20] The settlement of the *NOS NAL* did nothing to undermine the standard established by the Commission (and applied to Touch-Tel in the NAL) that when advertising rate information associated with telecommunications services, service providers must provide clear and conspicuous disclosures on how to calculate the cost of a call.[21]

3. Claim of Discriminatory Enforcement

6. The only nuance the Petition adds to Touch-Tel's otherwise repetitive due process claims is its argument that penalizing it when "a number of other prominent prepaid calling card companies utilize substantially similar types of marketing . . . . is unfair . . . [and] violates due process."[22] Touch-Tel's discriminatory enforcement claim is untimely and fails to "rais[e] additional facts not known or not existing until after the petitioner's last opportunity to present such matters."[23] Touch-Tel was aware that the Commission determined that its marketing practices and the similar practices of other carriers violated

(Continued from previous page)
presents its "diminished precedent" claim for the first time in its Petition – over four years later. We therefore find that Touch-Tel's arguments on this issue do not warrant reconsideration of the Forfeiture Order. 47 CFR § 1.106(b), (p) (Petitions for Reconsideration that fail to rely on new facts or changed circumstances may be dismissed).

[16] Forfeiture Order, 30 FCC Rcd at 11732, para. 7 (citing *NOS NAL*, 16 FCC Rcd at 8138, para. 9) (internal quotations omitted); Touch-Tel NAL, 26 FCC Rcd at 12838, para. 6 (citing *NOS NAL* to conclude "[t]he Commission has found that unfair and deceptive marketing practices . . . constitute unjust and unreasonable practices under [S]ection 201(b)").

[17] *Lyca Tel, LLC*, Forfeiture Order, 30 FCC Rcd 11792, 11795, para. 9 (2015). *See also Preferred Long Distance*, 30 FCC Rcd at 13718, para. 16 & n.53 (finding that an NAL, with other Commission decisions, "provided the requisite fair notice").

[18] *Id.* at 11796, para. 15 (internal 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).

[19] Petition at 5 (citing *NOS Commc'ns Inc. and Affinity Network Inc.*, Order and Consent Decree, 17 FCC Rcd 26853, 26857, para. 7 (2002) (*NOS Consent Decree*)).

[20] *NOS Consent Decree*, 17 FCC Rcd at 26857, para. 7.

[21] *See* Forfeiture Order, 30 FCC Rcd at 11733, para. 9 ("Touch-Tel's indefinite description of its fees make it impossible for a consumer to calculate the cost of a call at the point of sale."); Touch-Tel NAL, 26 FCC Rcd at 12841, para. 14 ("Touch-Tel failed to disclose, in any meaningful way, material information about its rates, charges and practices at the point of sale.").

[22] Petition at 6 (citing Forfeiture Order, 30 FCC Rcd at 11803 (Commissioner O'Rielly, dissenting)).

[23] *Supra* para. 2.

the Act after the Touch-Tel NAL's release in 2011. But Touch-Tel presents its "discriminatory enforcement" argument for the first time in its Petition – over four years later.

7. In addition to its untimeliness, Touch-Tel's discriminatory enforcement claim ignores our authority under the Act and relevant Commission precedent. Section 403 of the Act provides the Commission with "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 this Act."[24] The Commission has broad discretion to initiate investigations "so long as the matter is within the agency's jurisdiction."[25] The Supreme Court has repeatedly recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[26] Such considerable discretion is necessary because "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped . . . to deal with the many variables involved in the proper ordering of its priorities."[27] The Commission therefore holds "prosecutorial discretion in choosing to initiate investigations, *and the absence of action against any or all potentially liable entities does not preclude it from enforcing against a specific violator*."[28] The Commission remains in the best position to "weigh the benefits of pursuing an adjudication against the costs to the agency and the likelihood of success" and its decision to pursue enforcement action against an egregious violator like Touch-Tel falls fully within its broad prosecutorial discretion.[29] We therefore find that the Commission's investigation of Touch-Tel for deceptive marketing of prepaid calling cards did not violate due process requirements.[30]

B. The Commission Provided Sufficient Specificity as to Touch-Tel's Violations

8. Touch-Tel also asserts that the Commission failed to identify its violations with required specificity under Section 503(b)(4) of the Act, including the dates on which the violations occurred.[31] Touch-Tel contends that the forfeiture must be rescinded because the Commission "has not provided the name of even one customer who allegedly was confused by Touch-Tel's disclosures."[32] Touch-Tel further argues that the Commission "cannot definitely state or point to specific instances that demonstrate that the exact number of cards at issue were sold during . . . the statute of limitations" and "arbitrarily presumes that Touch-Tel had at least 125 customers who were confused or mislead [sic]" by its marketing practices.[33]

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[24] 47 U.S.C. § 403.

[25] *Viacom Inc., ESPN Inc*., Forfeiture Order, 30 FCC Rcd 797, 804, para. 18 (2015) (*Viacom/ESPN*). *See Spanish Broad. Sys. Holding Co., Inc*., Forfeiture Order, 27 FCC Rcd 11956, 11959, para. 8 & n.30 (EB 2012) (Section 403 provides broad discretion as to the type of misconduct the Commission may investigate and subject to enforcement action).

[26] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder,* 442 U.S. 114 (1979); *United States v. Nixon,* 418 U.S. 683 (1974); *Vaca v. Sipes,* 386 U.S. 171 (1967); *Confiscation Cases,* 7 Wall. 454 (1869)).

[27] *Id.*

[28] *Viacom/ESPN*, 30 FCC Rcd at 804, para. 17 (citations omitted) (emphasis added); *Radio One Licenses, LLC*, Forfeiture Order, 19 FCC Rcd 23922, 23932, para. 24 (2004) ("The Commission is a regulatory agency with broad prosecutorial discretion in enforcement proceedings.") (*Radio One*).

[29] *Radio One*, 19 FCC Rcd at 23932, para. 24 (citing *N.Y. State Dept. of Law v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993)).

[30] 47 CFR § 1.106(b), (p).

[31] Petition at 8-9.

[32] *Id.* at 8.

[33] *Id*.

9. Touch-Tel is mistaken. As stated above, "the Commission does not need to base its forfeiture orders on complaints or a showing of actual consumer harm."[34] Touch-Tel also misinterprets the Commission's findings – the Commission did not presume that there were at least 125 customers confused or misled by the company's marketing practices, but rather was explaining that the forfeiture amount was the equivalent of applying the base forfeiture to only 125 violations, far less than the hundreds of cards sold each day (and associated advertising posters), all of which shared the same shortcoming – they did not include enough countervailing information to allow consumers to calculate the cost of the call.[35]

10. 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."[36] 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.[37] Thus, an NAL satisfies Section 503(b)(4)'s date requirement if it specifies the applicable time period within which the carrier engaged in the unlawful practice or conduct.[38] This interpretation provides a practical reading of the statute and also gives effect to our interpretation of "practice" as used in Section 201(b),[39] while still providing sufficient information to satisfy the violator's due process rights.

11. In the Touch-Tel NAL, the Commission explained that *each* card Touch-Tel marketed using deceptive advertising constituted an independent violation of Section 201(b).[40] In both the Touch-Tel NAL and Forfeiture Order, the Commission also specified the time period during which Touch-Tel's deceptive marketing practices occurred – the year preceding the Touch-Tel NAL's release.[41] It would not only be impractical to list the date that each of Touch-Tel's cards were sold, but also unnecessary because the deceptive marketing practice giving rise to the violations (failure to include sufficient countervailing information about its rates that would enable consumers to calculate the cost of calls) was identical for every violation. As such, the Commission satisfied the notice requirements of Section 503(b)(4) by identifying: (1) the specific provision of the Act that Touch-Tel violated (Section 201(b)); (2) the nature of Touch-Tel'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 Touch-Tel NAL's release).[42] Accordingly, Touch-Tel's Section 503(b)(4) claims are without merit and denied.

[34] *Supra* para. 4, note 12.

[35] Forfeiture Order, 30 FCC Rcd at 11735, para. 13 & n.39; Touch-Tel NAL, 26 FCC Rcd at 12842, para. 17 & n.41.

[36] *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)).

[37] *Id.* at 11749-50, para. 15.

[38] *Id.* at 11750, para. 15.

[39] *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).

[40] Touch-Tel NAL, 26 FCC Rcd at 12842, para. 17.

[41] *Id.*; Forfeiture Order, 30 FCC Rcd at 11735, para. 13.

[42] *See* Touch-Tel NAL, 26 FCC Rcd at 12842, para. 17; Forfeiture Order, 30 FCC Rcd at 11735, para. 13. *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").

III. CONCLUSION

12. Based on the record before us and in light of the applicable statutory factors, we affirm our conclusion that Touch-Tel 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.[43] 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 Commission's rules (Rules), the Petition for Reconsideration filed by Touch-Tel USA, LLC, is hereby **DISMISSED IN PART AND**, in remaining part, **DENIED**.[44]

14. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules, Touch-Tel USA, LLC **IS LIABLE FOR A MONETARY FORFEITURE** of five million dollars ($5,000,000) for willfully and repeatedly violating Section 201(b) of the Act.[45]

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.[46] 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.[47]

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. Touch-Tel USA, LLC 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.[48] 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 –

[43] 47 U.S.C. § 201(b).

[44] 47 U.S.C. § 405; 47 CFR § 1.106.

[45] 47 U.S.C. §§ 201(b), 503(b); 47 CFR § 1.80.

[46] 47 CFR § 1.80.

[47] 47 U.S.C. § 504(a).

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

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.[49] 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.

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 Touch-Tel USA, LLC, Attention: Amanul Syed, Chief Executive Officer, and William Stankos, Chairman/Senior Officer, 5444 Westheimer Road, Suite 1535, Houston, TX, 77056; and to Thomas Crowe Law Offices, DC Agent for Service of Process, 1250 24th Street NW, Washington, DC, 20037; and to Adam Bowser, Esq., and Alan Fishel, Esq., Arent Fox LLP, 1717 K Street NW, Washington, DC, 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[49] *See* 47 CFR § 1.1914.

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 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.