

**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."<sup>1</sup> 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."<sup>2</sup>

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, the Commission makes no such finding—probably because each company's liability then would have

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<sup>1</sup> See 47 U.S.C. § 503(b)(4).

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

been capped at \$1.575 million.<sup>3</sup> 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.

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<sup>3</sup> See 47 C.F.R. § 1.80(b)(2).