

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

In the Matter of)	
)	
NobelTel, LLC)	File No.: EB-TCD-12-00000412
)	NAL/Acct. No.: 201232170011
)	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 NobelTel, LLC (NobelTel) seeking reconsideration of a Forfeiture Order issued by the Commission. In the Forfeiture Order, the Commission imposed a forfeiture of \$5,000,000 against NobelTel 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 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 NobelTel’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 NobelTel’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 NobelTel’s other arguments on their merits for failing to demonstrate a material error or omission. Accordingly, we dismiss in part and deny in part NobelTel’s Petition.

¹ NobelTel, LLC, Petition for Reconsideration (Nov. 20, 2015) (on file in EB-TCD-12-00000412) (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. *NobelTel, LLC*, Forfeiture Order, 30 FCC Rcd 11779 (2015) (Forfeiture Order); *NobelTel, LLC*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 11760 (2012) (NobelTel 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, NobelTel reprises arguments it previously raised with the Commission in response to the Notice of Apparent Liability for Forfeiture (NobelTel NAL)⁴ that the Commission did not provide fair notice regarding what disclosures are required from prepaid calling card providers in their marketing materials.⁵ NobelTel once again claims that the absence of specific consumer complaints about its advertising practices demonstrates that it did not know that its actions violated the law.⁶ NobelTel also argues that the standard established by the Commission in the *NOS NAL* (and applied to it in the NobelTel 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 NobelTel of what marketing activities were prohibited.⁷ NobelTel contends that because Commission NALs “can be settled or modified,” they “are not final law” and lack any precedential value.⁸ In addition, NobelTel argues that the NobelTel NAL and Forfeiture Order represent “discriminatory enforcement” of the deceptive marketing rules because other prepaid calling card providers used similar marketing disclosures without being penalized by the Commission.⁹

1. Consumer Complaints

4. Nearly all of these arguments (excepting the claim of discriminatory enforcement) were already made by NobelTel,¹⁰ and then considered by the Commission and rejected in the Forfeiture Order.

⁴ See NobelTel USA, LLC, Response to Notice of Apparent Liability for Forfeiture, at 7-12 (Nov. 19, 2012) (on file in EB-TCD-12-00000412) (NAL Response).

⁵ Petition at i, 4-10.

⁶ *Id.* at 2-4, 8; NAL Response at 11-12.

⁷ Petition at 8-9 (citing *NOS Commc’ns Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133 (2001) (*NOS NAL*)).

⁸ *Id.* at 8.

⁹ *Id.* at 9-10. 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 11784, para. 13 & n.43. 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 NAL Response at 7-12, 16-19. We also underscore that NobelTel’s reliance on *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 that past precedent, the Commission determined that NobelTel 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 11782-83, para. 11.

As we stated in the Forfeiture Order, “the Commission does not need to base its forfeiture orders on complaints.”¹¹ The Communications Act of 1934, as amended (Act), empowers the Commission to “investigate and impose forfeitures on common carriers even in the complete absence of consumer complaints.”¹² NobelTel therefore cannot escape liability because the Commission did not cite to specific consumers complaints about its deceptive marketing practices. Consequently, we find NobelTel’s arguments on this issue do not warrant reconsideration of the Forfeiture Order.¹³

2. Precedential Value of the *NOS NAL*

5. We similarly find no reason to reconsider NobelTel’s repetitive challenge to the precedential value of the *NOS NAL*. The relevant legal issue here is not the “precedential weight” of the *NOS NAL*, but rather whether it provided fair notice to NobelTel. As we explained at length 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.”¹⁴ The mere fact that the Commission subsequently resolved the *NOS NAL* through settlement “does not undermine the value of [it] in providing fair notice.”¹⁵ Due process requires fair notice and 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.¹⁶ Indeed, the Commission already applied this standard to find five other carriers apparently liable for similar deceptive marketing practices related to prepaid calling cards *over a year* prior to the NobelTel NAL’s release.¹⁷ Although the standard established by the Commission in the *NOS NAL* already provided fair notice to NobelTel that its deceptive marketing practices violated the Act, these NALs provided further notice that the Commission would find carriers liable for misleading, confusing, and inadequate disclosures regarding their prepaid calling card rates and charges. We therefore find that

¹¹ Forfeiture Order, 30 FCC Rcd at 11781, para. 6 (citing *STi Telecom Inc. (formerly Epana Networks, Inc.)*, Forfeiture Order, 30 FCC Rcd 11742 (2015) (*STi*)).

¹² *Preferred Long Distance, Inc.*, Forfeiture Order, 30 FCC Rcd 13711, 13717, para. 14 (2015).

¹³ 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”).

¹⁴ Forfeiture Order, 30 FCC Rcd at 11782-83, para. 11 (citing *NOS NAL*, 16 FCC Rcd at 8137-38, para. 9).

¹⁵ *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”).

¹⁶ Forfeiture Order, 30 FCC Rcd at 11783, para. 11 (internal quotations 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).

¹⁷ NobelTel NAL, 27 FCC Rcd at 11763, para. 6 (citing *STi Telecom Inc. (formerly Epana Networks, Inc.)*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12808 (2011), *aff’d*, Forfeiture Order, 30 FCC Rcd 11742 (2015); *Locus Telecommunications, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12818 (2011), *aff’d*, Forfeiture Order, 30 FCC Rcd 11805 (2015); *Lyca Tel, LLC*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12827 (2011), *aff’d*, Forfeiture Order, 30 FCC Rcd 11792 (2015); *Touch-Tel USA, LLC*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12836 (2011), *aff’d*, Forfeiture Order, 30 FCC Rcd 11730 (2015); *Simple Network, Inc.*, Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 11765 (2011), *aff’d*, Forfeiture Order, 30 FCC Rcd 11730 (2015)).

NobelTel's arguments on this issue (which have already been fully vetted and rejected in the Forfeiture Order¹⁸) do not warrant further consideration.¹⁹

3. Claim of Discriminatory Enforcement

6. The only nuance the Petition adds to NobelTel's otherwise repetitive due process claims is its argument that the NobelTel NAL and Forfeiture Order "ha[ve] and will lead to discriminatory enforcement."²⁰ NobelTel states that its marketing disclosures that the Commission found violated the law "are not unique"²¹ and that "other well-known prepaid calling card providers" use "very similar qualifications" on their rates and charges.²² NobelTel suggests that the Forfeiture Order and similar penalties issued against five other carriers for deceptive marketing of prepaid calling cards represent a "random selection of targets" that is "arbitrary and discriminatory" in violation of its due process rights.²³

7. NobelTel's argument is untimely. NobelTel's discriminatory enforcement claim fails to "rais[e] additional facts not known or not existing until after the petitioner's last opportunity to present such matters."²⁴ NobelTel was aware that the Commission determined that its marketing practices and the similar practices of other carriers violated the Communications Act of 1934, as amended (Act), after the NobelTel NAL's release in 2012. But NobelTel presents its "discriminatory enforcement" argument for the first time in its Petition – over three years later.

8. In addition to its untimeliness, NobelTel'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."²⁵ The Commission has broad discretion to initiate investigations "so long as the matter is within the agency's jurisdiction."²⁶ 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."²⁷ 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."²⁸ The Commission therefore holds "prosecutorial discretion in choosing to initiate investigations, *and the absence of action against any or*

¹⁸ Forfeiture Order, 30 FCC Rcd at 11781, 11782-83, paras. 6, 11 (citing *STi*).

¹⁹ 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").

²⁰ Petition at 9-10.

²¹ *Id.* at 10.

²² *Id.* (citing Forfeiture Order, 30 FCC Rcd at 11803 (Commissioner O'Rielly, dissenting)).

²³ *Id.*

²⁴ *Supra* para. 2.

²⁵ 47 U.S.C. § 403.

²⁶ *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).

²⁷ *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)).

²⁸ *Id.*

all potentially liable entities does not preclude it from enforcing against a specific violator.”²⁹ 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 NobelTel falls fully within its broad prosecutorial discretion.³⁰ Consequently, we find that the Commission’s investigation of NobelTel for deceptive marketing of prepaid calling cards did not violate due process requirements.³¹

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

9. In its Petition, NobelTel repeats arguments it previously raised with the Commission in its NAL Response³² that the Commission failed to provide sufficient information under Section 503(b)(4) of the Act regarding the “action and facts” supporting its findings that it engaged in deceptive marketing.³³ NobelTel again suggests that the Commission must identify specific complaints or consumers harmed by its prepaid calling card marketing practices in order to assess a forfeiture.³⁴ NobelTel indicates that, without such evidence, the Commission requires it “to defend each and every card sale . . . [and] prove the negative – that no customers were deceived by the calling card they purchased.”³⁵ NobelTel also challenges the Commission’s forfeiture calculation methodology.³⁶

1. The Commission Provided Sufficient Specificity as to NobelTel’s Violations

10. We considered NobelTel’s Section 503(b)(4) claim in the Forfeiture Order and rejected it. Not only did we determine that the Commission provided “sufficient specificity” regarding NobelTel’s violations under Section 503(b)(4), we reminded NobelTel that “the Commission does not need to base its forfeiture orders on complaints or a showing of actual consumer harm.”³⁷ Both the NobelTel NAL and the Forfeiture Order identified: (1) the specific provision of the Act that NobelTel violated (Section 201(b)); (2) the nature of NobelTel’s conduct that violated the Act (deceptive marketing of prepaid

²⁹ *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*).

³⁰ *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)).

³¹ 47 CFR § 1.106(b), (p) (Petitions for Reconsideration that fail to rely on new facts or changed circumstances may be dismissed).

³² See NAL Response at 12-19.

³³ Petition at 11-13. 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). The NobelTel NAL set forth the details of NobelTel’s apparent violations in 2012 and the company had the opportunity to raise any Section 503(b)(4) claim in its NAL Response, but failed to do so. NobelTel’s Section 503(b)(4) claim therefore fails to “rais[e] additional facts not known or not existing until after the petitioner’s last opportunity to present such matters,” and can be dismissed under Section 1.106 of the Commission’s rules. *Supra* para. 2. However, as NobelTel argues that the Forfeiture Order also contained insufficient information, we deny these claims on their merits below.

³⁴ See Petition at 11; NAL Response at 16-19.

³⁵ Petition at 12.

³⁶ *Id.* at i, 13-15.

³⁷ Forfeiture Order, 30 FCC Rcd at 11781, para. 6 (citing *STi*, 30 FCC Rcd at 11748-50, 11753-54, 11756, paras. 12-15, 25, 32).

calling cards); and (3) the time period during which such conduct occurred (the year preceding the NobelTel NAL's release).³⁸

11. NobelTel's mistakenly asserts that it must prove a negative in order to contest our violation findings. The applicable standard is whether, after advertising certain rates associated with its prepaid calling cards, the information provided on each prepaid calling card sold and the associated marketing posters contained sufficient information to allow customers to calculate the cost of a call.³⁹ Far from proving a negative, NobelTel needed only to show that, when advertising rates, its prepaid calling card disclosures provided enough countervailing rate information to allow a consumer to calculate the cost of a call. We found the disclosures failed to meet this standard.⁴⁰ We therefore dismiss NobelTel's repetitive Section 503(b)(4) claims.⁴¹

2. The Commission Provided Sufficient Support for the Forfeiture Amount

12. We also reject NobelTel's argument that the Commission adopted "shifting rationales" for the fines by applying "two inconsistent bases for calculating the forfeiture."⁴² The Commission issued the forfeiture in this case in accordance with Section 503(b) of the Act,⁴³ Section 1.80 of the Commission's rules (Rules),⁴⁴ and the Commission's *Forfeiture Policy Statement*.⁴⁵ 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."⁴⁶ In this case, the Commission

³⁸ See NobelTel NAL, 27 FCC Rcd at 11767-68, para. 17; Forfeiture Order, 30 FCC Rcd at 11784, para. 14. See also *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").

³⁹ See Forfeiture Order, 30 FCC Rcd at 11781-82, paras. 7-10; NobelTel NAL, 27 FCC Rcd at 11763-66, paras. 7-13; *NOS NAL*, 16 FCC Rcd at 8138, para. 9.

⁴⁰ See Forfeiture Order, 30 FCC Rcd at 11782, para. 10 ("NobelTel's disclosures omitted key facts that consumers need in order to understand the rate structure and calculate the cost of a call."); NobelTel NAL, 27 FCC Rcd at 11765, para. 10 ("NobelTel's disclosures do not provide the information necessary for a consumer to determine what fees apply, the amounts of those fees, and when and how they will affect the number of calling minutes offered.").

⁴¹ 47 CFR § 1.106(p)(3). We also affirm our finding that Section 503(b)(4) presents a flexible standard that "does not require exact dates in every context." *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)). We reiterate that 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. *Id.* at 11749-50, para. 15. See also *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). 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 apparent unlawful practice or conduct. *STi*, 30 FCC Rcd at 11750, para. 15.

⁴² Petition at i, 13-15.

⁴³ 47 U.S.C. § 503(b).

⁴⁴ 47 CFR § 1.80.

⁴⁵ *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).

⁴⁶ 47 U.S.C. § 503(b)(2)(E).

considered each of these factors and determined that a \$5,000,000 forfeiture took into account “the extent and gravity of NobelTel’s egregious conduct, as well as its culpability.”⁴⁷ 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 “NobelTel’s failure to adequately provide material information about its rates to thousands of consumers who purchased the Company’s prepaid cards.”⁴⁸ The Commission also based the \$5,000,000 forfeiture on the penalties proposed against five other carriers over a year before the NobelTel NAL for similar deceptive marketing of prepaid calling cards.⁴⁹ 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 NobelTel cards sold each day.⁵⁰ 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.

13. NobelTel also argues that if Section 503(b)(4) can be satisfied by identifying a time period rather than each specific date its calling cards were sold, then the Commission cannot then calculate the forfeiture on a “per-card-sold basis.”⁵¹ However, NobelTel 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. NobelTel claims that the “Commission . . . argues that practices are not discrete events”⁵² This is incorrect. 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.⁵³

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.⁵⁴ 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.⁵⁵ Thus, the Commission found that NobelTel’s deceptive marketing of each prepaid calling card to consumers constituted a separate violation of Section 201(b) and properly calculated the forfeiture while accounting for the violations’ egregiousness, NobelTel’s culpability, and the need to ensure that deceptive marketing forfeitures “are

⁴⁷ NobelTel NAL, 27 FCC Rcd at 11768, para. 17. See Forfeiture Order, 30 FCC Rcd at 11783, para. 13 (noting forfeiture amount was based on Section 503 factors).

⁴⁸ NobelTel NAL, 27 FCC Rcd at 11768, para. 17.

⁴⁹ *Id.*

⁵⁰ Forfeiture Order, 30 FCC Rcd at 11784, para. 13 & n.43; NAL, 27 FCC Rcd at 11768, para. 17 & n.66.

⁵¹ Petition at 14.

⁵² *Id.*

⁵³ *STi*, 30 FCC Rcd at 11748-49, para. 14 (citations omitted) (emphasis original).

⁵⁴ NobelTel concedes that it “sold approximately [REDACTED] pre-paid calling cards in 2011.” Letter from Robert J. Aamoth and Barbara A. Miller, Esq., Counsel to NobelTel, LLC, to Kimberly A. Wild, Assistant Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, at 13 (Feb. 3, 2012) (on file in EB-TCD-12-00000412).

⁵⁵ See NobelTel NAL, 27 FCC Rcd at 11767, para. 16; Forfeiture Order, 30 FCC Rcd at 11784-85, para. 13 (citing *NOS NAL*, 16 FCC Rcd at 8141, para. 19).

not considered merely an affordable cost of doing business.”⁵⁶ NobelTel advances no argument or new fact that warrants reconsideration of these findings.

III. CONCLUSION

14. Based on the record before us and in light of the applicable statutory factors, we affirm our conclusion that NobelTel 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.⁵⁷ We further affirm our decision not to cancel or reduce the \$5,000,000 forfeiture.

IV. ORDERING CLAUSES

15. 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 NobelTel, LLC, is hereby **DISMISSED IN PART AND**, in remaining part, **DENIED**.⁵⁸

16. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules, NobelTel, 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.⁵⁹

17. 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.⁶⁰ 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.⁶¹

18. 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. NobelTel, 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.⁶² 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.

⁵⁶ NobelTel NAL, 27 FCC Rcd at 11767-68, para. 17.

⁵⁷ 47 U.S.C. § 201(b).

⁵⁸ 47 U.S.C. § 405; 47 CFR § 1.106.

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

⁶⁰ 47 CFR § 1.80.

⁶¹ 47 U.S.C. § 504(a).

⁶² An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- 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.

19. 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 20554.⁶³ 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.

20. **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 NobelTel, LLC, Attention: Richard Mahfouz, Chief Executive Officer, and Colleen Guffey, Chairman/Senior Officer, 5973 Avenida Encinas, Suite 202, Carlsbad, CA, 92008; and to Corporation Service Company, DC Agent for Service of Process, 1100 New York Avenue NW, W Tower, #500, Washington, DC, 20005; and to Steven A. Augustino, Esq., and Dawn R. Damschen, Esq., Kelley Drye & Warren LLP, 3050 K Street NW, Suite 400, Washington, DC, 20007.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶³ 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 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
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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
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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.