

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Affordable Enterprises of Arizona, LLC.)
File No.: EB-TCD-17-00024974
NAL/Acct. No.: 201832170003
FRN: 0027881093

FORFEITURE ORDER

Adopted: October 27, 2020

Released: October 28, 2020

By the Commission: Chairman Pai and Commissioner Starks issuing separate statements; Commissioner O'Reilly approving in part and dissenting in part.

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I. INTRODUCTION

1. Combatting unlawful, unwanted telephone calls—including unlawfully spoofed telemarketing calls—is the top consumer protection priority for the Federal Communications Commission (FCC or the Commission). Spoofing occurs when caller ID information is manipulated or altered to display anything other than the originating telephone number. The Truth in Caller ID Act of 2009 and the Commission rules prohibit any individual from falsifying or misrepresenting his or her caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value.¹ Accurate

¹ 47 U.S.C. § 227(e); 47 CFR § 64.1604 (“No person or entity in the United States . . . shall, with the intent to defraud, cause harm, or wrongfully obtain anything of value, knowingly cause, directly, or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information[.]”).

caller ID information allows consumers to make informed decisions about which calls to accept, ignore, or block, and whether the party on the other end of the phone line is reputable and deserving of their trust. Accurate caller ID also allows the phone companies and law enforcement to detect and combat unlawful calls, such as unlawful telemarketing calls. As technology has advanced, the dangerous combination of spoofing and illegal telemarketing calls has become much more pervasive and harder to stop.

2. Today we continue our ongoing efforts to eliminate unwanted and unlawful spoofed telemarketing calls. Affordable Enterprises of Arizona, LLC (Affordable or Company)² made unlawfully spoofed telemarketing calls to consumers throughout Arizona—many of whom had placed their numbers on the National Do Not Call Registry (Registry or Do Not Call Registry) to avoid unwanted telemarketing calls. When making the calls, Affordable did not transmit the actual originating phone number. Instead, Affordable displayed the caller ID information of: (1) numbers that were assigned to prepaid wireless phones, for which the subscriber information was not available; (2) numbers that were unassigned (i.e., not in use by any consumer); or (3) numbers that were assigned to consumers who had no affiliation or relationship with Affordable (Innocent Consumers). The caller ID information was misleading or inaccurate and did not permit consumers to identify the caller.

3. The evidence shows that, over a 14-month period spanning 2016 and 2017, Affordable made 2,341,125 unlawful spoofed telemarketing calls. Moreover, Bureau staff analyzed a sample of 37,525 calls and confirmed that all of those calls were made by spoofing numbers that were, at the time of the calls, either unassigned or assigned to innocent consumers—leaving such individuals vulnerable to scores of angry callbacks from other consumers whom Affordable had targeted with unwanted marketing messages while effectively shielding itself from their complaints. We affirm the Notice of Apparent Liability (*Notice*)³ and find that the Company violated section 227(e) of the Communications Act of 1934, as amended (Act) and section 64.1604 of the Commission’s rules by displaying or transmitting misleading or inaccurate caller ID information with the intent to cause harm or wrongfully obtain anything of value.⁴ After reviewing Affordable’s response to the *Notice*, we find no reason to cancel, withdraw, or reduce the proposed penalty, and therefore affirm the proposed \$37,525,000 forfeiture.

II. BACKGROUND

4. *Legal Background.* The Commission has recognized the importance of requiring telemarketers to transmit accurate caller ID information. The Commission noted that “[c]aller ID allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again.”⁵ The Commission further stated that “[k]nowing the identity of the caller is also helpful to consumers who feel frightened or threatened by hang-up and ‘dead air’ calls.”⁶ However, caller ID is

² Affordable operates under several names. See *Affordable Enterprises of Arizona, LLC.*, Response to Notice of Apparent Liability for Forfeiture, at 1 n.1 (Dec. 11, 2018) (on file in EB-TCD-17-00024974) (Notice Response). According to Affordable’s Notice Response, Affordable’s related entities—Affordable Windows and Home Renovations, LLC, Affordable Windows of Tucson, LLC, and Affordable Windows, LLC—are currently inactive with the Arizona Corporation Commission, while Affordable Kitchens, LLC, and Affordable Enterprises, LLC, are still in good standing. Affordable transacts all of its business through its Windows Plus Exteriors and Bathrooms entities. *Id.*

³ See *Affordable Enterprises of Arizona, LLC.*, Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 9233 (2018) (*Notice*). The *Notice* includes a more complete discussion of the facts and history of this case and is incorporated herein by reference.

⁴ 47 U.S.C. § 227(e); 47 CFR § 64.1604.

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14121, para. 179 (2003) (*TCPA Order*).

⁶ *Id.*

only valuable if it is accurate.⁷ Congress codified these policies in the Truth in Caller ID Act of 2009 (Truth in Caller ID Act), as codified in section 227(e) of the Act.⁸ The Truth in Caller ID Act prohibits “caus[ing] any caller identification service,” in connection with any telecommunications service or Internet Protocol-enabled service, to “knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value[.]”⁹

5. Congress also recognized the importance of being able to avoid receiving unwanted calls in the first place.¹⁰ Citing “widespread consumer dissatisfaction” with increasing numbers of telemarketing calls, the FCC released a Report and Order that, among other things, established the National Do Not Call Registry for consumers who wish to avoid unwanted telemarketing calls.¹¹ Accordingly, consumers can register their telephone numbers on the Registry to prevent unwanted telephone solicitations.¹² It is illegal, subject to certain exceptions,¹³ for persons or entities (including advertisers and marketers) to make telephone solicitations to residential numbers listed on the Registry. The Registry was jointly implemented by the FCC and the Federal Trade Commission (FTC),¹⁴ and covers all entities that use the telephone to advertise.¹⁵ The FCC, FTC, and states share the authority to enforce the do-not-call rules.¹⁶

6. *Factual Background.* In 2017, the Commission became aware that Affordable was engaged in a large-scale telemarketing campaign in which it displayed caller ID information that, in many instances, did not reflect telephone numbers that were, at the time of the calls, assigned to Affordable. The FCC’s Enforcement Bureau (Bureau) initiated an investigation, compiling evidence from multiple sources, including consumer complaints and sworn statements from a former employee of Affordable (Former Employee), and found that Affordable made 2,341,125 live spoofed telemarketing calls during a 14-month period, from July 26, 2016, to September 25, 2017.¹⁷ The investigation uncovered that

⁷ 156 Cong. Rec. H2522, H2524 (2010) (Remarks of Rep. Engel) (“Now, if you see a caller ID and you see it has a phone number, most people think that it’s ironclad that that’s the actual phone number that’s calling them when in truth it’s not.”); 155 Cong. Rec. S170-02, S173 (2009) (Remarks of Sen. Nelson) (“Consumers expect caller I.D. to be accurate because it helps them decide whether to answer a phone call and trust the person on the other end of the line.”).

⁸ 47 U.S.C. § 227(e).

⁹ *Id.*; see also 47 CFR § 64.1604. There are exceptions for investigative, protective, or intelligence activities, but those exceptions do not apply here.

¹⁰ See Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (codified at 15 U.S.C. § 6101) (Do-Not-Call Act).

¹¹ *TCPA Order*, 18 FCC Rcd at 14033, 14044-65, paras. 25, 28-85.

¹² See 47 CFR § 64.1200(c)(2) (telephone solicitations are prohibited to a “residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government.”).

¹³ The exceptions are: (1) the person or entity can demonstrate that the violations were made in error despite its adherence to certain standards; (2) the telemarketer has prior express invitation or permission to call the consumers; (3) the telemarketer has a personal relationship with the consumer; (4) the telemarketer has an established business relationship with the consumer; or (5) the telemarketer is or is calling on behalf of a tax-exempt non-profit organization. See 47 CFR § 64.1200(c)(2)(i)-(iii), (f)(14)(i)-(iii).

¹⁴ See 47 CFR § 64.1200 *et seq.*; 16 CFR part 310.

¹⁵ *TCPA Order*, 18 FCC Rcd at 14034, para. 27.

¹⁶ See generally Do-Not-Call Act; see also Consolidated Appropriations Resolution of 2003, Pub. L. 108-7, enacted Feb. 21, 2003 (authorizing the FTC to collect fees sufficient to implement and enforce the “do-not-call” provisions of the Amended Telemarketing Sales Rule); 47 U.S.C. § 227(f).

¹⁷ See *Notice*, 33 FCC Rcd at 9236, paras. 8-9.

Affordable's live telemarketing calls displayed one of thirteen telephone numbers in the caller ID.¹⁸ Some of the 13 telephone numbers were assigned to consumers who had no affiliation or relationship with Affordable (Innocent Consumers).¹⁹ Some of the telephone numbers were unassigned.²⁰ Some of the telephone numbers were assigned to prepaid phones that Affordable purchased but failed to maintain; the telephone numbers then were put back into the numbering pool and either became unassigned or, in some cases, were reassigned to Innocent Consumers.²¹

7. The Former Employee explained that Affordable used lists of numbers of Arizona customers to target in its telemarketing campaign, and those lists included numbers that were registered on the Do Not Call Registry²²—information corroborated by Affordable's Notice Response.²³ Affordable used these lists of numbers to initiate telemarketing calls to advertise various home remodeling and improvement services.²⁴ Affordable made the calls using a third-party telemarketing platform, {[]}.²⁵ In order to further its telemarketing campaign, Affordable purchased prepaid phones that were marketed by TracFone Wireless, Inc., doing business as Tracfone (Tracfone).²⁶ According to the Former Employee, Affordable registered the phones anonymously and referred to them internally as “burner phones.”²⁷

8. Affordable did not use the prepaid phones to make the telemarketing calls; instead it imported the phone numbers assigned to the prepaid phones into a third-party telemarketing platform, so that when Affordable placed live calls using the platform, the caller ID displayed the prepaid phone numbers.²⁸ The caller ID often did not include Affordable's name or any other information that would

¹⁸ *See id.*

¹⁹ *See id.* at 9237, para. 10. In some instances, Innocent Consumers had phone numbers that had once been assigned to one of Affordable's prepaid phones but had since been reassigned to the Innocent Consumer. In other instances, Innocent Consumers had phone numbers that had never been associated with one of Affordable's prepaid telephones.

²⁰ Like the Innocent Consumer numbers, some of the unassigned numbers were phone numbers that had never been associated with any of Affordable's prepaid telephones; other unassigned numbers were those that had once been associated with a prepaid phone but were subsequently unassigned.

²¹ Telephone numbers are a finite resource. The Commission has taken numerous actions to promote the efficient use of telephone numbers. *See, e.g., Numbering Resource Optimization*, CC Docket Nos. 99-200 and 92-237, Order, 33 FCC Rcd 6866 (2018). Among other things, the Commission has ensured that telephone numbers do not lie fallow for more than a brief duration. *See* 47 CFR § 52.15. Once a number is disconnected, a service provider can designate it as an “aging number” for a period and subsequently reassign it to a new subscriber. *See id.* at (f)(ii) (“Aging numbers are disconnected numbers that are not available for assignment to another end user or customer for a specified period of time. Numbers previously assigned to residential customers may be aged for no less than 45 days and no more than 90 days.”). After a number has been disconnected and gone through an appropriate aging period, the number will be made available for reassignment to another subscriber. *Id.*

²² *See Notice*, 33 FCC Rcd at 9235, para. 5; Federal Trade Commission, National Do Not Call Registry, <https://www.donotcall.gov/>.

²³ *See Notice Response* at 1-2; *see also Notice Response*, Exh. 3 at 8 (containing a text message, dated October 11, 2017, from Affordable's owner to the telemarketing platform indicating that numbers Affordable called using lists provided by the platform included numbers “registered with the DNC.”).

²⁴ *See Notice*, 33 FCC Rcd at 9235, para. 5.

²⁵ Material set off by double brackets {[]} is confidential and is redacted from the public version of this document.

²⁶ We note that Tracfone is accused of no wrongdoing. All violations discussed in this *Order* are attributed solely to Affordable.

²⁷ *See Notice*, 33 FCC Rcd at 9235, para. 6.

²⁸ *See Notice Response* at 4, 10. Affordable sometimes handled the prepaid phones to check voicemail or answer them when they were ringing, but those prepaid phones were not used to make the 2.3 million telemarketing calls at (continued....)

have associated the phone calls with the Company. According to the Former Employee, Affordable elected to display the prepaid numbers on the caller ID so that customers could not identify the company or otherwise report the company to authorities.²⁹ The Former Employee stated that Affordable would use a variety of caller ID information (none of which was traceable to Affordable) to ensure that no phone number was used too often.³⁰

9. The telephone numbers assigned to the prepaid phones expire unless usage minutes are added at specified intervals. According to Tracfone's published terms and conditions:

If you do not purchase and add airtime prior to the Service End Date, your Tracfone Service will be deactivated on the Service End Date *and you will lose your phone number* even if you have minutes remaining. To prevent this from occurring, please keep your Tracfone Service active by purchasing and adding an Airtime Card on or before your Service End Date If your Service is deactivated, your Service can be reactivated by purchasing and adding an Airtime Card. Once reactivated, your phone may be assigned a new phone number.³¹

The Company states that it bought new prepaid phones rather than adding minutes to existing phones.³² Once the telephone numbers expire, they are considered to be unassigned and are available to be assigned to new customers.³³ The record reflects that the phone numbers assigned to the prepaid phones were reassigned to other customers once Affordable stopped adding minutes to the phones.³⁴

10. Affordable admits that the Company conducted online searches, sometimes daily, of the phone numbers that it displayed in caller ID.³⁵ According to the Former Employee, Affordable conducted such searches to identify numbers associated with too many complaints as a precursor to retiring the

issue in this Order. *Id.* at 4, 10; *see also* Declaration of Jeffrey Caruso, Exh. 1 to Notice Response, ¶ 11 (Caruso Decl.).

²⁹ *See Notice*, 33 FCC Rcd at 9235, para. 7.

³⁰ *See id.* at 9235, para. 7.

³¹ *See Tracfone Wireless Terms and Conditions of Service*, <https://www.tracfone.com/termsandconditions> (emphasis added) (last visited Oct. 5, 2020) (*TracFone Terms of Service*).

³² *See Notice Response* at 2-3 (“As purchasing additional minutes for a phone was often more expensive than buying new phones with preloaded minutes, Affordable would replace a phone once the lead generators used its initial allotment of minutes.”). *See also Notice*, 33 FCC Rcd at 9246, para. 34 n.87 (citing to Tracfone's terms of service, which make clear that service would be deactivated for lack of use or payment).

³³ At the time of the calls at issue, numbers could be immediately reassigned to another customer upon disconnection. The Commission has since adopted rules requiring numbers to be reassigned to new customers only after 45 days. *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Report and Order, 33 FCC Rcd 12024, 12030, para. 15 (2018).

³⁴ E-mail from Shellie Blackeney, Director, Federal Affairs, Government Affairs Department, T-Mobile USA, to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 22, 2018, 10:39 EST) (on file in EB-TCD-17-00024974) (T-Mobile USA Mar. 22, 2018 E-mail); *see also* E-mail from Soraya Decade, Subpoena Compliance Supervisor, TracFone Wireless, Inc., to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 8, 2018, 15:26 EST) (on file in EB-TCD-17-00024974) (TracFone Mar. 8, 2018 E-mail); E-mail from Shellie Blackeney, Director, Federal Affairs, Government Affairs Department, T-Mobile USA, to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 28, 2018, 22:19 EST) (on file in EB-TCD-17-00024974) (T-Mobile USA Feb. 28, 2018 E-Mail); E-mail from Evelyn Bendles, TracFone Wireless, Inc., to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 27, 2018, 16:30 EST) (on file in EB-TCD-17-00024974) (TracFone Feb. 27, 2018 E-mail).

³⁵ *See Notice Response* at 5.

phone numbers.³⁶ The Company states that the searches were done to monitor its online reputation. In either event, Affordable's searches would have provided notice that: (1) Affordable was using a phone number that belonged to an Innocent Consumer,³⁷ (2) consumers were confused about who was calling them,³⁸ (3) Affordable's name was not displaying in the caller ID,³⁹ and (4) consumers were unable to reach Affordable when they called the numbers back.⁴⁰ None of the 2,341,125 calls at issue in this *Order* revealed Affordable's actual business phone number in the caller ID. Accordingly, there was no way for consumers or service providers to identify Affordable as the caller based on the spoofed phone number Affordable chose to display in the caller ID.⁴¹

11. The Bureau also reviewed 45 consumer complaints that were filed with the FTC and related to Affordable's telemarketing calls.⁴² The Bureau found that consumers expressed great frustration at receiving the calls on their home and wireless phones, even though many of the complainants stated that they had registered their numbers on the Do Not Call Registry.⁴³ The complaints reflect that consumers tried, without success, to reach the caller to voice their anger and frustration at receiving the unsolicited telemarketing calls.⁴⁴ The complaints also reflected that Affordable did not provide identifying information to the consumers.⁴⁵ The *Notice* found that some consumers were only able to provide the number listed on the caller ID (that is, one of the thirteen caller ID numbers that Affordable used) and could not identify Affordable as the calling party.⁴⁶ Only a few consumers were able to identify Affordable by name, but when prompted to provide the phone number of the calling party, the complainant entered the number reflected on the caller IDs, which the Bureau's investigation

³⁶ See *id.*; *Notice*, 33 FCC Rcd at 9235, para. 7.

³⁷ See Online Complaint (Aug. 4, 2017), { } ("Caller ID said { }").

³⁸ See Online Complaint (Feb. 16, 2017), { } ("Caller: No Idea."); Online Complaint (July 22, 2016), { } ("Call center of some kind. I don't normally answer unknown calls (CLID said 'cell phone') . . .").

³⁹ See Online Complaint (July 17, 2017), { } ("Caller: use cell phone { }"); Online Complaint (July 17, 2017) { } ("Caller ID was 'Cell Phone AZ'. Did not bother to answer and they left no message."); Online Complaint (May 23, 2017), { } ("CID reads: AW. No VM. Blocked; Caller AW(?"); Online Complaint (July 22, 2016), { } ("Call center of some kind. I don't normally answer unknown calls (CLID said 'cell phone') . . .").

⁴⁰ See Online Complaint (Aug. 1, 2017), { } ("Got a call from this number, no message left. Do not know who this is, did not answer. Tried to call back but just rang & rang & then went to VM but did not say who was calling...did NOT LEAVE MESSAGE! Most likely a scam artist or a telemarketer . . . wish there were a way to STOP these calls!"); Online Complaint (Jan. 17, 2017), { } ("Called it back with my number blocked and nobody picked up. The mailbox was full; seems like it's a cell phone.").

⁴¹ See *Notice*, 33 FCC Rcd at 9236, paras. 8-9. When a customer purchases a Tracfone, the customer must then activate the phone and is given the option to register the phone (providing a name, address, e-mail address, and alternative contact phone number). See *TracFone Terms of Service*. Affordable chose not to provide its business name or other identifying information when it activated the phone numbers, preserving their anonymity, which in turn meant that any research into those numbers would not have identified Affordable as the caller.

⁴² See *Notice*, 33 FCC Rcd at 9237, para. 11.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 9238, para. 11.

⁴⁶ See *id.*

determined was not the number assigned to the phone that placed the call (and often was a phone number that, if dialed, would not reach Affordable).⁴⁷

12. The Bureau also received evidence from one of the Innocent Consumers whose phone number Affordable spoofed and displayed in its caller ID, and who, as a result, received angry call backs related to Affordable's telemarketing calls.⁴⁸ Bureau staff interviewed the legitimate user of phone number {{ }}, which was one of the thirteen numbers that Affordable spoofed and displayed in the caller ID of its telemarketing calls.⁴⁹ The consumer was assigned the number as her cell phone number.⁵⁰ The *Notice* highlighted the consumer's recounting of a two-month period, beginning "around May 2017," in which she received more than five calls per day on her cell phone from consumers complaining that they were receiving unwanted calls from her number and demanding that she stop calling them.⁵¹ The consumer indicated that she was very "annoyed" at receiving so many calls per day on her cell phone and "confused" as to why she was receiving such calls in the first place.⁵² The consumer did not know how to stop the annoying and intrusive calls on her cell phone.⁵³ The Bureau's investigation found that Affordable displayed the number assigned to this consumer in the caller ID for 48,349 calls during the time period that it was assigned to this consumer.⁵⁴

13. On September 26, 2018, the Commission issued the *Notice*,⁵⁵ proposing a \$37,525,000 forfeiture against Affordable for its apparent willful and repeated violation of the Truth in Caller ID Act⁵⁶ and section 64.1604 of the Commission's rules.⁵⁷ That proposed forfeiture was calculated based on a sample of 37,525 spoofed calls that displayed in its caller ID one of 13 phone numbers, none of which was, at the time of the calls, assigned to Affordable or to the prepaid phones it purchased. The numbers for those 37,525 calls were either unassigned or assigned to Innocent Consumers at the time of each call.⁵⁸ In addition to a copy of the *Notice*, the Commission provided Affordable with an attachment listing each of the 37,525 illegally spoofed calls on which the forfeiture was based and additional record evidence, including a subpoena response from T-Mobile indicating the time periods that the phone numbers that Affordable spoofed belonged to Innocent Consumers.⁵⁹ In a separate action, the Bureau cited Affordable

⁴⁷ *See id.*

⁴⁸ *See id.* at 9238, para. 13.

⁴⁹ *See id.* This phone number was never assigned to one of Affordable's prepaid phones during the period at issue in this *Order*.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See id.* at 9238, para. 14 (citing {{ }} which provided call detail records for Affordable).

⁵⁵ *See generally Notice.*

⁵⁶ 47 U.S.C. § 227(e).

⁵⁷ 47 CFR § 64.1604.

⁵⁸ *See Notice*, 33 FCC Rcd at 9245-46, para. 34. Though the forfeiture was calculated using the sample of calls described above, we note that each of the 2,341,125 spoofed calls Affordable made from July 26, 2016, to September 25, 2017, was a violation of the Truth in Caller ID Act and that the Commission could have assessed a larger fine, taking those violations into account. *See id.* at 9245, para. 34.

⁵⁹ *See* E-mail from Shante Willis, Attorney-Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau, to Dennis K. Burke, Counsel, Ballard Spahr, LLP (Nov. 29, 2018, 13:18 EST). The e-mail confirms that the Bureau uploaded T-Mobile's subpoena response into Ballard Spahr's secure portal. The T-Mobile subpoena response contained redactions to reflect only portions of the Innocent Consumers' names and the periods of time that the phone numbers that Affordable spoofed belonged to Innocent Consumers.

for making illegal telephone solicitations to consumers registered on the Do Not Call Registry in violation of section 227 of the Act and section 64.1200 of the Commission's rules.⁶⁰

14. Affordable filed a response to the *Notice* on December 11, 2018, arguing that the *Notice* should be canceled or the proposed forfeiture should be reduced substantially.⁶¹ The Company admits that it hired a third-party telemarketing platform and intentionally manipulated the caller ID of its telemarketing calls to display numbers other than the originating number.⁶² Affordable, however, argues that because the caller ID reflected phone numbers assigned to prepaid phones that Affordable had purchased, the Company did not illegally spoof the caller ID, and lacked the requisite knowledge or intent required by the Truth in Caller ID Act.⁶³ Affordable further argues that the Commission's evidence was insufficient to support a finding of knowledge or intent.⁶⁴ The Company also argues that it lacked notice that its actions violated the Truth in Caller ID Act.⁶⁵ It also asserts that the proposed forfeiture violated the Fifth and Eighth Amendments and was miscalculated under the Act's section 503 balancing factors.⁶⁶ Finally, Affordable asserts an inability to pay and provided financial documentation.⁶⁷ The Company argues that its inability to pay warrants a downward adjustment to \$152,316.76 and that due process warrants a further reduction to \$3,752.50.⁶⁸

III. DISCUSSION

15. The Commission proposed a forfeiture in accordance with section 503(b) of the Act,⁶⁹ section 1.80 of the Commission's rules,⁷⁰ and the Commission's *Forfeiture Policy Statement*.⁷¹ We have fully considered Affordable's response to the *Notice*, which includes a variety of legal and factual arguments, but we find none of them persuasive. We therefore affirm the \$37,525,000 forfeiture proposed in the *Notice*.

A. Affordable Knowingly Engaged in Illegal Spoofing.

16. A key purpose of the Truth in Caller ID Act and our rules is to let consumers know the identity of the caller *before they pick up the phone*. Indeed, the Commission has been explicit that the purpose of the Truth in Caller ID Act and our rules is to ensure that caller ID information "allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call

⁶⁰ See *Affordable Enterprises of Arizona, LLC.*, Citation and Order, 33 FCC Rcd 8826, 8826-27, paras. 1-2 (EB 2018) (*Citation*). The *Citation* includes a more complete discussion of the facts and history of this case and is incorporated herein by reference.

⁶¹ See Notice Response. Affordable did not file a response to the *Citation*.

⁶² Notice Response at 4, 10.

⁶³ *Id.* at 9-10.

⁶⁴ *Id.* at 7-14.

⁶⁵ *Id.* at 10-12.

⁶⁶ *Id.* at 15-18.

⁶⁷ *Id.* at 18-19; *id.* at Appx. A; *Notice*, 33 FCC Rcd at 9247-48, paras. 38, 41-42.

⁶⁸ Notice Response at 19.

⁶⁹ 47 U.S.C. § 503(b).

⁷⁰ 47 CFR § 1.80.

⁷¹ *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).

again.”⁷² To that end, Congress made plain that the underpinning of the Truth in Caller ID Act is the substantial value that consumers place in receiving accurate and reliable caller ID information, which assists them not only in deciding whether to answer a phone call, but also, ultimately, whether to trust the caller on the other end of the line.⁷³ In keeping with that goal, the Commission’s rules explicitly require a certain type of caller—telemarketers—to “transmit caller identification information,” and stipulate that “the phone number . . . must be one that a person can call to request placement on a company-specific do-not-call list.”⁷⁴ These obligations not only “facilitate[] consumers’ ability to request placement on company-specific do-not-call lists,” but also allow them “to more easily identify incoming telemarketing calls.”⁷⁵ In short, our rules require telemarketers to transmit caller ID that both (1) identifies the caller and (2) allows the consumer to reach the telemarketer. Affordable did neither.

17. Affordable knew that its telemarketing calls displayed spoofed numbers that were either inaccurate (because the numbers were unassigned or assigned to Innocent Consumers) or misleading (because the numbers were assigned to unregistered prepaid telephones, and Affordable took steps to conceal its identity as the caller). In doing so, Affordable frustrated consumer attempts to identify the caller and to report the violations to authorities. Accordingly, we find that Affordable violated section 227(e) of the Act and section 64.1604 of the Commission’s rules by knowingly displaying or transmitting both inaccurate caller ID information and misleading caller ID information in its telemarketing calls.⁷⁶

1. Affordable Knew that It Was Displaying Inaccurate Phone Numbers in the Caller ID.

18. The record reflects that Affordable knowingly falsified the caller ID information of its telemarketing calls by displaying numbers that were not assigned to Affordable at the time of the calls. Each of the 37,525 calls that the Commission evaluated were made using telephone numbers in the caller ID that were either unassigned or assigned to an Innocent Consumer at the time of the call.⁷⁷ The caller ID information therefore was inaccurate because it did not represent phone numbers that were assigned to Affordable when the calls were made.

19. Affordable claims that it lacked the requisite knowledge that the numbers it transmitted were inaccurate within the meaning of the Truth in Caller ID Act.⁷⁸ According to Affordable, it did not *know* that the numbers were no longer associated with the prepaid phones, and were, at the time of the calls, unassigned or assigned to Innocent Consumers.⁷⁹ It further asserts that such actions were “purely inadvertent,” and that such occurrences were “limited at best.”⁸⁰ Finally, Affordable argues that the Commission has insufficient evidence to establish that it knowingly transmitted unassigned or other consumers’ phone numbers.⁸¹ None of these arguments are persuasive.

⁷² See *TCPA Order*, 18 FCC Rcd at 14121, para. 179; *Best Insurance Contracts, Inc., and Philip Roesel, dba Wilmington Insurance Quotes*, Forfeiture Order, 33 FCC Rcd 9204, 9215, para. 30 (2018) (*Roesel Forfeiture Order*).

⁷³ See 155 Cong. Rec. S170-02, S173 (2009) (“Consumers expect caller I.D. to be accurate because it helps them decide whether to answer a phone call and trust the person on the other end of the line.”).

⁷⁴ See *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd 9114, 9128, para. 36 (2011) (*Truth in Caller ID Order*); see also 47 CFR § 64.1601(e).

⁷⁵ *Truth in Caller ID Order*, 26 FCC Rcd at 9128, para. 36.

⁷⁶ 47 U.S.C. § 227(e); 47 CFR § 64.1604.

⁷⁷ See *Notice*, 33 FCC Rcd at 9233-34, para. 2.

⁷⁸ Notice Response at 9-10.

⁷⁹ *Id.* at 9-11.

⁸⁰ *Id.* at 10, 18.

⁸¹ *Id.* at 10.

20. *First*, Affordable knew that it was not adding minutes to its prepaid phones. Tracfone’s terms of service state that the prepaid phones would be deactivated if minutes are not added at specified intervals. This term of service is displayed prominently on Tracfone’s website, and not merely buried in small print in the company’s boilerplate provisions. We thus impute to Affordable knowledge of the terms of service and find that Affordable knew that, by failing to update usage minutes, the numbers would no longer be assigned to the Company’s prepaid phones and the associated phone numbers might be assigned to Innocent Consumers.

21. What is more, Affordable had reason to know that the phone numbers were not assigned to the Company: The phones were dead.⁸² Affordable presents no evidence that it engaged in any efforts or had in place any policies to track the numbers it used, update the numbers transmitted in caller ID, or discontinue the use of any prepaid wireless phone numbers associated with phones whose minutes had expired. Accordingly, Affordable knew that its policies of purchasing new phones instead of renewing minutes associated with older phones, and its failure to monitor its inventory of numbers that were assigned to the prepaid phones, effectively ensured that it was using phone numbers associated with deactivated phones and that those phone numbers were either unassigned or, worse, had been reassigned to Innocent Consumers.

22. *Second*, Affordable conducted frequent online searches of the phone numbers it used as caller ID information. Those searches necessarily would show that a number had been reassigned and provided Affordable with knowledge that it was displaying a phone number in the caller ID of thousands of calls that it had no right to use.⁸³ Bureau staff performed basic online searches (similar to what Affordable states it did) associated with each of the phone numbers that Affordable used and found that such searches would have placed Affordable on notice that it was using a phone number that was assigned to an Innocent Consumer. For example, an online complainant received a call on August 4, 2017, from {{ }}—one of the thirteen phone numbers that Affordable displayed in the Caller ID of its telemarketing calls⁸⁴—that displayed the name “{{ }}.”⁸⁵ Bureau staff confirmed that Affordable was actively displaying this phone number in the caller ID of its telemarketing calls on the date listed in the online complaint.⁸⁶ To extent Affordable was not already aware that it was using the numbers of Innocent Customers (again, the evidence shows that Affordable knew or should have known as much), its own searches for online complaints put Affordable on notice that it was displaying phone numbers that it no longer had a right to use, as well as numbers it never had the right to use.

23. *Third*, Affordable’s practice of intentionally letting its phones deactivate resulted in the Company using Innocent Consumers’ phone numbers in its caller ID, and such use was far from “limited”—it was pervasive. For example, the record showed that Affordable made 137,539

⁸² According to the terms in Tracfone’s service agreement, if the phone is deactivated, you will lose your phone number, and you may be reassigned a new number if you reactivate your phone. *See TracFone Terms of Service*.

⁸³ *See* Notice Response at 5 (Affordable admits that it conducted online searches, sometimes daily, using the phone numbers displayed by it on the caller ID as a search parameter to monitor its online reputation.); Online Complaint (Aug. 4, 2017), {{ }} (“Caller ID said {{ }}.”).

⁸⁴ *See* Online Complaint (Aug. 4, 2017), {{ }} (“Caller ID said {{ }}.”).

⁸⁵ {{ }}, however, did not make the complained of call. In fact, {{ }} is one Innocent Consumer who received a barrage of angry call backs from Affordable’s other victims. *See* E-mail from Shellie Blackeney, Director, Federal Affairs, Government Affairs Department, T-Mobile USA to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 28, 2018, 22:19 EST) (on file in EB-TCD-17-00024974). *See* T-Mobile USA Feb. 28, 2018 E-Mail.

⁸⁶ Affordable’s call detail records reflect that Affordable displayed {{ }} in the caller ID of its telemarketing calls from September 7, 2016, to September 6, 2017. *See* {{ }} Response (providing call details records for Affordable).

telemarketing calls displaying the phone numbers of just four Innocent Consumers.⁸⁷ Indeed, the record identified one consumer whose phone number was used by Affordable to make 48,349 calls during the period that it was assigned to the consumer.⁸⁸ The Commission documented the frustration that this Innocent Consumer endured over the course of two months when she received more than five calls per day on her cell phone from consumers complaining that they were receiving unwanted calls from her number and demanding that she stop calling them.⁸⁹ We thus reject Affordable's claim that its use of such caller ID was limited.

24. The totality of the evidence makes clear that Affordable knew that it was displaying numbers that were no longer assigned to it and that were either unassigned or had been reassigned to Innocent Consumers.⁹⁰ Based on the record, we affirm the finding in the *Notice* that Affordable knowingly displayed inaccurate caller ID information when it used phone numbers that were unassigned or belonged to Innocent Consumers.

2. Affordable Knew that Its Use of Prepaid Phone Numbers as the Caller ID Information Was Misleading.

25. In addition to making calls with *inaccurate* caller ID information (by spoofing unassigned telephone numbers or numbers belonging to Innocent Consumers), Affordable also made calls with *misleading* caller ID information. We base our finding that Affordable used misleading caller ID information on the totality of Affordable's actions, which demonstrated that the Company used the prepaid phones in a manner calculated to obscure its identity, evade detection, and prevent consumers from opting out of future calls. We find that, taken as a whole, such use of prepaid phone numbers constitutes misleading caller ID information, and that Affordable's actions contravened both the letter and the spirit of the Truth in Caller ID Act.

26. *Affordable Deliberately Disguised Its Identity.* Affordable intentionally preserved its anonymity by choosing not to provide any registration information during the activation process for its prepaid phones. The activation process for prepaid cell phones includes the option to register the phones, which in turn requires an overt act to include or omit identifying subscriber information. Affordable elected to exclude its business name and other identifying information in the Tracfone activation process (thus activating the phones anonymously),⁹¹ and the record reflects that it engaged in this behavior repeatedly.⁹² The *Notice* identified 13 separate phone numbers that Affordable displayed as the caller ID information for its 2,341,125 spoofed telemarketing calls, and the subscriber records definitively show

⁸⁷ See *Notice*, 33 FCC Rcd at 9243, para 28. Upon review of the record, based upon Affordable's Notice Response, the Commission has determined that Affordable made 137,539 telemarketing calls using numbers belonging to the four Innocent Consumers. The 154,756 telemarketing calls referenced in the *Notice* included some calls that Affordable made using numbers that were unassigned (and thus, like the numbers of Innocent Consumers, Affordable had no right to use).

⁸⁸ See *id.* at 9238, para. 14.

⁸⁹ See *id.* at 9238, para. 13.

⁹⁰ The record reflects that Affordable not only used numbers that had expired, but also used numbers that were unassigned (and thus not related to Tracfone at all) or always belonged to Innocent Consumers. Even if we were convinced by Affordable's argument that it inadvertently used numbers after they expired, that excuse is entirely irrelevant for numbers that Affordable never had the right to use in the first place.

⁹¹ See *Notice*, 33 FCC Rcd at 9236, para. 9 ("The subscriber records showed that none of the 13 numbers that Affordable displayed on the caller ID when making the 2,341,125 telemarketing calls were registered to Affordable, or otherwise listed Affordable as the subscriber of record.").

⁹² See TracFone Mar. 8, 2018 E-mail; see also E-mail from Soraya Decade, Subpoena Compliance Supervisor, TracFone Wireless, Inc., to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 6, 2018, 13:27 EST) (on file in EB-TCDD-17-00024974) (TracFone Mar. 6, 2018 E-mail); TracFone Feb. 27, 2018 E-mail.

that *none* of the 13 numbers were ever registered under Affordable’s business name or otherwise listed Affordable as the subscriber of record.⁹³

27. Affordable denies that its prepaid wireless phones were registered anonymously and asserts that the phone numbers were traceable and allowed called parties to contact the Company and request placement on a company-specific do-not-call list.⁹⁴ The evidence proves otherwise. Affordable presents no evidence—such as records showing that it registered the phone numbers under its business name with its carrier, Tracfone, during the time period covered by the Bureau’s investigation—to counter these registration records. Affordable claims that there was a legitimate business reason for using prepaid wireless phones (for example, “to add additional working lines” to its telemarketing operations),⁹⁵ and we do not dispute that the phones themselves may serve a legitimate purpose. But the Company does not claim any legitimate business reason for declining to provide its own contact information or to register those phones under its business name. Instead, Affordable simply denies that it registered the phones anonymously⁹⁶—an assertion that is contradicted by the evidence.⁹⁷ We find it significant that Affordable, as the party in possession of records relevant to the issue at hand, provided none. Accordingly, the record supports our finding that Affordable omitted its name and contact information from the registration process, thus preserving its anonymity, and that it did so willfully.

28. Affordable also made telemarketing calls that did not consistently display its business name or other identifying information in the caller ID.⁹⁸ Our rules require telemarketers to transmit “caller identification information,” including the telemarketers’ name when it is available.⁹⁹ The *Notice* and *Citation* both highlighted numerous FTC consumer complaints indicating that Affordable did not

⁹³ See *Notice*, 33 FCC Rcd at 9236, paras. 8-9. Some numbers were assigned to Innocent Consumers throughout the time period covered by the investigation (and thus Affordable never had the right to use them in the first place); others may have at one time been assigned to a prepaid phone, but nonetheless changed status throughout the time period Affordable used them in caller ID. For example, one number ({{ }}) changed status eight times during the relevant time period, alternating between unassigned and assigned to Innocent Consumers (three different Innocent Consumers), and finally ending up assigned to T-Mobile Prepay.

⁹⁴ See *Notice Response* at 12; *Caruso Decl.* ¶ 15 (“All numbers used by Affordable were traceable back to Affordable. Prepaid phones were purchased and owned by Affordable, and when those lines were called, the caller would reach Affordable. A voicemail for Affordable was set up on all prepaid cellular phones that Affordable purchased and used in its business operations.”).

⁹⁵ See *Notice Response* at 2, 12.

⁹⁶ See *id.* at 5.

⁹⁷ See *TracFone Mar. 6, 2018 E-mail*; see also *TracFone Mar. 8, 2018 E-mail*; *TracFone Feb. 27, 2018 E-mail*. The subpoenas responses received from Tracfone unequivocally show that the phone numbers were never registered under Affordable’s name.

⁹⁸ A telemarketer’s failure to display its name in the caller ID information constitutes a violation of our rules. See 47 CFR § 16.1601(e). The fact that Affordable cites some instances in which it attempted to display its business name in the caller ID of its telemarketing calls does not absolve it from liability for the many calls in which it did not.

⁹⁹ See *Truth in Caller ID Order*, 26 FCC Rcd at 9128, para. 36; see also 47 CFR § 64.1601(e) (“Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information. (1) For purposes of this paragraph, caller identification information must include either CPN [calling party number] or ANI [automatic numbering information], and, when available by the telemarketer’s carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller’s customer service telephone number. The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.”).

provide its business name or other identifying information to consumers.¹⁰⁰ The complaints referenced in the *Notice* and *Citation* span from July 26, 2016, to September 7, 2017, and reflect that Affordable failed to display identifying information, including its business name, throughout the course of this investigation.

29. Affordable tacitly concedes that it did not routinely display its business name in each of its more than two million telemarketing calls. Instead, the Company claims that it “took steps to ensure that all phone numbers utilized by Affordable were identified as Affordable when such was possible[,]”¹⁰¹ and that when Affordable noticed that its dialing system was not displaying its name, it sought to take corrective steps.¹⁰² The record, however, reflects that despite Affordable’s purported efforts, that information was often not transmitted throughout the time period covered by the investigation.¹⁰³ Indeed, the fact that Affordable went out of its way to purchase prepaid wireless phones and use the numbers associated with those “burner” phones rather than its business lines undermines the credibility of Affordable’s assertion that it was attempting to display its name to consumers. After all, Affordable had a simple solution to its supposed quandary—display its actual, registered phone number—which it repeatedly failed to do.

30. *Affordable Knew that Its Misleading Caller ID Information Left Consumers Unable to Either Identify or Contact the Company.* The Commission has made clear that telemarketers are required to transmit caller ID information and that “the phone number they transmit must be one that a person can call to request placement on a company-specific do-not-call list.”¹⁰⁴ One purpose of this requirement is to ensure that phone numbers are traceable to the telemarketers who use them.¹⁰⁵

31. Notwithstanding Affordable’s response that it took efforts to transmit its business name in the caller ID, we find that the Company knew that such identifying information was not being consistently conveyed, if it were conveyed at all. The Company states that it conducted online searches,

¹⁰⁰ See *Notice*, 33 FCC Rcd at 9237-38, para. 11; see *Citation*, 33 FCC Rcd at 8830, para. 10 (attaching 45 consumer complaints associated with Affordable’s unwanted calls, most of which did not display Affordable’s name or other identifying information and occurred as early as July 26, 2016, and as late as September 7, 2017).

¹⁰¹ See Caruso Decl. ¶ 14.

¹⁰² See Notice Response at 4 (indicating that in September 2017, “Cabrera began noticing various problems with the new { } system” including that “the system was not broadcasting Affordable’s name for caller ID information.”); Notice Response, Exh. 3 at 160 (in a September 28, 2017, text message, Ms. Cabrera wrote: “Can you make sure our name is broadcasting with the phone number when we call out? 480-704-3327. That’s our main office number for scheduling. Perhaps we should be broadcasting that with Affordable Windows at least until further notice[.]”); *id.* at 94, 96 (On Oct. 5, 2017, Affordable initiated text messages to the telemarketing platform that stated, “What is the dialer currently broadcasting our name as? I need to make sure the phone number is accessible to me for voicemails and it is broadcasting our name.”; “It’s very important I know exactly what name is being broadcast and what phone number and I have access to the people calling in. Going forward there cannot be any issues or I’m going to shut the room down immediately.”).

¹⁰³ The complaints reflect that Affordable failed to display its business name or other identifying information in the caller ID of its telemarketing calls throughout the entire course of this investigation. See *Notice*, 33 FCC Rcd at 9237, para. 11. In its review of 45 complaints filed with the Federal Trade Commission, 30 complaints stated that Affordable was not identified.

¹⁰⁴ *Truth in Caller ID Order*, 26 FCC Rcd at 9128, para. 36. Telemarketers are specifically excluded from the class of persons and entities that may mask their identities through, for example, caller ID blocking. See *id.* (“Although our rules generally allow callers to block caller ID, as discussed in the *Caller ID Act NPRM*, telemarketers are required to transmit caller identification information, and the phone number they transmit must be one that a person can call to request placement on a company-specific do-not-call list. This requirement allows consumers to more easily identify incoming telemarketing calls and to make informed decisions about whether to answer particular calls. It also facilitates consumers’ ability to request placement on company-specific do-not-call lists. Additionally, the requirement assists law enforcement investigations into telemarketing complaints.”) (footnotes omitted).

¹⁰⁵ *Id.*

sometimes daily, using these caller ID phone numbers as a search parameter to monitor its online reputation.¹⁰⁶ Bureau staff performed online searches associated with each of the 13 caller ID phone numbers and found many complaints about the numbers during the time of the Company’s telemarketing calls. Simple searches, such as the ones that Affordable conducted, reveal that: (1) consumers were confused about who was calling;¹⁰⁷ (2) the Company’s name was not displaying in the called party’s caller ID,¹⁰⁸ and (3) consumers were unable to reach Affordable when they called the numbers back.¹⁰⁹ We find that such searches would have made the Company aware of the inadequacies in its caller ID information.

32. Moreover, we proposed a forfeiture for the calls that displayed caller ID that was then unassigned or was assigned to an Innocent Consumer—information that was not only inaccurate, but also misleading because it led consumers to believe the calls were coming from unassigned numbers or Innocent Consumers, not Affordable. Accordingly, upon review of the record, we find that the Company was aware that its use of prepaid phone numbers in the caller ID of its telemarketing calls was misleading to consumers and failed to accurately identify Affordable as the calling party.

33. In addition, as a practical matter, called parties could not contact Affordable. Affordable argues that the caller ID was not inaccurate or misleading because called parties could call the phone number that appeared as the caller ID and reach the Company on the prepaid phones. But evidence does not bear that out. Although the caller ID did, in some instances, reflect phone numbers associated with prepaid phones in Affordable’s possession, there is evidence that Affordable either did not answer those phones or, if it did answer, it did not respond to callers in a meaningful way.¹¹⁰ In fact, the Former Employee recounted that when consumers called the number associated with the prepaid phones to ask that the Company cease making its unwanted telemarketing calls, Affordable instructed its employees to “hang up on complaining customers, or to apologize but to avoid engaging in any conversation.”¹¹¹ In turn, the Former Employee says that Affordable instructed its employees to simply hang up on those consumers who stated that they were on the National Do No Call Registry.¹¹²

¹⁰⁶ See Notice Response at 5. Affordable seeks to rebut the Former Employee’s claim that it searched online for complaints associated with the prepaid phone numbers in order to retire the use of phone numbers that amassed too many complaints. See Notice, 33 FCC Rcd at 9235, para. 7.

¹⁰⁷ See Online Complaint (Feb. 16, 2017), { } (“Caller: No Idea.”); Online Complaint (July 22, 2016), { } (“Call center of some kind. I don’t normally answer unknown calls (CLID said ‘cell phone’) . . .”).

¹⁰⁸ See Online Complaint (July 17, 2017), { } (“Caller: use cell phone { }.”); Online Complaint (July 17, 2017) { } (“Caller ID was ‘Cell Phone AZ’. Did not bother to answer and they left no message.”); Online Complaint (May 23, 2017), { } (“CID reads: AW. No VM. Blocked; Caller AW(?.”); Online Complaint (July 22, 2016), { } (“Call center of some kind. I don’t normally answer unknown calls (CLID said ‘cell phone’) . . .”).

¹⁰⁹ See Online Complaint (Aug. 1, 2017), { } (“Got a call from this number, no message left. Do not know who this is, did not answer. Tried to call back but just rang & rang & then went to VM but did not say who was calling...did NOT LEAVE MESSAGE! Most likely a scam artist or a telemarketer . . . wish there were a way to STOP these calls!”); Online Complaint (Jan. 17, 2017), { } (“Called it back with my number blocked and nobody picked up. The mailbox was full; seems like it’s a cell phone.”).

¹¹⁰ See Notice, 33 FCC Rcd at 9239, para. 18.

¹¹¹ See *id.* at 9239, para. 18 n.47.

¹¹² *Id.* at 9239, para. 18 nn.47-48.

34. Affordable claims that the Former Employee’s characterization is inaccurate.¹¹³ But such claims are belied not just by the sworn testimony of its Former Employee and reasonable inferences from its decision to display the numbers from “burner” phones, but also by corroborating consumer complaints in the record, which reflect Affordable’s pattern of “hanging up” on consumers who confronted Affordable about its wrongdoings. For example, some consumers complained:

- “I asked them to stop calling and remove my number from their records and they asked ‘why’ and I told them because I asked them too [sic] and he laughed and hung up on me.”¹¹⁴
- “I asked the gentlemen who called me if he knew what the do not call list was. He said yes, and he said ‘you don’t think they hand out a list do ya!’ My response was the company should check the list and then he hung up.”¹¹⁵

35. Indeed, one consumer complained to the FTC about receiving an unidentified and unwanted telemarketing call from {[redacted]}—one of Affordable’s prepaid wireless numbers.¹¹⁶ This consumer filed several complaints expressing his frustration about Affordable’s unwanted telemarketing calls.¹¹⁷ Even though the consumer returned the call and left a message to have his number removed from the telemarketer’s call list,¹¹⁸ the record shows that Affordable continued to make telemarketing calls to this consumer months after his initial, company-specific do-not-call request.¹¹⁹ The Bureau’s investigation confirmed that each of the consumer’s unwanted telemarketing calls originated from Affordable,¹²⁰ and that the consumer attempted to make his company-specific do-not-call request when consumers could purportedly “reach Affordable” (that is, when the number was still assigned to a prepaid phone with active service between the carrier and Affordable).¹²¹

36. In other words, the record supports the Former Employee’s testimony. Accordingly, and notwithstanding Affordable’s assertions, we find that calls which displayed prepaid phone numbers in the

¹¹³ See Caruso Decl. ¶ 15 (claiming when the prepaid phone numbers were called “the caller would reach Affordable” and that a voicemail was set up on all prepaid wireless phones); Caruso Decl. ¶ 11 (claiming that employees would respond to voicemails or answer calls from consumers); Notice Response at 5. Affordable claims it neither instructed nor trained its employees to “hang up on complaining customers.” See Declaration of Jessika Tracy-Cabrera, Notice Response, Exh. 8, ¶ 18 (Cabrera Decl.). Instead, Affordable instructed employees to place complaining customers’ information on the company’s internal do-not-call list and/or provide the number to the owners. See Cabrera Decl. ¶¶ 18–19.

¹¹⁴ Complaint 84031004 (Consumer Sentinel, May 16, 2017).

¹¹⁵ Complaint 83382189 (Consumer Sentinel, Apr. 27, 2017).

¹¹⁶ See Complaint 85368480 (Consumer Sentinel, June 24, 2017) (“I received a call to my registered dnc telephone number on {[redacted]} [redacted] at 3.17p from {[redacted]} identified as Phoenix, AZ. I returned the call the next day. I left [a] message to have my number removed. [I] contend this number should not have called in the first place. This number’s identification is a violation of FCC regulations.”).

¹¹⁷ See Complaint 87814849 (Consumer Sentinel, Aug. 17, 2017); Complaint 87241970 (Consumer Sentinel, Aug. 5, 2017); Complaint 85368480 (Consumer Sentinel, June 24, 2017); Complaint 77496996 (Consumer Sentinel, Oct. 16, 2016).

¹¹⁸ See Complaint 85368480 (Consumer Sentinel, June 24, 2017).

¹¹⁹ The consumer reports that he made his do-not-call request on June 23, 2017. See Complaint 85368480. In response to Affordable’s claims, we reviewed Affordable’s call records and found that Affordable made additional calls to this consumer’s phone number, {[redacted]}, on two occasions after the consumer made his company-specific do-not-call request, on August 4, 2017, and August 14, 2017. See {[redacted]} Response (providing call details records for Affordable).

¹²⁰ See Citation, 33 FCC Rcd at 8829, para. 7.

¹²¹ The Bureau’s billing name and address evidence confirms that {[redacted]} was assigned to a Tracfone prepaid wireless phone on the date that the complainant returned the call to make his company-specific do-not-call request.

caller ID were misleading because they did not represent accurate call-back information and called parties had no way to reliably contact Affordable.

37. And again, we proposed a forfeiture for the calls that displayed caller ID that was then unassigned or was assigned to an Innocent Consumer. For those numbers, there was no way for any called party to reach Affordable because Affordable had no right to use the number displayed in the caller ID.¹²² We also find based on the evidence that, if prepaid phones appeared in too many online complaints, the Company discarded that phone and associated phone number and switched to a new phone number.¹²³

38. Indeed, Affordable admits that it allowed the prepaid phones, and associated phone numbers, to expire.¹²⁴ Under Tracfone's terms of service, Affordable was informed that, by not adding minutes to the prepaid phones, the phones would become inactive and lose their assigned telephone numbers. The phone numbers would then become available for assignment to a carrier's other customers.¹²⁵ Affordable makes no effort to explain how a called party could possibly reach the Company via a deactivated phone number.

39. *Affordable's Use of Misleading Caller ID Information is Not Corrected by the Company Sometimes Identifying Itself After the Fact.* Affordable asserts that even if the caller ID did not identify the Company, this shortcoming was cured because Affordable disclosed its name at the beginning of every answered call.¹²⁶ Whatever the truth of this assertion (one belied by the complaints of many consumers who did not know that Affordable was the caller), this argument is unavailing.

40. The Commission has stated that a party's original failure to provide caller ID information that would permit the called party to identify the caller cannot be cured by any subsequent disclosure.¹²⁷ A key purpose in requiring accurate caller ID is to allow consumers the opportunity to make an educated decision about whether to answer the call. In this case, by the time the consumer answered the phone and received Affordable's introduction and telemarketing pitch, the violation had already occurred. In short, spoofing violations are not cured simply because the spoofer at times identifies itself in a voicemail message or once the called party picks up the phone.

41. *The Entirety of the Record Supports the Commission's Finding that Affordable Used Misleading Caller ID Information.* We disagree with Affordable's claim that our findings and proposed forfeiture are based solely on the declaration of an "aggrieved" Former Employee.¹²⁸ The Bureau issued subpoenas to obtain Affordable's call detail records from July 26, 2016, to September 25, 2017, and

¹²² If a person called the number, they would either reach no one (unassigned) or reach an unaffiliated third party (an Innocent Consumer).

¹²³ See Notice, 33 FCC Rcd at 9241, para. 23 & n.59.

¹²⁴ See Notice Response at 2-3 ("As purchasing additional minutes for a phone was often more expensive than buying new phones with preloaded minutes, Affordable would replace a phone once the lead generators used its initial allotment of minutes."). Affordable said that because lead generators (Affordable's employees) often returned missed calls on a voice over internet protocol system, it took months for a prepaid phone's initial allotment to run out. See *id.* at 2.

¹²⁵ See Notice, 33 FCC Rcd at 9246, para. 34 n.87 (citing Tracfone's terms of service which make clear that service would be deactivated for lack of use or payment). Tracfone's website states, "If your Service is deactivated . . . your phone may be assigned a new phone number." *TracFone Terms of Service*.

¹²⁶ See Notice Response at 12 ("Affordable's employees were trained to disclose the company's name at the beginning of every call."); *id.* at 17 ("Here, however, Affordable did not target vulnerable members of society and provided its business name at the beginning of every answered call.").

¹²⁷ *Roesel Forfeiture Order*, 33 FCC Rcd at 9204, 9214, para. 28 ("Second, the statute does not provide for a 'cure.'").

¹²⁸ See Notice Response at 3-6, 10.

confirmed that Affordable had not registered any of the prepaid phone numbers in its name, and that some of the numbers were unassigned or were assigned to Innocent Consumers.¹²⁹ The Bureau reviewed numerous complaints from consumers that provided insight into Affordable's actions that reflect consumer frustration at receiving unwanted telemarketing calls from Affordable. The Bureau heard first-hand from one consumer who was particularly affected by Affordable's illegal calls because it used her cell phone number in the caller ID of its telemarketing calls.¹³⁰ We also considered the Company's Notice Response. In short, we rely on the entirety of the record in concluding that the Company committed knowing and deliberate violations.

42. *Affordable Had Sufficient Notice that its Use of Misleading Caller ID Information was Illegal.* Affordable contends that, to the extent it displayed the telephone numbers assigned to the prepaid phones that Affordable purchased, it lacked notice that this practice would constitute spoofing and that the Commission's prohibitions on spoofing have never "incorporated a business's associated phone numbers."¹³¹ We disagree. Caller ID exists, in large part, to allow consumers to identify the calling party and allow them to make an informed choice about whether to answer the call and trust the caller.¹³² To this end, telemarketers are subject to heightened requirements meant to ensure that they transmit their name and contact information.¹³³ Despite these clear and long-standing requirements, the prepaid phone numbers at issue were not associated with Affordable's business and Affordable took affirmative steps to prevent called parties from identifying the Company as the caller. Affordable let the prepaid telephone service (and thus the phone numbers) deactivate while continuing to use the numbers associated with the phones, guaranteeing that called parties would not be able to reach the Company by dialing the phone numbers displayed in the caller ID. We find that Affordable went out of its way to mislead consumers and evade federal requirements through its use of "burner" phones.

43. In *Roesel*, the violator falsified caller ID information to reflect unassigned telephone numbers, rather than using his own business numbers, in order to avoid having his cell phone overwhelmed with return calls.¹³⁴ In finding the violator culpable for unlawful spoofing, the Commission noted that the violator "could have requested a toll-free number or additional working telephone lines from his carrier to populate the caller ID" rather than using unassigned numbers—but did not.¹³⁵ Affordable had the same options, and likewise failed to exercise them. If Affordable had used prepaid phones that allowed called parties to accurately identify the caller—for example, by displaying its business name in the caller ID in each of its calls, and transmitting a phone number that the Company answered—its use of prepaid wireless phones could have satisfied the requirements of the Commission's rules. But Affordable instead chose to shield its identity when making calls using the prepaid phone numbers. Therefore, we reject Affordable's argument that its use of prepaid numbers comports with the

¹²⁹ See T-Mobile USA Mar. 22, 2018 E-mail. See also E-mail from Shalini Niraj, Law Enforcement Unit, Communication Data Disclosure Officer, Lycatel Services Ltd., to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 20, 2018, 9:14 EST) (on file in EB-TCD-17-00024974); TracFone Mar. 8, 2018 E-mail; TracFone Mar. 6, 2018 E-mail; T-Mobile USA Feb. 28, 2018 E-Mail; TracFone Feb. 27, 2018 E-mail; Letter from Jennifer Pelzman, Manager, Legal Support, Public Policy & Law, Verizon Wireless to Kristi Thompson, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 26, 2018) (on file in EB-TCD-17-00024974).

¹³⁰ See Declaration of Shante Willis at 1 (filed May 11, 2018) (on file in EB-TCD-17-00024974).

¹³¹ Notice Response at 8-12. And, while Affordable claims a legitimate reason for using prepaid wireless phones (that is, to keep its "main business line free for incoming calls"), it does not provide any legitimate explanation for why it repeatedly elected to anonymously activate its prepaid wireless phones without providing its business name or other identifying information in the caller ID as required by the Commission's rules. Notice Response at 13.

¹³² See *TCPA Order*, 18 FCC Rcd at 14121, para. 179; *Truth in Caller ID Order*, 26 FCC Rcd at 9128, para. 36.

¹³³ See *Truth in Caller ID Order*, 26 FCC Rcd at 9128, para. 36; 47 CFR § 64.1601(e).

¹³⁴ Notice Response at 11.

¹³⁵ *Roesel Forfeiture Order*, 33 FCC Rcd at 9215-16, para 33.

guidance provided by the Commission in *Roesel*.¹³⁶

44. Finally, Affordable's use of prepaid wireless numbers in the caller ID of its telemarketing calls was neither inadvertent nor benign.¹³⁷ Even if we were persuaded by Affordable's assertion that it had a benign reason (namely to increase its ability to make calls without tying up its main phone line),¹³⁸ we find that it was not the primary reason for using numbers associated with prepaid phones. Unlike other "benign" uses of modified caller ID, Affordable's actions were intended to make it *less* reachable by consumers—not more.¹³⁹

45. We find that the Act, the Commission's rules, and case history provided Affordable the requisite prior notice that its calls displaying the numbers of prepaid phones were "misleading" and did not conform to the requirements of the Truth in Caller ID Act. Nonetheless, our monetary forfeiture is based only on calls that Affordable made using phone numbers that were unassigned or assigned to Innocent Consumers. That finding addresses any concerns about fair notice and due process. Going forward, however, parties are on notice that any person or entity that makes misleading use of telephone numbers, whether for telemarketing purposes or otherwise, may be subject to enforcement action for violating the Truth in Caller ID Act. Parties may not display telephone numbers in a manner that thwarts the underlying purpose of the Truth in Caller ID Act.

B. Affordable Falsified Caller ID with the Intent to Cause Harm and Wrongfully Obtain Something of Value.

46. The Act and the Commission's rules make it unlawful to spoof caller ID information with the "intent to defraud, cause harm, or wrongfully obtain anything of value[.]"¹⁴⁰ Courts have recognized that direct evidence of specific intent is rarely available.¹⁴¹ Therefore, it is reasonable to look at a party's actions to determine its intent.¹⁴² The evidence shows that Affordable intended to harm both called parties who received Affordable's spoofed calls and the Innocent Consumers who had been assigned the phone numbers that Affordable spoofed. Affordable also intended to wrongfully obtain value from its

¹³⁶ See Notice Response at 11-12.

¹³⁷ See *id.* at 11.

¹³⁸ See *id.* at 11-12.

¹³⁹ For example, a benign use that allows a called party to identify and return a call of a party would include doctors that "may want to use their cell phones to return" calls to patients, "but choose to transmit their office number rather than their cell phone number as the calling number." *Truth in Caller ID Order*, 26 FCC at 9117-18, para. 9. See also S. Rep. No. 111-96, at 2 (2010), as reprinted in 2010 U.S.C.C.A.N. 1376, 1377 (2009) (discussing benign uses of modified caller ID).

¹⁴⁰ 47 U.S.C. § 227(e); 47 CFR § 64.1604.

¹⁴¹ See, e.g., *United States v. Dearing*, 504 F.3d 897, 901 (9th Cir. 2007); *United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984). See also *General Cigar Co., Inc. v. CR Carriers, Inc.*, 948 F.Supp. 1030, 1036 (M.D. Ala. 1996) ("Because one cannot know another's subjective intent, circumstantial evidence must be relied upon to indicate intent. The requirement of specific intent under the mail fraud statute is satisfied by the existence of a scheme which was reasonably calculated to deceive persons of ordinary prudence and comprehension and this intention is shown by examining the scheme itself.") (internal citations omitted).

¹⁴² See, e.g., *United States v. Davis*, 490 F.3d 541, 549 (6th Cir. 2007); *Tusa v. Omaha Auto Auction Inc.*, 712 F.2d 1248, 1253 (8th Cir. 1983) ("intent to defraud is ordinarily proved by circumstantial evidence"). See also *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) ("the scheme itself may be probative circumstantial evidence of an intent to defraud"); *United States v. Rogers*, 321 F.3d 1226, 1230 (9th Cir. 2003) ("It is settled law that intent to defraud may be established by circumstantial evidence"); *General Analytics Corp. v. CNA Ins. Co.*, 86 F.3d 51, 54 (4th Cir. 1996) ("[B]ecause it is abstract and private, intent is revealed only by its connection with words and conduct."); *FDIC v. St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1035 (6th Cir. 1991) ("intent . . . is thought to refer to a subjective phenomenon that takes place inside people's heads [The law is concerned only with] the external behavior ordinarily thought to manifest internal mental states") (citations omitted).

illegal spoofing campaign. Specifically, it sought to: (1) gain new customers and increase sales of its services and (2) avoid detection, evade law enforcement, and escape consumer litigation. These efforts were made in conjunction with wrongful actions as some of the spoofed calls were made to people on the Do Not Call Registry¹⁴³ and lacked the advance consent that the Telephone Consumer Protection Act requires.¹⁴⁴

47. *Intent to Cause Harm.* We find that Affordable intended to harm both consumers who received Affordable’s spoofed calls and the Innocent Consumers who had been assigned the phone numbers that Affordable spoofed.¹⁴⁵ With respect to consumers who received the telemarketing calls, Affordable’s intent to cause harm is demonstrated by its knowing and intentional disregard of the Do Not Call Registry, and thus its disregard of the wishes of called parties. The *Notice* highlighted numerous complaints indicating that called parties informed Affordable that they were on the Registry and that its calls were unwanted.¹⁴⁶ Affordable claims that “although the FCC highlights that [it] was aware of some consumer complaints, these complaints do not suggest [that] Affordable intended to cause harm.”¹⁴⁷

48. We must rely on the facts to determine intent, and in this case, the bulk of the evidence shows that Affordable was aware that it was making telemarketing calls to people listed on the Do Not Call Registry and failed to take preventative measures to avoid such calls. For the period before August 2017, Affordable offers no evidence of any internal policies or procedures, nor any explanation for whether or how it even tried to prevent calls to telephone numbers listed on the Registry. For the period after August 2017, Affordable submits various forms of rebuttal evidence to establish that it sought to comply with the Telephone Consumer Protection Act. Yet, Affordable’s evidence supports only that it finally established some ineffectual written Do Not Call policies beginning on or around August 2017, almost 13 months after its telemarketing campaign (and resultant Do Not Call Registry violations) began.¹⁴⁸

49. Affordable’s own account of its actions from August 2017 to September 2017 reveals that during this period, the Company (1) purportedly relied on the telemarketing platform provider to ensure compliance with the Do Not Call Registry, (2) nonetheless was fully aware that its call lists included many phone numbers on the Registry, and (3) knew that any steps Affordable may have been taking to prevent such calls had wholly or largely failed. During this two-month period in which the Company used lists of numbers obtained from its telemarketing platform, Affordable’s call representatives encountered multiple consumers who directly told the Company that they were on the Do Not Call Registry.¹⁴⁹ Yet the growing evidence of problems did not prompt Affordable to cease making

¹⁴³ See *Notice*, 33 FCC Rcd at 9237, paras. 11-12; *Citation*, 33 FCC Rcd at 8830, paras. 10-11. While we do not assess a fine for Affordable’s illegal calls to individuals registered on the Do Not Call Registry (such calls were fully discussed in the *Citation*), the Company’s disregard of Do Not Call Registrant’s wishes nonetheless goes to Affordable’s intent to cause harm or gain anything of value.

¹⁴⁴ 47 U.S.C. § 227; 47 CFR § 64.1200.

¹⁴⁵ See *Notice*, 33 FCC Rcd at 9243, paras. 27-28.

¹⁴⁶ See *id.* at 9237-38, 9240-41, paras. 11; *id.* at 9240-41, para. 21 & n.55 (“The consumer complaints suggest that Affordable knew that many of its telemarketing calls were going to consumers on the DNC Registry.”). See also Online Complaint (Sept. 7, 2017), {{ }} (“Pretty much the same, was soliciting kitchen & bath upgrades until I interrupted his sales pitch & asked if understood what do not call meant? Oh your [sic] on that he said, so I called him a F’n moron!!”).

¹⁴⁷ Notice Response at 14.

¹⁴⁸ See *id.* at 13; *id.*, Exhs. 6, 7. See also *id.* at 4 (“Cabrera also expressed concern to {{ }} whether the dialer system was scrubbing telephone number lists for DNC Registry compliance.”).

¹⁴⁹ See *id.*, Exh. 3 at 8. Affordable’s owner sent a message to the telemarketing platform, dated October 10, 2017, stating that: “For the last two months I’ve had the phone room manually hand writing all the phone numbers down that say they are on the DNC and today I’ve gone in to the national do not call registry and typed in a list of the

(continued....)

calls using the numbers the telemarketing platform provided, nor did the Company independently scrub the lists to remove numbers on the Registry. Instead, it just kept calling those numbers—and kept continuing to receive complaints from consumers whose phone numbers were on the Do Not Call Registry.¹⁵⁰

50. Based on the record evidence, Affordable’s only action in response to consumer complaints about Do Not Call Registry violations during August and September 2017 was an unhurried and incomplete effort to record the consumer objections. Affordable claims reliance on assurances from its telemarketing platform that the lists of numbers included people who had opted-in to telemarketing calls.¹⁵¹ But any such reliance is highly questionable and even if we were convinced Affordable believed it, it was only presented to the Company in October 2017¹⁵²—after more than two months of continuous do-not-call complaints.¹⁵³ Rather than taking swift action to scrub its call lists of *all* numbers on the Registry, Affordable states that it only took steps to prevent *additional* calls to individuals who already had complained.¹⁵⁴ Affordable states that it instructed employees to note the phone number of any called party that claimed to be on the Registry, add it to an internal do-not-call list, and to then alert Affordable’s owners of the consumer’s complaint.¹⁵⁵ While this effort may have prevented duplicative calls to consumers who complained, Affordable’s practice did not prevent other Do Not Call registrants from being called in the first instance. The Company did not engage in effective remediation for Do Not Call Registry violations for many weeks,¹⁵⁶ even though one of the owners took the lists of complaining parties and checked it against the Registry, confirming that almost every number was on the Registry.¹⁵⁷ It wasn’t until October 2017—after most of the 2.3 million telemarketing calls at issue here had been made—that Affordable took broad remedial action.¹⁵⁸

51. Affordable is damned by its own arguments and supporting evidence (including its Do Not Call Registry training policies and employee agreements), which show that the Company failed to act

phone numbers that had been given to me yesterday and this is what I see... Almost every single one is registered. I was told that you guys are scrubbing these. That’s obviously not the case if were [sic] still calling registered phone numbers.” *Id.*

¹⁵⁰ See Notice Response at 2.

¹⁵¹ See *id.*, Exh. 3 at 8 (containing a message, dated October 10, 2017, from the telemarketing platform to Affordable’s owner, discussing consumer complaints and indicating that, “You’ll run into issues like that. Remember these people received a service or gift in most cases to let companies resell their targeted info.”).

¹⁵² The record reflects that Affordable contacted the telemarketing platform on October 10, 2017, and indicated that for two months (beginning August 2017), it had been calling consumers that said they were registered on the Do Not Call Registry. See Notice Response, Exh. 3 at 8. The evidence indicates that the platform informed Affordable about the opt-in status of consumers on the call list on October 10, 2017. *Id.*

¹⁵³ See Complaint 85368480 (Consumer Sentinel, June 24, 2017); Complaint 87814849 (Consumer Sentinel, Aug. 17, 2017); Complaint 87241970 (Consumer Sentinel, Aug. 5, 2017); Complaint 85368480 (Consumer Sentinel, June 24, 2017); Complaint 77496996 (Consumer Sentinel, Oct. 16, 2016).

¹⁵⁴ Notice Response at 2. See also *id.*, Exhs. 6, 8.

¹⁵⁵ See Notice Response at 2; Cabrera Decl. ¶ 19; Posted DNC Registry Advisory.

¹⁵⁶ And the remedy was a limited one at best. It only benefitted those people who complained to the Company and who mentioned that they were on the Do Not Call Registry.

¹⁵⁷ See *supra* note 149.

¹⁵⁸ See Notice Response, Exh. 3 at 8 (containing a text message, dated October 11, 2017, from one of Affordable’s owners to the telemarketing platform indicating that, “The numbers they wrote down today saying they are on DNC again are all registered with the DNC. I need this taken care of. I’m pulling the room from working. You said that it would be done today. They’ve written down 50+ numbers from today alone. I need the dialer completely scrubbed. There are still dialing out DNC. tomorrow I’m closing the room down permanently. We can’t have this type of liability on her hands.”).

in a timely and urgent manner to prevent calls to consumers on the Do Not Call Registry and, when finally troubled to act, engaged in policies that epitomized “too little, too late.”¹⁵⁹ Affordable’s belated and ineffective efforts to scrub Do Not Call registrants from its calling lists demonstrate that it knew it was behaving unlawfully. Taken as a whole, Affordable’s calls to consumers using lists that it knew contained numbers on the Do Not Call Registry reflects its intention to harm those consumers.¹⁶⁰

52. With respect to harm to Innocent Consumers, the evidence demonstrates that Affordable intended to injure those consumers within the purview of the Truth in Caller ID Act. The Commission has found the requisite intent to harm where a company masks its actual phone number by using unassigned numbers or numbers belonging to completely unrelated third parties.¹⁶¹ In this case, our investigation found that some of the numbers Affordable chose to display as its caller ID were numbers that had *never* been associated with any of its prepaid phones, including some that had been assigned to Innocent Consumers before the outset of the Company’s telemarketing campaign.¹⁶² Other numbers that Affordable used as its caller ID were associated with prepaid phones that Affordable had once used, but had allowed the active service contracts to expire. Affordable knew that the associated numbers were therefore eligible for reassignment.¹⁶³ Bureau staff identified numerous Innocent Consumers and more closely examined a smaller subset of such consumers. In that subset (which is only a fraction of the total calls using Innocent Consumers’ phone numbers as caller ID), the record shows that Affordable made 137,539 calls using numbers that were assigned to Innocent Consumers.¹⁶⁴ We find that Affordable displayed phone numbers assigned to other people (including numbers that were deactivated due to the Company’s failure to maintain them, and numbers that had been assigned to Innocent Consumers throughout the entire telemarketing campaign), and in doing so Affordable intended to harm consumers who were validly assigned those numbers by forcing them—and not Affordable—to deal with any blowback from angry consumers upset at receiving unwanted telemarketing calls.

53. *Intent to Wrongfully Obtain Anything of Value.* The evidence shows that Affordable spoofed caller ID numbers to benefit itself in three different ways. In order to satisfy the statutory standard, that is substantiating the “intent to wrongfully obtain anything of value,” the Commission looks for intentional and wrongful (typically, unlawful) action undertaken for the purpose of obtaining something of value. In this case, Affordable acted wrongly each time it made calls to consumers

¹⁵⁹ See Notice Response at 4; see also *id.*, Exhs. 6, 7.

¹⁶⁰ The Commission has previously found that when spoofing is done in conjunction with unlawful activities, it indicates an intent to cause harm. See *Roesel Forfeiture Order*, 33 FCC Rcd at 9218-19, para. 40; see also *Adrian Abramovich. Mktg. Strategy Leaders, Inc., & Mktg. Leaders, Inc.*, Forfeiture Order, 33 FCC Rcd 4663, 4671-72, para. 27 (2018) (*Abramovich Forfeiture Order*). Accordingly, Affordable’s spoofing combined with its numerous Do Not Call violations are indicia of an intent to cause harm.

¹⁶¹ See *Abramovich Forfeiture Order*, 33 FCC Rcd 4663, 4668, para. 18.; *Roesel Forfeiture Order*, 33 FCC Rcd at 9217, para. 37 & n.92.

¹⁶² See E-mail from Shalini Niraj, Law Enforcement Unit, Communication Data Disclosure Officer, Lycatel Services Ltd., to Nakasha Ramsey, Analyst, Telecommunications Consumers Division, FCC Enforcement Bureau (Mar. 20, 2018, 9:14 EST) (on file in EB-TCD-17-00024974); see also T-Mobile USA Feb. 28, 2018 E-Mail; Letter from Jennifer Pelzman, Manager, Legal Support, Public Policy & Law, Verizon Wireless to Kristi Thompson, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 26, 2018) (on file in EB-TCD-17-00024974).

¹⁶³ According to the terms in Tracfone’s service agreement, if the phone is deactivated, the user will lose its phone number and may be reassigned a new number if the user reactivates the phone. See *TracFone Terms of Service*. Once the relevant telephone numbers expired, they were considered to be in disconnected status and were available to be assigned to new customers after a short aging period. See 47 CFR § 52.15 (f)(ii).

¹⁶⁴ See *Notice*, 33 FCC Rcd at 9243, para. 28 (Affordable made 137,539 telemarketing calls using numbers belonging to four Innocent Consumers; the 154,756 telemarketing calls referenced in the *Notice* included some calls that Affordable made using numbers that were unassigned (and thus, like the numbers of Innocent Consumers, Affordable had no right to use)).

registered on the Do Not Call Registry, which violates section 227(c) of the Act and section 64.1200(c)(2) of the Commission's rules.¹⁶⁵ By using spoofed caller ID information in making these calls, Affordable sought to obtain at least three things of value: (1) increased sales,¹⁶⁶ (2) avoidance of detection by law enforcement, and (3) escape from potential consumer litigation.¹⁶⁷

54. In the spoofing context, the Commission already has established precedent to guide our evaluation of Affordable's objectives here. *First*, like other spoofers engaged in commercial activity, Affordable wanted to reach as many people as possible in order to potentially increase sales of its home improvement and remodeling services.¹⁶⁸ By calling many consumers who had added their names and phone numbers to the Do Not Call Registry, we find that the Company broadened its pool of potential customers and thereby enhanced its chances of making more sales. *Second*, and also like other spoofers, in using bogus caller ID numbers Affordable made it more difficult and time-consuming for the Commission (or other law enforcement entities) to track the Company's wrongdoing and bring it to a halt.¹⁶⁹ *Third*, as with other spoofers, the misdirection Affordable created by using misleading or inaccurate caller ID numbers (some of which it had no valid right to use at all) allowed Affordable to also hide from potential civil actions brought by aggrieved individuals.¹⁷⁰ The Commission has previously found that the avoidance of culpability, whether involving government enforcement actions or private lawsuits, is a benefit that qualifies as a thing of value¹⁷¹—one with an ascertainable dollar value. Relevant valuation includes penalty amounts of up to \$20,489 per unlawful telemarketing call made in violation of the Commission's Do Not Call rules,¹⁷² and up to \$43,280 in civil penalties for each violation of the Telemarketing Sales Rule in a lawsuit brought by the FTC.¹⁷³

55. As demonstrated in this *Order*, Affordable took numerous steps to conduct its marketing campaign in anonymity.¹⁷⁴ The record evidence reveals that Affordable's actions caused harm to both consumers who received Affordable's spoofed calls and the Innocent Consumers who had been assigned the phone numbers that Affordable spoofed. Further, Affordable's actions deprived consumers of their right to determine a caller's identity before answering Affordable's telemarketing call. Moreover, as a result of its intentional acts, the Company stood to gain by expanding its potential customer base while

¹⁶⁵ See 47 U.S.C. § 227(c); 47 CFR § 64.1200(c)(2).

¹⁶⁶ See *Notice*, 33 FCC Rcd at 9240, para 21.

¹⁶⁷ See *id.* at 9241, paras. 22-23.

¹⁶⁸ See *id.* at 9240-41, para. 21; see also *Roesel Forfeiture Order*, 33 FCC Rcd at 9204, 9213, paras. 1, 25-26; *Abramovich Forfeiture Order*, 33 FCC Rcd at 4663, para. 1.

¹⁶⁹ See *Adrian Abramovich. Mktg. Strategy Leaders, Inc., & Mktg. Leaders, Inc.*, Notice of Apparent Liability, 32 FCC Rcd 5418, 5424, para. 21 (2017) (*Abramovich Notice*), *aff'd*, *Abramovich Forfeiture Order*, 33 FCC Rcd 4663; see also *Roesel Forfeiture Order*, 33 FCC Rcd at 9212, para. 22.

¹⁷⁰ See *Best Insurance Contracts, Inc., and Philip Roesel, dba Wilmington Insurance Quotes*, Notice of Apparent Liability, 32 FCC Rcd 6403, 6413, para. 27 (2017) (*Roesel Notice*), *aff'd*, *Roesel Forfeiture Order*, 33 FCC Rcd 9204.

¹⁷¹ See, e.g., *Roesel Forfeiture Order*, 33 FCC Rcd at 9212, para. 22; *Roesel Notice*, 32 FCC Rcd at 6413, para 27.

¹⁷² See 47 U.S.C. § 503(b)(2)(D); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 34 FCC Rcd 12824 (EB 2019).

¹⁷³ See 16 CFR § 310.1 *et seq.* See also Federal Trade Commission, *Complying with the Telemarketing Sales Rule*, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#penalties> (last visited Oct. 5, 2020) ("Anyone who violates the TSR [Telemarketing Sales Rule] is subject to civil penalties of up to \$43,280 for each violation.").

¹⁷⁴ See *Notice*, 33 FCC Rcd at 9241, para. 23 & n.60 (citing {{ }} at 2 ("The owners of Affordable Enterprises were aware of the TCPA and knew that their telemarketing calls were illegal. They used the burner cell phones to avoid detection and TCPA liability.")). See also TracFone Mar. 6, 2018 E-mail; TracFone Mar. 8, 2018 E-mail; TracFone Feb. 27, 2018 E-mail.

also evading detection by law enforcement or plaintiffs pursuing civil suits. Affordable's arguments to the contrary are unpersuasive. Accordingly, the record demonstrates the wrongful nature of Affordable's conduct and the benefits that Affordable could have gained if its efforts had remained undetected.

C. The Full Amount of the Forfeiture is Warranted, and the Amount is Appropriate and Consistent with FCC Precedent.

56. When we assess forfeitures, section 503(b)(2)(E) requires that we take into account the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹⁷⁵ After considering the relevant statutory factors and the Commission's *Forfeiture Policy Statement*, we find that Affordable is liable for a total forfeiture of \$37,525,000.¹⁷⁶

57. As explained in the *Notice*, this total results from applying a \$1,000 base forfeiture to each of the 37,525 spoofed calls specially evaluated by the Bureau.¹⁷⁷ The 37,525 illegally spoofed calls that serve as the basis for the forfeiture calculation are only a fraction of the illegally spoofed calls that Affordable made. In cases involving massive spoofing campaigns, the Commission has analyzed a portion of the calls and assessed a forfeiture on that subset of calls. We take the same approach here.

58. We also wish to cleanly resolve in this decision any potential notice objections concerning the use of misleading numbers in caller ID, including those derived from prepaid phones. Therefore, we have excluded from our forfeiture calculation any call that, when made, derived caller ID information from “live” prepaid phones (that is, phones with active service between Affordable and the carrier). The monetary sanction is based on calls that, when made, displayed phone numbers that either were unassigned or assigned to Innocent Consumers who had no connection to Affordable.¹⁷⁸

1. The Commission's Evidence Supports the Forfeiture, Which Is in Line with Recent Precedent.

59. We find that the Commission provided Affordable with sufficient evidence to support each of the calls included in the proposed forfeiture. In the *Notice*, the Commission laid out evidence showing that Affordable made more than 2.3 million illegally spoofed telemarketing calls—each of which constitutes a separate violation.¹⁷⁹ The Commission selected a sample of 37,525 illegally spoofed calls Affordable made using unassigned phone numbers or numbers belonging to Innocent Consumers, and based the forfeiture on those calls. Affordable received a copy of the *Notice* and an attachment listing each of the 37,525 illegally spoofed telemarketing calls for which the forfeiture was based. And, upon Affordable's request, the Commission provided Affordable with additional record evidence, including a subpoena response from T-Mobile indicating the time periods that the phone numbers that Affordable spoofed belonged to Innocent Consumers.¹⁸⁰

¹⁷⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁷⁶ Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein.

¹⁷⁷ See *Notice*, 33 FCC Rcd at 9246, para. 35.

¹⁷⁸ See *id.* at 9245-46, para. 34 & nn.86-87. The *Notice* stated that the 37,525 calls used to calculate the proposed forfeiture were all made using the phone numbers of Innocent Consumers. Upon review of the record, based upon Affordable's Notice Response, the Commission has determined that some of the telemarketing calls referenced in the *Notice* included calls that Affordable made using numbers that were unassigned (and thus, like the numbers of Innocent Consumers, Affordable had no right to use).

¹⁷⁹ See *id.* at 9245-46, paras. 34-35.

¹⁸⁰ See E-mail from Shante Willis, Attorney-Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau, to Dennis K. Burke, Counsel, Ballard Spahr, LLP. (Nov. 29, 2018, 13:18 EST). The e-mail confirms that
(continued....)

60. Despite the provision of all material information relied upon in the *Notice*, Affordable claims the Commission did not provide evidence that each of the calls contained in the call sample were made using phone numbers belonging to Innocent Consumers (rather than being unassigned) and argues that the *Notice* should therefore be rescinded.¹⁸¹ Affordable misunderstands the issue here. The Commission has determined the call sample includes both calls made using unassigned numbers and calls made using numbers assigned to Innocent Consumers. But whether a particular call falls into one category or the other is irrelevant—both types constitute violations. The fact remains that the Commission identified for Affordable each of the calls upon which we have based the forfeiture. Affordable does not contest the fact that it (1) made each of the calls contained in the sample, (2) was not registered as the subscriber or identified as the user of the caller ID numbers that appeared in connection with those calls, and (3) had no right to use the numbers in caller ID when the calls were made.

61. Further, the forfeiture proposed in the *Notice* is consistent with recent precedent. Using *Roesel* as guidance, the Commission applied a base forfeiture in the amount of \$1,000 per unlawful spoofed call contained in a verified sample of 37,525 of Affordable's over 2.3 million unlawfully spoofed telemarketing calls.¹⁸² Affordable contends that the proposed forfeiture was excessive and violated the Eighth Amendment.¹⁸³ Specifically, Affordable claims that the Commission's application of a \$1,000 per violation base forfeiture disregarded what the Company characterized as a lack of actual harm caused by Affordable as compared to other spoofing cases.¹⁸⁴ The per violation base amount used in this case is at the lowest base forfeiture amount specified in section 1.80 of the Commission's rules and amounts to less than 9% of the statutory maximum amount of \$11,278 per violation that is permissible to impose against Affordable.¹⁸⁵ Had the Commission assessed the statutory maximum for each of the spoofed telemarketing calls for which Affordable is responsible, the result would be a proposed penalty in the billions of dollars. Instead, the Commission applied a base forfeiture consistent with other spoofing cases and determined that the appropriate forfeiture amount for these violations was \$37,525,000.

62. Weighing the relevant statutory factors, our own forfeiture guidelines, and Commission precedent, we conclude, based upon the evidence before us, that the proposed forfeiture of \$37,525,000 properly reflects the seriousness, duration, and scope of Affordable's violations.

2. A Reduction in the Forfeiture Is Unwarranted Given the Severity of Affordable's Spoofing Violations.

63. Affordable argues that the proposed forfeiture is disproportionate to its size and ability to pay and so should be reduced. We disagree. A violator's "ability to pay" is only one of several factors

the Bureau uploaded T-Mobile's Subpoena Response into Ballard Spahr's secure portal. The T-Mobile Subpoena Response contained redactions to reflect only portions of the innocent consumer's name and the periods of time that the phone numbers that Affordable spoofed belonged to Innocent Consumers.

¹⁸¹ See Notice Response at 7. Affordable argues that the call sample includes calls that display phone number {{ }} during periods of time that the number was not assigned to an Innocent Consumer. *Id.* The record reflects that the phone number {{ }} was unassigned from February 28, 2017, to July 27, 2017, and assigned to an Innocent Consumer from July 28, 2017, to September 28, 2017. Accordingly, the Commission's sample includes some illegally spoofed telemarketing calls that Affordable made during the time period when the number was unassigned.

¹⁸² See *Notice*, 33 FCC Rcd at 9246, para. 35.

¹⁸³ See Notice Response at 17-18.

¹⁸⁴ *Id.* at 17.

¹⁸⁵ See *Notice*, 33 FCC Rcd at 9243-44, para. 31. Private TCPA actions can result in damages of \$500 per violation. See 47 U.S.C. § 227(b)(3). If the court finds that the defendant in such private right of action willfully or knowingly violated the TCPA or its implementing rules, the court may award up to \$1,500, treble damages, to the plaintiff. *Id.* Thus, the per violation base amount used in this case amounts to less than 67% of the statutory maximum of \$1,500 per violation that is permissible to be imposed against Affordable in private civil litigation.

the Commission must consider when determining an appropriate forfeiture under section 503 of the Act and our forfeiture guidelines. We must also consider “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, . . . and such other matters as justice may require.”¹⁸⁶ Affordable asserts that its average annual gross revenue over the last three-year period supports a reduction closer to 4.5% of its average annual gross revenue, or \${{ [redacted] }}.¹⁸⁷ Notwithstanding this argument,¹⁸⁸ we decline to reduce the forfeiture proposed in the *Notice*.

64. From the outset of the Commission’s adoption of its spoofing rules, the agency placed would-be violators on notice that we would “seek substantial penalties” for violations of those rules.¹⁸⁹ Moreover, the Commission has previously recognized the risk that, in cases involving massive spoofing campaigns where violators can initiate hundreds of thousands, or even millions, of illegal calls to consumers, the fines may “far exceed any person or company’s ability to pay.”¹⁹⁰ But as the Commission has explained before in several contexts, we are not required to reduce a proposed forfeiture where a party’s repeated or egregious conduct outweighs its alleged inability to pay.¹⁹¹ A substantial forfeiture is necessary to punish its misconduct and deter future wrongdoing. Upon considering Affordable’s Notice Response, we find that other statutory factors outweigh Affordable’s inability to pay.

65. In particular, we find that the nature, circumstances, extent, and gravity of Affordable’s violations and its degree of culpability support sustaining the full proposed forfeiture. The Company not only wrongfully obtained something of value, but also caused significant harm to the consumers who received its unwanted telemarketing calls and the consumers whose numbers Affordable spoofed (who were then subject to angry callbacks).

66. The record is replete with evidence that consumers were frustrated at receiving Affordable’s telemarketing calls despite having placed their numbers on the Do Not Call Registry. These consumers also were thwarted in any attempt to identify Affordable based on the caller ID.¹⁹² For example, a complaining consumer, when describing a call made by Affordable, stated “[c]aller ID No Name. No message. Has called others about solar windows.”¹⁹³

67. The harm caused by Affordable’s calls using Innocent Consumers’ numbers as caller ID was even more evident. Despite the Company’s claims that the transmission of Innocent Consumers’ phone numbers was “limited at best,”¹⁹⁴ the record indicates that Affordable used the phone numbers of

¹⁸⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁸⁷ Notice Response at 19. Affordable’s response included various financial documents to support its inability to pay claim, including federal tax returns, lead generation charts, and balances sheets. Affordable states that its three-year average gross revenue was \${{ [redacted] }} for years 2015 to 2017, with “taxable income” of \${{ [redacted] }} for the same periods. *Id.* at 16.

¹⁸⁸ *Id.* at 19.

¹⁸⁹ See *Truth in Caller ID Order*, 26 FCC Rcd at 9115, para. 2.

¹⁹⁰ See *Abramovich Notice*, 32 FCC Rcd at 5426, para. 24.

¹⁹¹ See, e.g., *TV Max, Inc., et al.*, Forfeiture Order, 29 FCC Rcd 8648, 8661, para. 25 (2014) (noting that the Commission “has previously rejected inability to pay claims in cases of repeated or otherwise egregious violations[.]”); *Whisler Fleurinor*, Forfeiture Order, 28 FCC Rcd 1087, 1090, para. 9 (EB 2013) (violator’s demonstrated inability to pay outweighed by gravity of repeated violations); *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840, 7844-45, para. 16 (EB 2011) (violator’s repeated intentional and malicious violations outweighed evidence of inability to pay), *recons. dismissed*, Memorandum Opinion and Order, 28 FCC Rcd 1170 (EB 2013).

¹⁹² See *Notice*, 33 FCC Rcd at 9237-38, para. 11.

¹⁹³ See *id.* at 9237-38, para. 11.

¹⁹⁴ See Notice Response at 18.

four Innocent Consumers to make more than 137,539 telemarketing calls.¹⁹⁵ The harms Affordable inflicted on consumers were significant. For example, one Innocent Consumer received irate calls on a daily basis for over two months.¹⁹⁶ This barrage of calls caused significant frustration and harm to this Innocent Consumer because they were unwanted and she could not stop them.

68. The Company seeks to minimize this harm by arguing that, unlike in the *Blumenstock* and *Roesel* cases, it lacked a desire to harm vulnerable members of the population, did not misrepresent the products or services it was selling, and did not engage in neighbor spoofing.¹⁹⁷ Affordable therefore contends that its actions do not “involve egregious and troublesome violations.”¹⁹⁸ In exercising our discretion under section 503, we evaluate each case based on its unique facts and circumstances. The *Blumenstock* case involved 31 calls to a single victim and the spoofing was not done in conjunction with any other communications law violations.¹⁹⁹ The *Roesel* case involved more than 21 million calls spoofing unassigned numbers over a period of three months, all done in conjunction with other communications law violations.²⁰⁰ Thus, to the extent the facts in *Roesel* were more egregious, those distinguishing characteristics are reflected in the higher forfeiture in that case, which was more than two times greater than the one we impose here.²⁰¹ In addition, we are imposing a small fraction of the statutorily authorized forfeiture amount and likewise applying it to a small fraction of the unlawful calls. In this case, as in other massive spoofing cases that the Commission has prosecuted, we find that the forfeiture is conservative relative to the volume of calls and the amounts that Congress has authorized.

69. Finally, there can be no serious question about the illegality of the spoofing that Affordable employed in this case. Nonetheless, Affordable seeks a downward adjustment because, it argues, the Commission employed a “novel interpretation” of what constitutes “inaccurate or misleading caller ID information” with respect to the Company’s use of prepaid phone numbers.²⁰² The Company notes that the prepaid phone numbers, at least at one point in time, “belonged to” Affordable.²⁰³ For the reasons discussed above, however, we find that Affordable’s use of those numbers in this case constituted illegal spoofing.²⁰⁴ Nonetheless, to the degree that notice is an issue, we have chosen to calculate the forfeiture based only on a small fraction of the total calls the Company made displaying numbers assigned to Innocent Consumers or unassigned numbers.²⁰⁵ None of the 37,525 calls included in the forfeiture calculation were made during time periods when the prepaid phone numbers were active, with current service between Affordable and the carrier.²⁰⁶

70. The Commission considered these factors and others, including that Affordable is a first-time offender, when it determined not to impose an upward or downward adjustment to the proposed base

¹⁹⁵ See Notice, 33 FCC Rcd at 9236, para. 8 n.24.

¹⁹⁶ See *id.* at 9243, para. 28.

¹⁹⁷ See Notice Response at 18.

¹⁹⁸ *Id.*

¹⁹⁹ *Steven Blumenstock*, Forfeiture Order, 32 FCC Rcd 356 (EB 2017) (*Blumenstock Forfeiture Order*).

²⁰⁰ *Roesel Notice*, 32 FCC Rcd at 6403, 6406-6407, paras. 10-12, 6414, para. 32.

²⁰¹ See *Roesel Forfeiture Order*, 33 FCC Rcd 9204.

²⁰² See Notice Response at 18.

²⁰³ See *id.*

²⁰⁴ See *supra* section III.A-B.

²⁰⁵ As previously noted, the Commission has determined that some of the telemarketing calls referenced in the Notice included calls that Affordable made using numbers that were unassigned (and thus, like the numbers of Innocent Consumers, Affordable had no right to use).

²⁰⁶ See Notice, 33 FCC Rcd at 9245, para. 34 n.86.

forfeiture.²⁰⁷ Accordingly, taking into account the repeated and intentional nature of Affordable's violations and the consumers it harmed, we find that the statutory factors of section 503 were properly considered in the *Notice*. Affordable presents no additional evidence that warrants a reduction to the proposed \$37,525,000 forfeiture.

3. The Proposed Forfeiture Satisfies Fifth Amendment Due Process Rights.

71. The Commission proposed a forfeiture against Affordable that was well below the statutorily permissible forfeiture amount. Affordable nonetheless contends that the forfeiture is excessive under the Fifth Amendment as applied to a company of Affordable's size and ability to pay. We find this argument is without merit.

72. Where procedural due process protections such as fair notice are not implicated (and they are not in this case),²⁰⁸ the Supreme Court has made clear that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."²⁰⁹ The forfeiture proposed by the *Notice* and assessed here meets this threshold. It is consistent with, and calculated in a manner similar to, other recent forfeitures for spoofing violations.²¹⁰ The Commission appropriately considered the statutory factors in section 503 and determined that no upward or further downward adjustment was warranted against Affordable.²¹¹ Then, instead of assessing the forfeiture on the basis of all of Affordable's more than 2.3 million spoofed telemarketing calls, the Commission limited the forfeiture to a fraction of the violations (that is, the proposed forfeiture was based on 37,525 of the 2,341,125 violations for which Affordable was responsible).²¹² In making this calculation, the Commission used the methodology that had been used in other recent cases, which then—as now—was not arbitrary or capricious, and comports with the Due Process clause of the Fifth Amendment.²¹³

73. The Commission has repeatedly found that a company's ability to pay is only one factor considered in assessing a forfeiture, and it is not dispositive.²¹⁴ Affordable primarily relies on two federal district court decisions, *Universal Elections* and *American Blastfax*, to support its contention that the proposed forfeiture is unconstitutional as applied to Affordable.²¹⁵ *Universal Elections* and *American Blastfax* are both district court cases in which the courts found proposed penalties to be unreasonable or inequitable based on the violators' size and ability to pay.²¹⁶ We find these cases neither dispositive nor

²⁰⁷ See *id.* at 9246, para. 35.

²⁰⁸ See *id.* at 9245, para. 34 & n.86. The proposed forfeiture excludes calls made using the numbers at times when the numbers were assigned to the prepaid phones. *Id.*

²⁰⁹ *Abramovich Forfeiture Order*, 33 FCC Rcd at 4670, para. 24 (citing *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

²¹⁰ See *Abramovich Forfeiture Order*, 33 FCC Rcd at 4670-71, para. 25; see *Roesel Forfeiture Order*, 33 FCC Rcd at 9223, para. 51 & n.134.

²¹¹ See *Notice*, 33 FCC Rcd at 9246, para. 35.

²¹² See *id.*

²¹³ We note that Affordable does not make an explicit argument that the forfeiture here would be arbitrary and capricious under the Administrative Procedure Act, but it did cite two cases where that standard was a basis for a court's decision. See *Notice Response* at 15, 17.

²¹⁴ See *Abramovich Forfeiture Order*, 33 FCC Rcd at 4679, para. 45; *Roesel Forfeiture Order*, 33 FCC Rcd at 9226-27, para. 60.

²¹⁵ See *Notice Response* at 16 (citing *Maryland v. Universal Elections, Inc.*, 862 F. Supp. 2d 457, 466-67 (D. Md. 2012), *aff'd*, 729 F.3d 370 (4th Cir. 2013) (*Universal Elections*); *Texas v. Am. Blast Fax, Inc.*, 164 F. Supp. 2d 892, 900-01 (W.D. Tex. 2001) (*American Blastfax*)). The *Notice Response* cited other cases, but primarily relied on *Universal Elections* and *American Blastfax* in support of its argument. See *Notice Response* at 16.

²¹⁶ See *Universal Elections*, 862 F. Supp. 2d at 466-67; *American Blastfax*, 164 F. Supp. 2d at 900-01.

persuasive. In *Universal Elections*, a federal trial court exercised its discretion to reduce the imposed penalty, but in dicta the court remarked that it should not be taken as a suggestion “that a \$10 million award would necessarily be unconstitutional.”²¹⁷ Further, the Commission specifically made clear that the court’s decision in *Blastfax* had no bearing on the Commission’s ability to impose forfeitures that were consistent with the statutory guidelines.²¹⁸ We find that the Commission exercised its discretion to impose a statutorily permissible forfeiture amount and we further find that the forfeiture does not violate Affordable’s due process rights.

4. The Forfeiture Amount is Reasonable and Comports with Commission Precedent and the Eighth Amendment to the Constitution.

74. The forfeiture of \$37,525,000 is consistent with the forfeitures proposed or imposed for spoofing violations.²¹⁹ In evaluating a claim that a forfeiture is excessive under the Eighth Amendment, one factor that is often highly probative, if not dispositive, is whether the fine is within the prescribed statutory maximum for the underlying offense.²²⁰ The D.C. Circuit has noted that “[a] penalty that is not far out of line with similar penalties imposed on others and that generally meets the statutory objectives seems highly unlikely to qualify as excessive in constitutional terms.”²²¹ Here, as explained above, the forfeiture falls well below the statutory limits and is consistent with other spoofing penalties.²²²

75. In our constitutional analysis, we also consider whether the forfeiture is “grossly disproportional” to the gravity of the offense.²²³ This factor involves examining the nature and extent of the underlying offense, including whether it was in furtherance of other illegal conduct, as well as the nature of the harm caused by the sanctioned person’s conduct.²²⁴ The burden of establishing that a forfeiture is grossly disproportional lies with the party challenging the forfeiture.²²⁵ Affordable fails to satisfy this burden. Affordable argues that the harm associated with its spoofed telemarketing calls is less

²¹⁷ *Universal Elections*, 862 F. Supp. 2d at 466. The court exercised its discretion to reduce a penalty due to *Universal Elections*’s size and presumptive ability to pay but did not suggest that failing to do so would be unconstitutional. *See id.* The Commission exercises its discretion in declining to reduce the penalty in this case.

²¹⁸ *See Scott Malcolm DSM Supply, LLC Somaticare, LLC*, Order on Reconsideration, 33 FCC Rcd 2410, 2414, para. 12 (2018) (*Malcolm Order on Recon*) (“The court in *Blastfax* chose to impose an amount on the basis of what it deemed to be the ‘average cost [per page] of receiving an unwanted fax.’ The Commission chose instead to assess a fine that was based on and consistent with the statutory guidelines. It was within the Commission’s discretion to do so.”) (footnotes omitted).

²¹⁹ *See Abramovich Forfeiture Order*, 33 FCC Rcd at 4670-71, para. 25; *Roesel Forfeiture Order*, 33 FCC Rcd at 9223, para. 51.

²²⁰ Courts have held that a critical Eighth Amendment factor is whether a fine is less than the maximum allowed by statute. For example, the Fifth Circuit stated that “[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.” *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000). Similarly, the D.C. Circuit readily upheld the Commission’s imposition of the maximum statutory penalty (adjusted for inflation) against an unlicensed radio operator who challenged that penalty as excessive. *See Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (noting that the statutory amount was “neither indefinite nor unlimited,” and that it did not “seem excessive in view of the [petitioner’s] continued and willful violation of the licensing requirement.”). *See also Malcolm Order on Recon*, 33 FCC Rcd at 2414, para. 11 (“Because the forfeiture was within the statutory limits, there is a strong indication that it was not excessive.”).

²²¹ *Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013).

²²² *See supra* section III.C.1.

²²³ *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

²²⁴ *See, e.g., United States v. Viloski*, 814 F.3d 104, 109 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 1223 (2017).

²²⁵ *United States v. Bajakajian*, 524 U.S. at 333-337. In *Bajakajian*, the dissent agreed that “[a] defendant must prove a gross disproportion before a court will strike down a fine as excessive.” *Id.* at 348.

substantial than the harms in *Blumenstock* and *Roesel*, and it therefore contends that the “Eighth Amendment demands proportionality to the harm inflicted by the spoofing violations.”²²⁶ We agree that *Blumenstock* and *Roesel* both involved significant harms, including harassment and intimidation of a targeted individual in the former case and preying upon vulnerable members of the community in the latter.²²⁷ But we disagree that the forfeitures in those cases demonstrate that the forfeiture against Affordable is “grossly disproportional.” *Blumenstock* made 31 calls, and thus that case does not approach the scope of Affordable’s activities. The *Roesel* forfeiture was more than double what we impose against Affordable, and thus reflects the larger number of calls in that case. In addition, we decided *not* to apply an upward adjustment despite the egregiousness of Affordable’s actions. As such, the forfeiture here is scaled appropriately, properly accounting for the specific facts of the case and Affordable’s actions.

76. The gravity of the harms in *Blumenstock* and *Roesel* does not diminish or undercut our finding that Affordable’s calls were harmful to consumers, including those who had entered their phone numbers on the Do Not Call Registry and those whose numbers were used in the caller ID information transmitted to others. We affirm the forfeiture as squarely proportional to the gravity of Affordable’s offenses. We therefore conclude that the forfeiture here is constitutional as it is in line with penalties imposed on other parties for similar misconduct and is reasonable in light of Affordable’s conduct.

IV. ORDERING CLAUSES

77. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act²²⁸ and section 1.80 of the Commission’s rules,²²⁹ Affordable Enterprises of Arizona, LLC., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of thirty-seven million, five hundred twenty-five thousand dollars (\$37,525,000) for willfully and repeatedly violating section 227(e) of the Act²³⁰ and section 64.1604 of the Commission’s rules.²³¹

78. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission’s rules within thirty (30) calendar days after the release of this Forfeiture Order.²³² Affordable shall send electronic notification of payment to Lisa Williford, Enforcement Bureau, Federal Communications Commission, at lisa.williford@fcc.gov on the date said payment is made. 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.²³³

79. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission’s Fee Filer (the Commission’s online payment system),²³⁴ or by wire transfer. The Commission no longer accepts forfeiture payments by check or

²²⁶ Notice Response at 17 (discussing *Blumenstock Forfeiture Order*, 32 FCC Rcd at 356, para. 1; *Roesel Notice*, 32 FCC Rcd at 6408-10, paras. 17-18).

²²⁷ See *Blumenstock Forfeiture Order*, 32 FCC Rcd at 358-59, paras. 7-9; see *Roesel Forfeiture Order*, 33 FCC Rcd at 9205-07, 9220, paras. 4-7, 42; *Roesel Notice*, 32 FCC Rcd at 6408-09, para. 17.

²²⁸ 47 U.S.C. § 503(b).

²²⁹ 47 CFR § 1.80.

²³⁰ 47 U.S.C. § 227(e).

²³¹ 47 CFR § 64.1604.

²³² 47 CFR § 1.80.

²³³ 47 U.S.C. § 504(a).

²³⁴ Payments made using the Commission’s Fee Filer system do not require the submission of an FCC Form 159.

money order. Below are instructions that payors should follow based on the form of payment selected:²³⁵

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters “FORF” in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN). For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the “Pay by Credit Card” option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu and then select the bill number associated to the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

80. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 45 L Street NE, Washington, DC 20554.²³⁶ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

81. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Affordable Enterprises of Arizona, LLC., 150 E. Alamo Drive, Suite 9, Chandler, AZ 85225, and to Dennis K. Burke, Esq. and Mitchell Turbenson, Esq., Ballard Spahr LLP, 1 E Washington Street, Suite 2300, Phoenix, Arizona 85004, and to Scott M. Pearson, Esq. and Taylor Steinbacher, Esq., Ballard Spahr LLP, 2029 Century Park East, Suite 1400, Los Angeles, CA 90067.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³⁵ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

²³⁶ See 47 CFR § 1.1914.

**STATEMENT OF CHAIRMAN
AJIT PAI**

Re: *Affordable Enterprises of Arizona, LLC*, File No. EB-TCD-17-00024974

Today, we continue our full court press to combat unwanted and unlawful spoofed telemarketing calls. In 2018, we found Affordable Enterprises of Arizona, LLC (Affordable) apparently liable for making millions of unlawfully spoofed telemarketing calls to consumers throughout Arizona and proposed to levy a \$37,525,000 fine against the company. In this Forfeiture Order, we affirm our earlier findings and impose that penalty.

To recap the sordid tale, Affordable used telemarketing calls to promote its business of selling remodeling and home improvement services. An investigation by our intrepid Enforcement Bureau staff found that during a 14-month period spanning 2016 and 2017, Affordable made 2,341,125 unlawful spoofed telemarketing calls in violation of the Truth in Caller ID Act and the Commission's rules.

Affordable asserts that it didn't know it was transmitting inaccurate or misleading caller ID information along with its calls, but the facts disagree. From the get-go, the company deliberately ensured that its business name wasn't included in caller ID information by using prepaid phones not registered to its business. Moreover, the company continued to use the numbers of prepaid phones it had allowed to become deactivated, knowing full well that upon deactivation those numbers would become unassigned, or worse, reassigned to innocent consumers. But rather than discontinue use of these numbers, the company brazenly continued to use them. For example, staff found that Affordable had displayed one of these numbers in the caller ID information for 48,349 calls during the period it was assigned to an innocent consumer. The unfortunate owner of this number received more than five calls per day from angry consumers asking for relief from these telemarketing calls.

Affordable seeks a slap on the wrist, asking us to impose a penalty of just \$3,752.50, or 0.01% of the proposed forfeiture, given its alleged inability to pay. No. The facts, Commission precedent, and statutory guidelines fully warrant a \$37,525,000 penalty.

I want to thank our staff for their meticulous work in bringing this action before the Commission: Lisa Gelb, Rosemary Harold, Jermaine Haynes, Shannon Lipp, Nakasha Ramsey, Linda Sims, Daniel Stepanicich, Kristi Thompson, Lisa Zaina, Kimbarly Taylor, Brandon Thompson, Kimberly Thorne, Bridgette Washington, Lisa Williford, and Shana Yates of the Enforcement Bureau; Eduard Bartholme, Kurt Schroeder, Mark Stone, and Kristi Thornton of the Consumer and Governmental Affairs Bureau; Shante Willis of the Media Bureau; Valerie Hill, Rick Mallen, and Bill Richardson of the Office of General Counsel; and Pam Arluk, Matthew Collins, Daniel Kahn, and Melissa Droller Kinkel of the Wireline Competition Bureau.

**STATEMENT OF COMMISSIONER
GEOFFREY STARKS**

Re: *Affordable Enterprises of Arizona, LLC., Forfeiture Order*, File No. EB-TCD-17-00024974

The telemarketing scheme carried out by Affordable Enterprises of Arizona, LLC (Affordable) was large scale and deliberate in its intent to place calls displaying misleading and inaccurate caller ID information. Affordable clearly intended to obscure its identity, evade detection, and prevent consumers from opting out of future calls. Its claim of not knowing the numbers associated with prepaid phones it had purchased were no longer assigned to Affordable is unconvincing, and in any event would not excuse its failure to adhere to minimal standards for telemarketers, including requirements to transmit accurate caller ID information, to ensure that called parties could call the displayed number to request placement on a company-specific do not call list, and to refrain from calling numbers listed on the National Do Not Call Registry. Affordable also caused predictable and significant harm to subscribers whose numbers it spoofed, forcing them to endure angry calls and harassment as a result of Affordable's illegal behavior. I therefore approve this action in support of our continuing efforts to stop illegal robocalls, the Commission's top consumer protection priority.

I remain concerned, however, about our track record of actually collecting these large forfeitures we assess. I note that we should be working with the Department of Justice to establish concrete timelines and procedures for timely collection of forfeitures if these actions are going to be worth the paper they're written on.