

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY,
APPROVING IN PART AND DISSENTING IN PART**

Re: *Kenneth Moser dba Marketing Support Systems*, File No.: EB-TCD-18-00028267.

Those familiar with my approach to similar forfeiture proceedings know that I am strongly committed to a text-based interpretation of the Truth in Caller ID Act's prohibitions on spoofing. While we should certainly take swift and meaningful enforcement action against those who violate the statute, we shouldn't twist the words of the Act to achieve a preferred result or an outcome that aligns with certain political priorities.

As a result, I've departed from the Commission in previous enforcement proceedings that found a subject's intent to cause harm despite the absence of probative evidence to indicate a malevolent mindset. For better or for worse, the statute requires a finding of "intent," and often, the facts simply don't support such a finding. Similarly, I disagree with this item's claim that Moser's spoofing campaign, in conjunction with his TCPA violations, are on their own indicative of an intent to harm the called parties. Rather, he intended to disseminate negative information about a candidate for political office during a primary election on an anonymous basis, pursuant to his client's wishes. In other words, he falsified caller ID not to harm the call recipients, but to engage in anonymous speech, a type of interest that the Supreme Court has deemed to be protected under the First Amendment, including in an election context.¹

While I disagree that Moser intended to harm the recipients of his calls, the record does support the finding that he intended to harm his competitor HomeyTel by spoofing a number assigned to it, and I therefore approve with respect to that part of the draft. However, I completely disagree with the item's finding that, even if there weren't sufficient evidence that Moser intended to harm his competitor, he nevertheless intended to harm any current or future subscriber to the number he spoofed. If that's true, spoofing itself is always determinative of an intent to cause harm (after all, there are always going to be potential current or future subscribers to a number), which would render the "intent" prong of the statute totally meaningless.

Further, I am grateful that, unlike the NAL, the Forfeiture Order does not focus unnecessarily on the "falsity" of the information in the calls, which is irrelevant to our analysis. The FCC shouldn't give the impression that we are targeting a caller on the basis of content, regardless of the ultimate grounds for liability. I appreciate that the item before us doesn't repeat some of the more sensationalist language from the NAL (i.e., "egregious"; "smeared a political candidate"; and "factually baseless"), and I hope that our future enforcement proceedings will make every effort not to repeat this previous error.

I approve in part and dissent in part.

¹ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).