

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

In the Matter of)	
)	
Locus Telecommunications, Inc.)	File No.: EB-TCD-12-00000452 ¹
)	
)	NAL/Acct. No.: 201132170025
)	
)	FRN: 0010729515
)	
)	

FORFEITURE ORDER

Adopted: September 14, 2015

Released: October 21, 2015

By the Commission: Commissioners Pai and O’Rielly dissenting and issuing separate statements.

I. INTRODUCTION

1. We impose a penalty of \$5,000,000 against Locus Telecommunications, Inc. (Locus or Company) for deceptively marketing its prepaid telephone calling cards. The Company earned more than \$ [REDACTED] in 2011 by targeting its marketing to immigrants with prominent claims in large print that, for a card costing just a few dollars, buyers could make international phone calls for hundreds or thousands of minutes. However, unless consumers used *all* of the hundreds or thousands of minutes in a single call, consumers could make calls for only a small fraction of the advertised time. Although the Company included lengthy “disclosures” in fine print, the terms were misleading, confusing, and inadequate; indeed, the Company’s descriptions of its multiple fees and surcharges were so unclear that it was impossible to calculate the cost of any call. After reviewing Locus’ response to the *NAL*, we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the \$5,000,000 forfeiture the Commission previously proposed.

II. BACKGROUND

2. The Federal Communications Commission (FCC or Commission) issued a Notice of Apparent Liability against Locus (*NAL* or *Locus NAL*) in 2011.² The *Locus NAL* sets forth in detail the facts and circumstances upon which this *Forfeiture Order* is based and need not be repeated here at length. Locus is a Delaware corporation³ that provides long distance telecommunications service through

¹ This case was formerly assigned the file number EB-10-TC-395. In January 2012, the Telecommunications Consumers Division assigned the case a new file number.

² *Locus Telecomms., Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12818 (2011) (*NAL* or *Locus NAL*). The *Locus NAL* is incorporated by reference.

³ Locus’s principal address is 111 Sylvan Avenue, Englewood Cliffs, NJ 07632. Locus is a subsidiary of KDDI America, Inc., which in turn is a wholly-owned subsidiary of KDDI Corporation, a Japanese corporation. KDDI Corporation is a global telecommunications company. See About KDDI, <http://global.kddi.com/about/index.html> (last visited Sept. 30, 2014); see also Letter from David H. Solomon and Robert G. Kirk, Counsel for Locus Telecommunications, Inc., to Colleen K. Heitkamp, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (May 17, 2010) (on file in EB-TCD-12-00000452) (LOI Response).

the use of prepaid calling cards.⁴ Locus has developed over 500 different long distance calling cards “tailored to meet the needs of specific market segments.”⁵ The Company’s website states that Locus sells its prepaid calling cards through a national distributor network that reaches over 70,000 retailers.⁶ Retail vendors use marketing posters that Locus designs and distributes to encourage consumers to buy the cards.⁷ Locus’s typical posters prominently represented that buyers of cards costing just several dollars could make hundreds or thousands of minutes of calls to various international destinations using the card.⁸ While the Company earned more than \$ [REDACTED] in 2011 from prepaid calling card sales, its total gross revenue in 2011 was more than \$ [REDACTED].⁹

3. Based upon these and other facts in the record, the Commission issued the *Locus NAL* on September 1, 2011, and found that the Company’s practice of deceptively marketing its prepaid calling cards constituted an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, as amended (Act).¹⁰ The Commission explained that Locus misled consumers about the number of minutes buyers of its cards could use to make calls to foreign countries and failed to disclose, in any meaningful way, material information about its rates, charges, and practices that would enable consumers to calculate the cost of certain international or interstate calls, and thus substantially harmed persons who purchased its calling cards.¹¹ The Commission concluded that the forfeiture must consider the extent and gravity of Locus’s egregious conduct and must serve as an adequate deterrent against deceptive marketing practices.¹² The Commission also considered the Company’s ability to pay and ultimately proposed a forfeiture of \$5,000,000.¹³ On October 21, 2011, Locus responded to the *Locus NAL*.¹⁴

III. DISCUSSION

4. We have considered the Company’s response to the *Locus NAL*, which includes a variety of legal and factual arguments, but we find none of them persuasive. We find that the Company willfully and repeatedly violated Section 201(b) of the Act and find no reason to cancel, withdraw, or reduce the proposed forfeiture amount. We therefore affirm the \$5,000,000 forfeiture proposed in the *Locus NAL*.

5. Locus offers six arguments that the Commission should rescind the *Locus NAL*: (1) Section 201(b) does not reach advertising claims;¹⁵ (2) the Commission has not met due process requirements because it “has not prescribed . . . [rules] with respect to advertising practices” and its cited authority, including prior NALs, are not “binding legal norm[s]”;¹⁶ (3) Locus’s prepaid card service is not

⁴ See *Locus NAL*, 26 FCC Rcd at 12819, para. 3.

⁵ *Id.* (quoting LOI Response at 1).

⁶ See Locus Communications, http://www.locustelecom.com/calling_card/main.shtml (last visited Feb. 17, 2015).

⁷ LOI Response at 4.

⁸ *Locus NAL*, 26 FCC Rcd at 12819, para. 4.

⁹ See Locus Telecommunications, Inc., 2012 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2011 Revenues)).

¹⁰ 47 U.S.C. § 201(b).

¹¹ See *Locus NAL*, 26 FCC Rcd at 12823, para. 15.

¹² *Id.* at 12824–25, paras. 16, 18.

¹³ *Id.* at 12824–25, para. 18.

¹⁴ Locus Telecommunications, Inc.’s Request for Rescission of Notice of Apparent Liability (Oct. 21, 2011) (on file in EB-TCD-12-00000452) (NAL Response).

¹⁵ NAL Response at 15–19.

¹⁶ *Id.* at 16–18, 25–29.

a common carrier service;¹⁷ (4) Locus’s rate disclosures are not misleading and the Commission cannot show that the Company’s advertising harmed consumers;¹⁸ (5) Locus has complied with State regulations and Federal Trade Commission (FTC) “Truth-in-Advertising Law”;¹⁹ and (6) the facts do not support the proposed forfeiture.²⁰

6. We have already addressed and rejected a number of Locus’s arguments in our companion *STi Forfeiture Order*.²¹ Specifically, in that order we thoroughly addressed Locus’s first two arguments and explained that Section 201(b) reaches deceptive marketing²²—including the practices Locus engaged in—and that the statute does so even in the absence of implementing rules.²³ Regarding Locus’s fourth argument, as is made clear in the companion order, the Commission need not demonstrate actual harm to consumers to find violations of Section 201(b), and we therefore reject this part of Locus’ fourth argument.²⁴ We address each of Locus’s remaining arguments below.

A. Locus is a Common Carrier in the Business of Providing Telecommunications Service in the Form of Prepaid Calling Cards

7. Section 201(b) of the Act prohibits “unjust and unreasonable” practices by telecommunications carriers “in connection with [interstate or foreign] communication service.”²⁵ The term “telecommunications carrier” is defined by the Act as “any provider of telecommunications services”²⁶ The term “telecommunications service,” in turn, is defined by the Act as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²⁷

¹⁷ *Id.* at 3–15.

¹⁸ *Id.* at 34–36.

¹⁹ *Id.* at 22–25, 36–37.

²⁰ *Id.* at 38–41.

²¹ See *STi Telecom Inc.*, File No. EB-TCD-12-00000453, Forfeiture Order, FCC 15-113 (rel. Oct. 21, 2015) (*STi Forfeiture Order*).

²² See *id.* at paras. 7–11 (citing *Bus. Disc. Plan, Inc.*, Order of Forfeiture, 15 FCC Rcd 14461, 14468, para. 15 (2000) (*BDP*), *recon. granted in part and denied in part*, 15 FCC Rcd 24396, 24399, para. 8 (2000) (*BDP Order on Reconsideration*); *NOS Commc’ns, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133, 8136, para. 6 (2001) (*NOS*) (finding that deceptive marketing can “constitute unjust and unreasonable practices under section 201(b)”).

²³ See *STi Forfeiture Order*, FCC 15-113 at paras. 16–18. Locus, unlike *STi*, also argues that “[a]ny attempt to enforce advertising provisions based solely on the language of Section 201(b) [] violates [its] 5th Amendment right to due process.” NAL Response at 17. However, as discussed in the *STi Forfeiture Order*, the Commission can develop the law on a case-by-case basis; indeed, it can even announce new applications of law in adjudications. See, e.g., *AT&T v. FCC*, 454 F.3d 329, 332–34 (D.C. Cir. 2006) (upholding the Commission’s order classifying prepaid calling cards as a telecommunications service for the first time in an adjudication). Moreover, as discussed in the *STi Forfeiture Order*, the Commission previously articulated a clear standard regarding carriers’ marketing practices for purposes of complying with Section 201(b). *STi Forfeiture Order*, FCC 15-113 at para. 18. See also *Locus NAL*, 26 FCC Rcd at 12820, para. 7 & n.13. Thus, in addition to the language of Section 201(b), Locus has been on notice at least since the issuance of *BDP* and *NOS* that deceptive marketing of its calling cards is an unjust and unreasonable practice under Section 201(b).

²⁴ See *STi Forfeiture Order*, FCC 15-113 at para. 25.

²⁵ 47 U.S.C. § 201(b).

²⁶ *Id.* § 153(51).

²⁷ *Id.* § 153(53). Any company classified as a telecommunications carrier is a common carrier. See *Cable & Wireless PLC*, Cable Landing License Application, 12 FCC Rcd 8516, 8521, para 12 (1997).

8. Locus does not dispute that it is a common carrier²⁸ that provides telecommunications service, but argues that it is not engaged in a common carrier service with respect to the calling card business at issue in the *Locus NAL* because it does not [REDACTED] “[REDACTED].”²⁹ Thus, according to Locus, the Commission cannot find that it violated Section 201(b) with respect to the advertising related to its calling cards.³⁰ The crux of Locus’s argument is that it does not [REDACTED], but only [REDACTED].

³¹ Locus acknowledges that it develops and prints the advertising for the cards, but only “the “[REDACTED].”³² Locus argues that the [REDACTED].

³³ Locus concludes that “[REDACTED] . . .” and because the [REDACTED], it cannot be held liable for violating Section 201(b).³⁴

9. The dispositive fact here is that Locus sells calling cards directly to consumers on its website: www.shoplocus.com³⁵ and, thus, is a telecommunications carrier. The “ShopLocus” website identifies the cards available for purchase³⁶ and provides the rates, terms and conditions, and surcharges and fees associated with each Locus card.³⁷ Even if the Company did not sell cards directly to the public on its website, however [REDACTED].

Although Locus may consult with its distributors, the [REDACTED].

²⁸ See NAL Response at 10. Locus obtained international Section 214 authority on September 1, 2005. See ITC-214-19950819-00044; Public Notice, “Overseas Common Carrier 214 Applications Actions Taken (Formal Section 63.01)” (Sept. 8, 2005).

²⁹ See NAL Response at 3–11 (citing 47 U.S.C. § 154(46)).

³⁰ *Id.*

³¹ *Id.* at 6.

³² *Id.* at 3, 7.

³³ *Id.* at 7.

³⁴ *Id.* at 11.

³⁵ LOI Response at 3. Consumers may purchase prepaid calling cards or re-charge existing prepaid accounts directly from the Locus website. See ShopLocus Prepaid Calling Cards website, <https://www.shoplocus.com/showCtrl.php?page=callingCardMain> (last visited Feb. 17, 2015). Thus, Locus offers prepaid calling card services on a retail basis to the public. See also *Universal Serv. Contribution Methodology*, Order, 25 FCC Rcd 14533, 14535, para. 5 (2010) (“Calling card services have been regulated by the Commission as telecommunications services because they provide transmission of information, without a change in form or content, for a fee directly to the public.”); *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (stating “[w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently”) (citation omitted).

³⁶ See ShopLocus Prepaid Calling Cards website, <https://www.shoplocus.com/showCtrl.php?page=callingCardMain> (last visited Feb. 17, 2015). Notably, some of the same cards Locus sells on its website (e.g., “Go,” “Pan,” and “LaVictoria”) were also provided to distributors for sale in retail locations.

³⁷ Locus’s website states: “Locus Prepaid Calling Cards are the recognizable choice among international callers, business travelers, tourists and students who are looking for clear, reliable connections [sic], flexibility and low long distance rates to over 250 countries. Whether you require private label or branded cards, Locus delivers. Our 500+ segment-customized cards can be purchased in all 50 states through a national distributor network that reaches over 70,000 retailers.” Locus Telecommunications Calling Card website, http://www.locustelecom.com/calling_card/main.shtml (last visited Feb. 17, 2015). Notably, while Locus’ website references a distributor network, it replaces the word “distributor” with “reseller” in its NAL Response. See, e.g., NAL Response at 14.

Company “sets the destination rates” and often offers low promotional rates “to create demand for the card.”³⁸ Locus further controls the number of minutes for which the cards can be used and designs and contracts with printers to print the cards and posters advertising such minutes.³⁹ In the rare instances in which distributors choose to design and print cards, Locus nonetheless retains ultimate control. Namely, Locus “requires distributors to use disclosures provided by Locus” and the “[f]inal designs for cards and marketing materials must be approved by Locus.”⁴⁰ Finally, Locus determines the access numbers to the calling cards, operates the customer service center, handles all complaints and inquiries related to the cards, and issues refunds and credits directly to customers who purchase the cards.⁴¹ Locus’s attempt to [REDACTED] does not change Company’s legal status.⁴² Locus is a common carrier engaged in the business of providing telecommunications service to consumers in the form of prepaid calling cards and, therefore, its advertising for such calling cards is subject to Section 201(b) of the Act.⁴³

B. Locus Violated the Standard the Commission Enunciated in *NOS*

10. Under our interpretation of Section 201(b), advertising associated with telecommunications services must provide “clear and conspicuous disclosure on how to calculate the total cost of a call” and that “in the absence of clear and conspicuous disclosure regarding the nature and components of the rate structure,” a carrier’s marketing materials would “certainly be misleading to consumers”⁴⁴ We find that the Company violated this standard.

³⁸ LOI Response at 3. Locus also argues that although the cards it printed include a dollar value on the front, “nothing in the contracts between Locus and resellers prohibits the reseller from selling those cards . . . at a retail price that is below, or . . . above . . . the value printed on the cards” NAL Response at 7. That argument is superfluous; Locus provides no evidence that the entities it contracted with to distribute the cards ever sold the calling cards at different prices from those indicated on the cards. Even if they did, there is certainly no evidence that distributors could alter the number of minutes Locus’s cards provide or change the fees imposed by Locus that reduce the number of minutes the cards provide.

³⁹ LOI Response at 4.

⁴⁰ *Id.*

⁴¹ See LOI Response attachments in Q9 and Q17; see also Letter from Robert G. Kirk, Counsel for Locus Telecommunications, Inc., to David Marks, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau at 4 (July 22, 2010) (on file in EB-TCD-12-00000452). Contrary to what Locus maintains in its NAL Response, consumers who purchased Locus’s calling cards through distributors had every reason to believe that the distributor was acting on Locus’s behalf to distribute Locus’s cards and that they were purchasing service from Locus. Locus or one of its brands (UNI, CallPlus or GEO) is identified on marketing posters and the calling cards themselves; the www.shoplocus.com website refers to Locus cards; and its customer service email address is customerservice@locus.net.

⁴² Locus’s own website [REDACTED]. The [REDACTED] on the Company’s website. See Locus Distributors website, <http://www.locustelecom.com/distributors/main.shtml> (last visited Feb. 17, 2015). Locus’s website also distinguishes between types of cards—specifically, [REDACTED]. See Locus Prepaid Card Distributor Website, http://www.locustelecom.com/distributors/cc_product.shtml (last visited Feb. 17, 2015). The Commission classifies [REDACTED]. See [REDACTED].

⁴³ We note that the Commission’s rules also require regulated prepaid card providers to file quarterly reports with the Commission providing their percentage of intrastate, interstate, and international calling card minutes. 47 C.F.R. § 64.5001(c). Locus routinely filed such reports with the Commission. See <http://apps.fcc.gov/ecfs/document/view?id=7521072491> (last visited Feb. 17, 2015).

⁴⁴ *NOS*, 16 FCC Rcd at 8137–38, para. 9. For ease of reference, we refer to this colloquially below as the “*NOS* standard” or the like.

11. Locus claims its rate disclosures are sufficient, arguing that they: (1) are set apart from the other text in the advertisement and not interlaced with other words or disclaimers; (2) clearly indicate that the advertised rates are based upon a single initial call using a local access number; and (3) state that fees may apply in certain, clearly explained circumstances.⁴⁵ Locus suggests that “the Commission’s real complaint actually is about the nature of the product itself rather than the accuracy of the descriptions of the product” because consumers can in fact use the full minutes advertised during the initial call.⁴⁶ We find these arguments unpersuasive.

12. As an initial matter, we reject Locus’s assertion that its disclosures are “readily noticeable, readable, and understandable to consumers.”⁴⁷ The disclosures are in small print and far from clear or conspicuous in relation to the claim of total available minutes on Locus’s marketing posters. Locus’s posters typically advertise the number of calling minutes offered to certain countries in large, colorful, simple text, which is prominently displayed at the top or center of the poster.⁴⁸ This information is not qualified in any way; i.e., there is no suggestion that the consumer will receive “up to” the specified number of minutes, and no indication that the consumer must read the small print at the bottom in order to determine what he or she is actually purchasing. The main part of the poster stands in stark contrast to the disclosures regarding additional fees and surcharges, which are at the bottom of the posters in significantly smaller type and easily overlooked. The disclosures simply are not presented in such a way to prevent the advertisement from being deceptive.⁴⁹ As the Commission has previously stated, “[a] fine-print disclosure at the bottom of a print ad [or] a disclaimer buried in a body of text unrelated to the claim being qualified . . . is not likely to be effective. To ensure that disclosures are effective, advertisers should use clear and unambiguous language, avoid small type, place any qualifying information close to the claim being qualified, and avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.”⁵⁰ We thus conclude that such disclosures are insufficient to satisfy Section 201(b).

13. Moreover, the content of Locus’s disclosure is inadequate. The poster used to market Locus’s \$2 “The Card” includes the following disclosure:

Advertised Rates Based on a Single Initial Call Using Local Access Numbers

Rates and fees are subject to change after validation date. Minutes and rates are based on a single call from the contiguous United States to a non-cellular destination unless otherwise advertised. Domestic rates apply only to calls within the contiguous United States. Calls made using a toll-free access number on a local access card are billed at a higher per minute rate. Calls are billed in one minute increments. The following surcharges and fees will have the effect of reducing total minutes available if not used on a single call: 99¢ charge per

⁴⁵ NAL Response at 31.

⁴⁶ *Id.* at 31–32.

⁴⁷ *Id.* at 31.

⁴⁸ *See, e.g.*, Letter from David H. Solomon and Robert G. Kirk, Counsel for Locus Telecommunications, Inc., to Colleen Heitkamp, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, attachment “The Card” poster (with advertised rates valid until January 30, 2011) (June 1, 2010) (on file in EB-TCD-12-00000452) (First Supplemental Response).

⁴⁹ According to Locus, the advertised “minutes and rates are based on a single call.” In other words, the only possible way a consumer could use all of the 1,000 advertised minutes would be to make a single 16-hour call from a local access number—a duration so lengthy as to make such calls highly improbable by the typical consumer.

⁵⁰ *Joint FCC/FTC Policy Statement For the Advertising of Dial-Around and Other Long Distance Services to Consumers*, Policy Statement, 15 FCC Rcd 8654, 8662, para. 20 (2000) (*Joint Policy Statement*).

call using a payphone; Post call fee of 49¢ per minute; 99¢ weekly charge after 24 hours of first use. \$1.50 charge for directory assistance (max duration 3 min). Card expires 30 days after the date of first use. Network services are provided by Geo Telecom.⁵¹

Uncertainty and equivocation dominate these “disclosures.” Indeed, in violation of the *NOS* standard, they omit important information and make it impossible to calculate the cost of almost any call. For example, a caller cannot tell what the higher per-minute rate is when using one of the toll-free access numbers on the card. Further, with regards to the post-call fee of 49¢ per minute, callers have no way to determine if that fee only applies for each minute the card is used during the first call as opposed to subsequent calls, or if the fee applies to all calls.

14. In sum, as the Commission noted in the *Locus NAL*, Locus’s disclosures “are inadequate to inform consumers fully about the possible reduction in the number of advertised minutes, the circumstances under which those minutes will not be received, or how to calculate the actual number of minutes provided.”⁵² Locus’s disclosures include a list of possible fees and surcharges that may reduce the value of the card, but those rates are subject to change without notice, and the Company gives no meaningful explanation of how such fees and charges relate to the initial advertised rate. In addition to vague or incomplete representations, Locus’s disclosures omit key facts that consumers would need to understand the rate structure. Furthermore, as we noted in the *NAL*, the minutes the cards claim to offer “are based on a single call.”⁵³ Almost no consumer is likely to make a single call of more than *sixteen hours*, so almost no one will get the advertised experience.⁵⁴

15. The Company makes no attempt to argue that its advertising met the *NOS* standard (i.e., that consumers could calculate the cost of their calls), but simply asserts that the missing information was neither misleading nor harmful to consumers.⁵⁵ Locus also makes several related arguments about the purported accuracy of its advertising and the inferences it would have us draw from the existence of repeat purchasers.⁵⁶ We addressed arguments like these in the *STi Forfeiture Order* and found them frivolous; indeed, if accepted, such arguments would immunize most deceptive advertising from prosecution.⁵⁷

C. State Regulations and Enforcement Actions Do Not Preclude this Proceeding

16. Locus argues that it should not be subject to enforcement action by the Commission because of its compliance with state regulations and voluntary compliance agreements with several states, as well as with FTC Truth-in-Advertising jurisprudence.⁵⁸ In addition, Locus contends that the FTC is the expert agency on matters of deception, and that the Commission has “a duty to abide by the standards it

⁵¹ See First Supplemental Response, “The Card” poster (with advertised rates valid until January 30, 2011). Moreover, the disclosure on the actual card is even sparser—the card itself omits approximately half of the poster’s disclosure, including only the latter half of the disclosure, beginning with “Calls are billed in one minute increments”

⁵² *Locus NAL*, 26 FCC Rcd at 12822–12823, para. 12.

⁵³ *Id.* at 12823, para. 13.

⁵⁴ See *id.*

⁵⁵ See *NAL Response* at 34–37.

⁵⁶ *Id.* at 39.

⁵⁷ See *STi Forfeiture Order*, FCC 15-113 at para. 24.

⁵⁸ See *NAL Response* at 22–25, 32–37.

seeks to import from the FTC.”⁵⁹ It then maintains that the Commission has not established that Locus engaged in deception as defined by the FTC Act.⁶⁰ Locus’s arguments again fail.

17. As we noted in the *STi Forfeiture Order*, we find that the existence of state laws regulating advertising does not preclude the Commission from taking action to protect consumers from deceptive advertising on its own motion under the Act.⁶¹ Similarly, the grant of authority to the FTC indicates nothing about the Commission’s own authority. Moreover, the FTC Act expressly exempts common carriers subject to the Communications Act, like Locus, from the FTC’s mandate and power to prohibit persons from engaging in unfair and deceptive acts in or affecting commerce, making it critical that the Commission monitor and take enforcement action against carriers’ deceptive advertising practices.⁶²

D. The Assessment of the Forfeiture under Section 503(b) Was Appropriate

18. Section 503(b)(1) of the Act provides, in relevant part, that any person who willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.⁶³ Section 503(b)(2)(B) of the Act and Section 1.80 of the Commission’s rules authorize the Commission to assess a forfeiture against Locus of up to \$150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,500,000 for a single act or failure to act.⁶⁴

19. In calculating the proposed forfeiture in the *Locus NAL*, the Commission relied on *NOS*, which squarely addresses deceptive marketing practice violations.⁶⁵ In *NOS*, the Commission found that

⁵⁹ NAL Response at 35.

⁶⁰ See NAL Response at 32–34; 15 U.S.C. § 45(a).

⁶¹ See *STi Forfeiture Order*, FCC 15-113 at para. 28; *Bradshaw v. Twp. of Middleton*, 296 F. Supp. 2d 526, 550 (D.N.J. 2003) (defendants’ argument that federal claim was preempted by state law was “far-fetched” and court held that “[s]tate law cannot preempt federal law”); *Little Co. of Mary Hosp. & Health Care Ctrs. v. Shalala*, 165 F.3d 1162, 1164 (7th Cir.1999) (“But of course state law cannot preempt federal law.”); *BDP*, 15 FCC Rcd at 14468–69, para. 16; see also *Joint Policy Statement*, 15 FCC Rcd at 8657, para. 10.

⁶² 15 U.S.C. § 45(a)(2). While the FTC’s mandate and power does not reach common carriers, we nonetheless noted in the *STi Forfeiture Order* that the FTC has prevailed in cases involving the deceptive or unfair marketing and advertising of prepaid calling cards by non-carriers, both in court and via settlements, and that such cases offer analogous guidance to common carriers regarding the types of practices that would be unlawful under Section 201(b). See *STi Forfeiture Order*, FCC 15-113 at para. 26 & n.81.

⁶³ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

⁶⁴ See 47 U.S.C. § 503(b)(2)(B); 47 C.F.R. § 1.80(b)(2). These amounts reflect inflation adjustments to the forfeitures specified in Section 503(b)(2)(B) (\$100,000 per violation or per day of a continuing violation and \$1,000,000 per any single act or failure to act). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321 (DCIA), requires the Commission to adjust its forfeiture penalties periodically for inflation. See 28 U.S.C. § 2461 note (4). The Commission most recently adjusted its penalties to account for inflation in 2013. See *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 28 FCC Rcd 10785 (Enf. Bur. 2013); see also *Inflation Adjustment of Monetary Penalties*, 78 Fed. Reg. 49,370-01 (Aug. 14, 2013) (setting Sept. 13, 2013, as the effective date for the increases). However, because the DCIA specifies that any inflationary adjustment “shall apply only to violations which occur after the date the increase takes effect,” we apply the forfeiture penalties in effect at the time the apparent violations took place. 28 U.S.C. § 2461 note (6). Here, because the violations at issue occurred before September 13, 2013, the applicable maximum penalties are based on the Commission’s previous inflation adjustment that became effective on September 2, 2008. See *Inflation Adjustment of Maximum Forfeiture Penalties*, 73 Fed. Reg. 44,663, 44,664 (July 31, 2008).

⁶⁵ See *Locus NAL*, 26 FCC Rcd at 12824–25, paras. 17–18 & n.40.

“each [deceptive] rate sheet sent to consumers constitutes a separate violation of Section 201(b).”⁶⁶ Thus, the Commission properly found here that the marketing of each prepaid calling card to consumers constitutes a separate apparent violation of Section 201(b).⁶⁷ Considering the thousands of prepaid calling cards Locus deceptively marketed and sold,⁶⁸ the Commission is well within its authority to impose the proposed forfeiture of \$5,000,000. Notably, the \$5,000,000 penalty is equivalent to applying a \$40,000 penalty to only 125 apparent violations that occurred within one year of the *NAL*—far fewer than the actual number of prepaid cards marketed and sold by Locus through its deceptive advertising in the relevant time period.⁶⁹

20. The Company contends that the *Locus NAL* fails to provide a lawful basis for the \$5,000,000 proposed forfeiture.⁷⁰ Locus argues that because the *NAL* cites no consumer complaints, the Company should not be subject to forfeiture amounts higher than those imposed in cases like *NOS* and *BDP*.⁷¹ This argument lacks merit. As discussed in the *STi Forfeiture Order*, the Commission is not required to rely on or refer to consumer complaints in order to investigate and impose forfeitures on common carriers.⁷²

21. Locus further argues that the \$5,000,000 proposed forfeiture is arbitrary and capricious because the Commission failed to consider the factors enumerated in Section 503(b)(2)(B) and that the forfeiture amount proposed in the instant case is not supported by FCC precedent.⁷³ This argument is also

⁶⁶ *NOS*, 16 FCC Rcd at 8141, para. 19 (emphasis added).

⁶⁷ See *Locus NAL*, 26 FCC Rcd at 12824, para. 18 n.38.

⁶⁸ See *id.* at 12824, para. 18 & n.39. Commissioner Pai’s dissent argues that it is unclear on which dates prepaid calling cards were sold and, in some instances, whether any cards at all were sold in the year preceding the release of the *NAL*. However, Locus reported more than \$ [REDACTED] in revenues during 2011 and nearly \$ [REDACTED] during 2010 from the sale of prepaid calling cards. See *supra* note 9 (Locus reporting \$ [REDACTED] in revenues for 2011); Locus 2011 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)) (reporting \$ [REDACTED] in revenues from the sale of prepaid calling cards for 2010). Approximately one-third of the reported 2010 revenues (\$ [REDACTED]) and two-thirds of the reported 2011 revenues (\$ [REDACTED]) was earned in the year preceding the *NAL*’s release. Locus’ cards were typically sold for \$5 or less. See *NAL*, 26 FCC Rcd at 12818–19, paras. 2, 4–5. Even if we assumed the cards averaged \$10 each, and assumed a mere \$ [REDACTED] in revenues in the year preceding the *NAL*, it would still equate to the sale of at least [REDACTED] cards in a year, or an average of [REDACTED] cards each day (and even more if the calculation was made based on a \$5 or \$2 card). It is a logical and reasonable inference that at least one card (and likely [REDACTED] of cards) were sold on each of the 365 days preceding the *NAL* – far more than the mere 125 needed to support the forfeiture amount.

⁶⁹ See *Locus NAL*, 26 FCC Rcd at 12824–25, para. 18 nn.39–40. The amount of revenues that Locus’ reported for 2010 not only empowered us to assess an forfeiture well in excess of \$5,000,000 (though we did not decide to apply an upward adjustment), but likewise indicate that well over 125 prepaid calling cards were sold. See *id.* at 12825, para. 18 & n.42 (citing Locus 2011 FCC Form 499-A (Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues))).

⁷⁰ *NAL* Response at 38–41.

⁷¹ See *id.* at 39–40.

⁷² *STi Forfeiture Order*, FCC 15-113 at para. 32. The Commission explained that Section 403 of the Act grants the Commission “full authority and power at any time to institute an inquiry, *on its own motion* . . . relating to the enforcement of any of the provisions of this Act.” *Id.* (citing 47 U.S.C. § 403 (emphasis added)).

⁷³ See *NAL* Response at 40–41 (arguing that *NOS* was “merely a Notice of Apparent Liability” and involved a lesser fine of \$500,000). Locus also makes a number of other frivolous arguments. The Company claims that it provides “a quality service for a good value” to consumers; that its rates are consistent with the rates offered by other service providers; and that it has a high percentage of repeat users, suggesting that consumers are happy with the service Locus provides. *NAL* Response at 39. These arguments are immaterial and have no bearing on Locus’s obligation to act in a just and reasonable manner when marketing its cards and complying with the requirements of the *NOS* standard.

unpersuasive. Nothing in the Communications Act requires the Commission to mechanically and inflexibly apply an identical methodology in all deceptive marketing cases. Consequently, the results of earlier enforcement adjudications do not automatically prescribe the outcome of all others that follow.⁷⁴ Rather, Section 503(b)(2)(E) of the Act requires the Commission to tailor the forfeitures it imposes to the particulars of the violator and the violation, directing the Commission to 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, ability to pay, and such other matters as justice may require.”⁷⁵ Accordingly, the Commission explained in the *Locus NAL* that while the proposed forfeiture was higher than the proposed forfeiture in *NOS*, the proposed amount was based on its consideration of the factors enumerated in Section 503(b)(2)(E).⁷⁶ We need not repeat that analysis here. *Locus* has presented no argument that causes us to revise our conclusions in the *NAL*, so we again conclude that the \$5,000,000 forfeiture is both reasonable and appropriate.

22. The *NAL* notified *Locus* that, if the Company was unable to pay the forfeiture, it could submit the requisite documentation and the Commission would consider reducing or canceling the forfeiture altogether.⁷⁷ *Locus* has never argued that it cannot pay the forfeiture, nor has it submitted any financial statements for our consideration. We therefore affirm the \$5,000,000 forfeiture proposed in the *Locus NAL*.

IV. CONCLUSION

23. We have reviewed *Locus*'s arguments and find no reason to cancel, withdraw, or reduce the proposed forfeiture. *Locus* fails to rebut the overwhelming evidence that, during the 12 months prior to release of the *Locus NAL*, it engaged in an unlawful practice by deceptively marketing thousands of prepaid calling cards. Accordingly, consistent with precedent, the Commission finds that the Company's advertising of prepaid calling cards is an “unjust and unreasonable” practice under Section 201(b). Pursuant to Section 503(b)(1)(B), we affirm the \$5,000,000 forfeiture proposed in the *Locus NAL*.

V. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,⁷⁸ and Section 1.80 of the Rules,⁷⁹ *Locus Telecommunications, Inc.*, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of five million dollars (\$5,000,000) for willfully and repeatedly violating Section 201(b) of the Act.

25. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release of this Forfeiture Order.⁸⁰ 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.⁸¹

⁷⁴ See *Globcom, Inc.*, Forfeiture Order, 21 FCC Rcd 4710, 4722, para. 34 (2006).

⁷⁵ 47 U.S.C. § 503(b)(2)(E).

⁷⁶ See *Locus NAL*, 26 FCC Rcd at 12824–25, para. 18. See also, e.g., *Commission's Forfeiture Policy Statement and Amendment Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17097–98, paras. 19–20 (1997) (recognizing the relevance of creating the appropriate deterrent effect in choosing the amount of a forfeiture), *recon. denied*, 15 FCC Rcd 303 (1999).

⁷⁷ See *Locus NAL*, 26 FCC Rcd at 12826, para. 24.

⁷⁸ 47 U.S.C. § 503(b).

⁷⁹ 47 C.F.R. § 1.80.

⁸⁰ *Id.*

⁸¹ 47 U.S.C. § 504(a).

26. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Locus Telecommunications, Inc., shall send electronic notification of payment to Johnny Drake at johnny.drake@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁸² When completing the Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with completed Form 159) must be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

27. Any request for full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.⁸³ 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.

28. **IT IS FURTHER ORDERED** that a copy of this Order for Forfeiture shall be sent by first class mail and certified mail, return receipt requested, to Locus Telecommunications, Inc., Attention: Todd D. Daubert, SNR Denton US, LLP, 1301 K Street, NW, Suite 600, East Tower, Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸² An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁸³ See 47 C.F.R. § 1.1914.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
Simple Network, Inc., File No.: EB-TCD-12-00000406
Touch-Tel USA, LLC, File No.: EB-TCD-12-00000409
NobelTel, LLC, File No.: EB-TCD-12-00000412
Locus Telecommunications, Inc., File No.: EB-TCD-12-00000452
STi Telecom Inc. (formerly Epana Networks, Inc.), File No.: EB-TCD-12-00000453

Locus Telecommunications, Inc., Lyca Tel, LLC, NobelTel, LLC, Simple Network Inc., STi Telecom Inc., and Touch-Tel USA, LLC each used blatantly misleading and deceptive marketing materials to sell prepaid calling cards. These six companies, moreover, focused their deceptive marketing on immigrants. Such behavior, especially when it involves preying upon vulnerable populations, should not be tolerated.

Unfortunately, the Commission's ability to lawfully impose a forfeiture upon these companies has been fatally compromised by its inadequate and incomplete investigation into their conduct. Here's why.

In each of these cases, the Commission contends that "a separate violation of Section 201(b) occurred each time a consumer purchased" a misleading and deceptive prepaid calling card.¹ Accepting this position for the sake of argument, it raises a number of questions pertaining to each violation (*i.e.*, each purchase of a prepaid calling card). Section 503(b)(4) of the Act requires Notices of Apparent Liability to set forth, among other things, "the nature of the act or omission charged against such person and the facts upon which such charge is based" as well as "the date on which such conduct occurred."² So: On which dates did the purchases of prepaid calling cards take place? Who purchased them? Where did the sales take place? And which type of card was purchased?

The six underlying Notices of Apparent Liability did not answer *any* of these questions with respect to even a single purchase of a prepaid calling card (nor do these Forfeiture Orders answer any of these questions either). Indeed, the Commission did not even ask these questions of the companies. I therefore do not believe that the Commission has complied with Section 503(b)(4) of the Act or fundamental aspects of due process.

To be sure, the Commission claims that it was not required to include any of this specific information, including particular dates, in the Notices of Apparent Liability. Rather, it contends that the companies were engaging in an unlawful "practice" that included activities repeated over time. Therefore, for example, the Commission argues it was sufficient that the Notices of Apparent Liability "refer[red] to the *time period* during which the unlawful practice giving rise to the violation occurred."³

Were the Commission finding here that these six companies had each committed a single continuing violation of Section 201(b) in the form of an unlawful practice, then I could understand the argument that the facts set forth in the Notices of Apparent Liability were sufficiently specific. However, the Commission does not make such a finding, probably because each company's liability then would have been capped at \$1.575 million.⁴ Instead, the Commission concludes that each company committed a

¹ See, e.g., *STi Forfeiture Order* at para. 13.

² See 47 U.S.C. § 503(b)(4).

³ *STi Forfeiture Order* at para. 15 (emphasis added).

⁴ See 47 C.F.R. § 1.80(b)(2).

separate violation of Section 201(b) each time that a consumer purchased a misleading and deceptive prepaid calling card—but fails to specify the basic facts underlying even a single sale, including (as noted above) the “date on which such conduct occurred.” This is not legally permissible.⁵

This lack of specificity leads to another problem. Neither the Notices of Apparent Liability nor the Forfeiture Orders in at least two of these cases⁶ contain any concrete evidence that any misleading and deceptive prepaid calling cards were sold within the one-year statute of limitations period, as required by Section 503(b)(6) of the Act.⁷ While the Commission points out that the companies’ marketing posters contained expiration dates that fell within the limitations period, it doesn’t put forth any evidence of a specific sale of a misleading and deceptive prepaid calling card that occurred during that time. All that is offered is speculation and conjecture. Indeed, it appears that we have no idea when the companies stopped selling any of the relevant cards.⁸

Finally, these Forfeiture Orders do not offer a coherent explanation of why the forfeiture imposed in each item is \$5 million. As in prior cases, it appears that this number was plucked out of thin air rather than determined through the use of a rational methodology.

* * *

When it comes to enforcement, I have previously expressed the concern that the Commission is more interested in seeking headlines than respecting the rule of law. This is yet another example of this problem. Here, the Commission appropriately identified six companies engaging in deeply problematic conduct. But because the Commission’s investigation of these companies was deeply flawed, I am unable to conclude that the six Forfeiture Orders issued today are lawful. Therefore, I must respectfully and regretfully dissent.

⁵ In these Forfeiture Orders, the Commission attempts to correct this mistake by implying that all of the prepaid calling cards sold by these companies were unlawful and by finding “it is a logical and reasonable inference that at least one card (or likely tens of thousands of cards) were sold on each of the 365 days preceding the NAL.” *See, e.g., STi Forfeiture Order* at para. 14. While this assertion could very well be true, there is a rather big problem with this gambit. None of this information was included in the Notices of Apparent Liability, as required by the Section 503(b)(4) of the Act. Nowhere do the NALs state that every single card marketed by the companies was unlawful or that each company sold a misleading prepaid calling card each and every day in the year prior to the issuance of the NALs. Indeed, the NALs fail to even mention each of the different cards sold by the companies, let alone go through the analysis necessary to explain how each was misleading and deceptive. Unfortunately, the Commission’s after-the-fact attempt here to rehabilitate the NALs cannot change the fact that the allegations against the companies contained in those NALs were simply too vague and conclusory to comply with the statute or basic principles of due process.

⁶ *NobelTel, LLC*, File No. EB-TCD-12-00000412; *STi Telecom Inc. (formerly Epana Networks, Inc.)*, File No. EB-TCD-12-00000453.

⁷ *See* 47 U.S.C. § 503(b)(6)(B).

⁸ While the Commission points to the companies’ Form 499-Qs to demonstrate that each was selling prepaid calling cards within the statute of limitations, *see, e.g., STi Forfeiture Order* at n. 57, that is not the relevant issue. Rather, the question is when those companies were selling the specific misleading and deceptive prepaid calling cards mentioned in the NALs. And with respect to that question, the NobelTel and STi Forfeiture Orders contain no relevant information. Indeed, as STi points out, it provided the Commission with examples of products distributed prior to May 2010 and products distributed after May 2010. *See* STi Telecom Inc.’s Response to Notice of Apparent Liability for Forfeiture at 4-5. And in the STi NAL, the Commission only discussed products distributed prior to May 2010. *See id.* As such, the Commission must be able to show that those products, which were distributed before May 2010, were sold after August 31, 2010. And the STi Forfeiture Order is bereft of such evidence.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Lyca Tel, LLC*, File No.: EB-TCD-12-00000403
Simple Network, Inc., File No.: EB-TCD-12-00000406
Touch-Tel USA, LLC, File No.: EB-TCD-12-00000409
NobelTel, LLC, File No.: EB-TCD-12-00000412
Locus Telecommunications, Inc., File No.: EB-TCD-12-00000452
STi Telecom Inc. (formerly Epana Networks, Inc.), File No.: EB-TCD-12-00000453

Through these six Forfeiture Orders, the Commission further expands the reach of section 201(b) to regulate every aspect of how providers market their services. Even worse, there is no limiting principle to the Commission's analysis. While prepaid calling card providers are the focus of today's actions, broadband providers, and even edge providers, should be extremely concerned about how these decisions will ultimately impact their own advertisements, including disclosures about their rates, terms, and conditions.

To start, I object to the notion that the Commission has authority under section 201(b) to regulate "deceptive marketing". I cannot change the fact that the Commission first applied section 201(b) to cover such conduct over a decade ago. And it is bad enough that the Commission routinely fines providers under section 201(b) when the conduct is already subject to penalty under express statutory authority, such as section 258's prohibition on slamming. But I will not agree to extend section 201(b) even further.

I was not at the Commission when the NALs underlying the current Forfeiture Orders were issued, and I would not have supported them had I been here. As Commissioner Furchtgott-Roth argued when the Commission started down this path:

The FCC has neither the authority nor the ability to be the "marketing police" of the telecommunications industry. . . . The plain meaning of the term "practices" taken in the context of Section 201 does not clearly reach advertising. Indeed, if "practices" includes advertising, then it is hard to imagine what it does not include.¹

Sadly, this Commission may lack many things, but imagination is not one of them.

Moreover, I continue to be troubled when the Commission seeks to impose a fine in the absence of any rules. If section 201 is truly "ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities" then how are providers supposed to know what conduct will run afoul of it?²

To be sure, the items point to the *Business Discount Plan Forfeiture Order* from 2000 and the *NOS Communications Notice of Apparent Liability* from 2001, but these actions provide no precedential value for the current items and are also easily distinguishable. Among other things, both involved actual consumer complaints. The Commission processed "thousands" of complaints about Business Discount Plan,³ and "almost 900" complaints regarding NOS and its related company.⁴ Here, there was not a

¹ *Business Discount Plan Forfeiture Order*, 15 FCC Rcd 14461, 14475 (2000) (dissenting statement of Commissioner Furchtgott-Roth).

² *STi Telecom Inc.*, para. 9 (quoting *Metrop hones Telecomms., Inc. v Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005)).

³ *Business Discount Plan Forfeiture Order*, 15 FCC Rcd at 14461.

⁴ *NOS Communications Notice of Apparent Liability*, 16 FCC Rcd 8133, 8134 (2001).

single complaint. If the advertisements were “so unclear that it was impossible to calculate the cost of almost any call” you wouldn’t know it from the deafening silence of the public.⁵

The items also cite the 2000 *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*. However, a Policy Statement is no substitute for actual rules. Hasn’t the Commission learned by now that it can’t base enforcement actions on a Policy Statement? Moreover, a Policy Statement on a subject area over which the Commission has no jurisdiction carries no weight at all.

Not only does the Commission lack jurisdiction over advertising; it also lacks experience. The only items cited are the trio of actions from 2000-2001 described above.⁶ One might rationally conclude that those were the high water mark of advertising enforcement by an overly aggressive prior Commission.⁷ Moreover, while the FTC consistently pursued claims against prepaid calling card distributors, the NALs underling these Forfeiture Orders marked the first time that the Commission pursued prepaid calling card providers for their ads.

Certainly no reasonable company would have expected that the Commission would suddenly target companies, without any preceding complaints, for disclosure language that seems fairly standard in the industry, much less hone in on the font sizes of their disclosures. The *STi Forfeiture Order*, for example, highlights that the advertisements state that “[r]egional and local phone company” charges “may” apply; that a “daily maintenance fee” of “up to \$1.99” will apply; that calls from cellular phones and to 800 numbers “are billed at higher rates”; and that fees and rates are subject to change without notice.⁸

First of all, if the Commission is going to cite a company for failure to specify “how much of the card will be used up by regional and local phone company charges”,⁹ then I challenge it to produce its own list of all regional and local phone company charges. There are only a handful of people at the Commission that would even know how to go about that task, parts could be subject to change at any time by the states, and it would not even come close to fitting on an advertisement in a font size acceptable to the Commission.

In addition, a quick search of other well-known prepaid calling card providers turned up disclosures with very similar qualifications. Likewise, posters with disclosures in smaller print on the bottom seem to be the norm. If the prior items and Policy Statement articulated a clear standard that provided companies with fair notice of the conduct required, as the Commission now alleges, then why doesn’t anybody seem to know it? Selective application of penalties when nobody appeared to be on notice is very troubling.

⁵ *Id.*, para. 1.

⁶ See also Telecommunications Consumers Division - Marketing Enforcement Actions Detailed Information (last updated June 12, 2015), <https://transition.fcc.gov/eb/tcd/mktg.html>.

⁷ While the Commission has pursued slamming and cramming violations throughout this timeframe, including under 201(b), those actions provided no additional notice as to how the Commission would regulate the content of providers’ advertisements and disclosures. Slamming typically involves misrepresentation of the identity of the provider, and cramming entails wholly unauthorized charges. Therefore, they provide no additional guidance on what constitutes “clear and conspicuous” disclosures.

⁸ *STi Forfeiture Order*, paras. 2-3.

⁹ *Id.*, para. 21.

Moreover, if the standard is that every single rate, term, and condition must be explained and spelled out to the last cent, the Commission has a term for that: tariff.¹⁰ However, the Commission long ago deregulated and detariffed most long-distance service, including detariffing prepaid calling card service, “because the FCC has determined that the long-distance market is competitive.”¹¹

Some may be tempted to dismiss these actions as merely closing out the enforcement backlog on an industry that has been on the decline for years, with no effect on other types of companies. Think again. The Commission has no assurance that the Department of Justice will even take up these cases, which involve conduct from 2010-2011 and NALs from 2011-2012. Indeed, it is not clear that all of these companies remain in business today. Since this isn’t about getting the money, which may never happen, then it must be about setting the principle. And that’s what’s really concerning. Once this bad “precedent” is set, it will undoubtedly be used against other types of providers in the future.

For instance, the qualification that rates and/or terms and conditions are subject to change is commonly used in both the voice and broadband context by wireline, cable, wireless and other providers. Will they be required to specify their rates, terms, and conditions in greater detail? So much for promises that “utility-style” regulations, including tariffing, were a thing of the past. Furthermore, if the “NOS standard” means that companies face heightened scrutiny if they do not use a price per minute calculation, what are the implications of that today? Will broadband providers have to disclose a price per megabit? That sounds a lot like backdoor rate regulation.

Additionally, it is typical for companies to include disclosures in smaller print at the bottom of a web page, or through a mouse-over or separate page or tab. Will they have to change their font size or disclosure placement? Seek FCC approval? How long before the Commission makes the claim that advertising impacts broadband adoption and, therefore, all parts of the supposed virtuous cycle—including edge providers—will have their ads and disclosures scrutinized? Since the Commission makes clear it can and will act even in the absence of complaints, it is only a matter of time before someone in the Enforcement Bureau spots another ad that supposedly doesn’t comply with its new standard.

While the Commission’s position that it has roving section 201(b) authority to police providers’ advertisements is unlawful and unwise, it was not unpredictable. This is just another link in the chain of decisions to extend the Commission’s authority over all parts of the communications sector. I must dissent.

¹⁰ Tariffs (last visited Sept. 11, 2015), <https://www.fcc.gov/encyclopedia/tariffs>.

¹¹ *Id.*