

# FCC Commissioner O’Rielly Questions Commission’s Forfeiture Calculations in Recent Forfeiture Order

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On December 7, 2015 the FCC released a [Forfeiture Order](#) against PTT Phone Cards, Inc. (formerly Star Pinless) (PTT or the Company), a prepaid calling card service provider that resells international telecommunications services, for allegedly violating the Company’s regulatory obligations as an international telecommunications service provider. The Forfeiture Order confirms a penalty proposed in a 2014 Notice of Apparent Liability (NAL) which found PTT apparently liable for, among other violations, failing to register with the FCC or obtain international telecommunications service authorization, file reports and make contributions to the TRS Fund and the local number portability (LNP) cost recovery mechanism. In his separate [statement](#), Commissioner O’Rielly calls into question the Commission’s process for reviewing a company’s response to an NAL and expressed disappointment with what he describes as the Commission’s “cursory response” in the Forfeiture Order. O’Rielly’s statement is interesting in that it represents the first suggestion from within the FCC that the Commission might re-examine its traditional application of the “ability to pay” component of Section 503’s forfeiture provisions.

In the Forfeiture Order, the Commission imposed a monetary penalty of \$493,327, the same amount included in the 2014 NAL. Notably, unlike a [recent settlement](#) in which the FCC retroactively applied its [new policy](#) of imposing a base forfeiture that is three times the delinquent contributor’s debts to the Universal Service Fund (USF), TRS, LNP, North American Numbering Plan (NANP) and regulatory fee programs, the Commission here makes no mention of that new policy and its (potential) impact on the forfeiture PTT would have faced.

On its face, the NAL and Forfeiture Order ply familiar territory – failure to pay required contributions to the Commission’s regulatory funds. The NAL alleged PTT had provided international telecommunications services without international Section 214 authority and failed to timely file the annual Telecommunications Reporting Worksheets (FCC Forms 499-A or Worksheets), calling card certifications, international traffic and revenue reports as well as annual Customer Proprietary Network Information (CPNI) certifications. PTT also allegedly failed to make timely payments to the local number portability (LNP) cost recovery mechanism or pay required regulatory fees.

The interesting part of the Forfeiture Order is the treatment of the “ability to pay” factor in assessing a forfeiture. Section 503 of the Communications Act, which governs the imposition of forfeiture, *requires* the Commission to consider several factors in setting a forfeiture, including the violator’s “ability to pay” the fine. The Commission long has considered only gross revenues in determining an entity’s ability to pay, and has refused to reduce fines that represented as much as 7% of the company’s gross revenues.

Citing Section 503, PTT sought a reduction of the forfeiture penalty. In particular, PTT argued that the Commission should consider its net – not gross – revenues in determining its ability to pay. For a reseller such as PTT, the difference between net revenues and gross revenues typically is substantial, and, if the Commission were to consider such a factor, forfeitures for resellers in low-margin businesses (such as prepaid calling cards) would be significantly lower.

The Forfeiture Order, using language that is familiar to any practitioner in this area, quickly denied PTT’s arguments. Commissioner O’Rielly approved of the order, but wrote separately to question the Commission’s “perfunctory application” of gross revenues as the metric for measuring whether a company can afford to pay a forfeiture and encouraged the Commission to take a more thorough look at the effect a proposed forfeiture may have on the financial viability of a company.

Commissioner O’Rielly also asserted that the Commission has a responsibility to “give serious and substantive consideration to arguments raised in the record as to why the standard is appropriate in a given case.” Expressing his disappointment, for what he described as a “ cursory response” by the FCC, Commissioner O’Rielly asserted that the Commission’s failure to address directly the arguments companies make in their NAL responses could appear as though a company’s response is irrelevant to the Commission’s analysis. While Commissioner O’Rielly agrees that a fine was warranted in PTT’s situation, he made it clear that he disagrees with the Enforcement Bureau’s focus on monetary penalties.

These comments are consistent with Commissioner O’Rielly’s broader concerns with the Commission’s aggressive forfeiture actions. But, they also could signal a future willingness to consider “inability to pay” arguments more favorably. Resellers, particularly resellers in low-margin businesses, should take note.