

State of Florida



Talbott  
Bedell

# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

RECORDS AND  
REPORTING

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**DATE:** JUNE 29, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF REGULATORY OVERSIGHT (BATES) *B 10 June*  
 DIVISION OF LEGAL SERVICES (FORDHAM) *L.F. 6/29/00*  
 DIVISION OF COMPETITIVE SERVICES (SIMMONS) *SAS*  
 DIVISION OF CONSUMER AFFAIRS (PENA) *A. Peña*

**RE:** INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST NOS COMMUNICATIONS, INC. D/B/A INTERNATIONAL PLUS D/B/A 011 COMMUNICATIONS D/B/A THE INTERNET BUSINESS ASSOCIATION, NOSVA LIMITED PARTNERSHIP AND AFFINITY NETWORK, INC. D/B/A QUANTUMLINK COMMUNICATIONS D/B/A HORIZONONE COMMUNICATIONS FOR VIOLATION OF RULES 25-24.485, FLORIDA ADMINISTRATIVE CODE, TARIFFS, AND 25-24.490, CUSTOMER RELATIONS RULES INCORPORATED.

DOCKET NO. 000630-TI - NOS COMMUNICATIONS, INC. D/B/A INTERNATIONAL PLUS D/B/A 011 COMMUNICATIONS D/B/A THE INTERNET BUSINESS ASSOCIATION  
 DOCKET NO. 000631-TI - NOSVA LIMITED PARTNERSHIP  
 DOCKET NO. 000632-TI - AFFINITY NETWORK, INC. D/B/A QUANTUMLINK COMMUNICATIONS D/B/A HORIZONONE COMMUNICATIONS

**AGENDA:** 07/11/00 - REGULAR AGENDA - SHOW CAUSE PROCEEDING - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMU\WP\000630.RCM

### CASE BACKGROUND

While investigating a complaint filed by Mr. Richard Morse on June 9, 1998, staff reviewed inquiry and complaint activity related to (a) NOS Communications, Inc. d/b/a International Plus d/b/a 011

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Communications d/b/a The Internet Business Association, (b) NOSVA Limited Partnership and (c) Affinity Network, Inc. d/b/a Quantumlink Communications d/b/a HorizonOne Communications (collectively, the Companies) and found that a number of the complaints dealt with customer confusion related to billing of calls, multi-part rate structures, conversion tables and in at least one case, apparent misrepresentation of rates. In particular, the customers could not calculate their calls to come up with the rate per minute the Companies advertised, without the assistance of representatives of the Companies.

Commission Rule No. 25-4.111(1), Florida Administrative Code, incorporated in the Interexchange Telephone Company rules by Rule 25-24.490, F.A.C., states in part:

The term "complaint" as used in this rule shall be construed to mean any oral or written report from a subscriber or user of telephone service relating to a physical defect, difficulty or dissatisfaction with the operation of telephone facilities, errors in billing or the quality of service rendered.

Particular to Mr. Morse's complaint, the customer was quoted specific, per minute rates on the Companies' faxed advertisements, but when he received his bill, the rates were neither what he was quoted, nor did they appear in per minute increments. The method of billing in Total Call Units perplexed the customer because he believed he would be billed in minutes in keeping with the Companies' advertising.

Mr. Morse's complaint was resolved and he was given a credit of \$115.01 on his account, and at his request, the company moved him to the carrier of his choice.

Staff's experience with the Companies has shown that when a customer files a complaint with a regulatory agency, the Companies typically refund or credit the customer account in question rather than correct the underlying cause of the complaint. The Companies have refunded or credited customer accounts in excess of \$79,000 during the period of January 1, 1997, through May 23, 2000, based on the Commission's Consumer Activity Tracking System.

The amount and nature of complaint activity regarding these companies prompted staff to review and suggest changes to the

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Companies' tariffs. The Companies' tariffs and bills express rates in Total Call Units (TCU), while advertised rates are shown as cents per minute.

Rates are dependent on whether or not a customer is new. During the introductory period (the first two months of service), customers may or may not pay "non-transport charges" depending on the time of day. Customers are required to use two different calculations to determine the rate they are paying. The specific calculations are dependent on whether the call was made during peak or off-peak business hours. After the two-month introductory period, customers are required to pay non-transport charges for all calls. Customers must use conversion tables, provided by the Companies, or call the Companies to determine the rates they are paying.

Staff has discussed its concerns with the Companies and has suggested several changes to the tariffs and marketing materials which we believe would bring their tariffs into compliance with Commission Rules and Regulations. These suggested changes were designed to alleviate several apparent problems related to the complexity of the tariffs, including mislabeling of a service as a promotion, offering apparently discriminatory rates, and marketing rates in a different manner than portrayed in the Companies' tariffs. Staff believed the suggested changes would alleviate customer confusion, remove issues of discrimination, and therefore lower the number of complaints against the Companies.

The first change staff requested was a change of language in their tariffs. Staff was concerned with the representation of a service as a promotion, when in fact the service is a permanent offering. The Companies incorrectly used the term "promotion" to describe the introductory portion of a permanent service. At staff's request, the Companies corrected this language.

The tariff also included lower rates for customers utilizing specific forms of customer provided equipment for non-voice calls, in violation of Commission Rule No. 25-24.485(1)(e), Florida Administrative Code. In accordance with staff's request, the Companies removed the discriminatory provisions from their tariffs.

In addition, staff suggested that the Companies synchronize their marketing materials and their tariffs. In the Companies marketing materials, staff notes the Companies' use of the language "cents per minute," while neither their tariffs nor their bills

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include rates or charges expressed in "cents per minute." Staff believes this distinction is the major cause of customer confusion.

Staff met with representatives of the Companies and discussed the complexity and clarity of the Companies' tariffs. The Companies did refile their tariffs on January 21, 1999. However, after a review of the Companies' filings, staff believes the tariffs still do not conform with Commission Rule 25-24.485, subsections 25-24.485(1)(d) and 25-24.485(1)(e), Florida Administrative Code. The Companies believe the tariffs are within the guidelines expressed in the rule and indicate they will not amend their tariffs, marketing or billing practices.

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### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission order NOS and its affiliated companies to show cause within 21 days of the issuance of the Commission's Order why each company should not be required to pay a fine in the amount of \$100,000 or have its respective certificates canceled for violation of Rule 25-24.485, Florida Administrative Code?

**RECOMMENDATION:** Yes. The Commission should order NOS and its affiliated companies to show cause in writing within 21 days of the issuance of the Commission's Order why they should not be required to pay a fine in the amount of \$100,000 each or have their respective certificates canceled for violation of Rule 25-24.485, Florida Administrative Code. Each company's response should contain specific allegations of fact and law. If any company fails to respond to the show cause order, or request a hearing pursuant to Chapter 120, Florida Statutes, within the 21-day response period and the fine is not paid within 10 business days after the conclusion of the 21-day period, the facts should be deemed admitted, and the right to a hearing waived. Thus, the Company's respective certificates should be canceled. If the fine is paid, it should be remitted by the Commission to the State of Florida General Revenue Fund, pursuant to Section 364.285, Florida Statutes. **(Bates)**

**STAFF ANALYSIS:** NOS Communications, Inc. d/b/a International Plus d/b/a 011 Communications d/b/a The Internet Business Association, NOSVA Limited Partnership, and Affinity Network, Inc. d/b/a Quantumlink Communications d/b/a Horizon One Communications are interexchange telephone companies certificated to provide long distance services between points within Florida. The companies are subject to Commission Rules and Regulations, pursuant to Chapter 364, Florida Statutes.

#### **Rule 25-24.485**

All certificated Interexchange Telephone Companies are required to file tariffs with the Florida Public Service Commission. Rule 25-24.485, Florida Administrative Code states:

All tariffs must be filed with the Commission, using the following guidelines, before becoming effective.

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The guidelines set forth by Rule 25-24.485, F.A.C., are clear: 1) companies shall maintain tariffs with the Commission; 2) they shall provide support to accompany any proposed changes; 3) tariffs will be Florida-specific; and 4) tariffs will be clearly expressed.

Staff interprets the above Rule to mean that if a tariff is not filed according to the Rules of the Commission, the tariff cannot become effective. At the very least, staff believes the above rule allows the Commission to reject a filing or require corrections and/or changes to the tariffs before they are considered received and on file, and therefore become effective.

**Rule 25-24.485(1)(e)**

Commission Rules for Interexchange Telephone Companies refer to advertising and marketing plans and Rule 25-24.485(1)(e), Florida Administrative Code, states in pertinent part:

No public statement of service quality, rates, or service offerings or billings should be misleading or differ from those stated in the tariff.

Prospective customers, by and large, are solicited using telemarketers acting as company representatives. While the use of telemarketers is common industry practice, it has proven to be problematic for the Companies. Commission staff has conclusive information which shows the Companies' tariffs have been misinterpreted, and in some cases, disregarded when telemarketers describe the Companies' services to potential customers. This has been apparent from the faxes received during complaint resolution and, in one case, a legally obtained recording of a telemarketer misrepresenting one of the Companies. In meetings with the Companies and their attorneys, staff addressed these issues and was assured that the Companies have enacted guidelines and rules to prevent this from happening on a wide-scale basis.

Notwithstanding these apparent improvements, there are still differences between the presentation of rates in the tariffs and marketing materials. One apparent difference is the use of "cents per minute" in the marketing materials, while the tariff expresses rates in terms of "total call units." Another notable difference is that the Companies' marketing materials indicate that "non-usage" charges apply after the two-month introductory period. Staff believes that a reasonable customer would expect that "non-usage"

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charges are not sensitive to call duration. Per the Companies' tariffs, however, these "non-usage" charges appear to be a misnomer, in that these charges do vary with usage and are only capped on calls of twenty minutes or longer.

**Rule 25-24.485(1)(d)**

At the April 29, 1986 Agenda Conference, in Docket No. 840300-TI, the Commission approved, with clarifications, the IXC Rules. The final rules were adopted in Order No. 16940. As initially written, the rule stated that "the tariff must be clearly expressed so that the customer will understand that for which he is contracting". According to the vote sheet from this Agenda Conference, the Commissioners clarified that tariffs would use "simple words, sentences and paragraphs . . . avoid unnecessarily long, complicated or obscure phrases or acronyms..." Staff believes this clarification was made to avoid customer confusion. The complete, clarified Rule 25-24.485(1)(d), Florida Administrative Code, states:

The tariff must be clearly expressed in simple words, sentences and paragraphs. It must avoid unnecessarily long, complicated or obscure phrases or acronyms so that the customer will understand that for which he is contracting.

To facilitate analysis, the above Rule has been separated into separate components for review.

**a. Simplicity**

Customers with little or no telecommunications experience will find it difficult to understand the tariff as it is currently written. Indeed, Commission staff have found many instances where the wordiness of the tariff and the complicated rate structure are unwieldy. The tariff is not expressed in simple words, sentences and paragraphs.

**b. Obscurity and Length**

Staff reviewed the current tariffs filed by all three of the Companies and determined that they contain definitions and terms not consistent with Commission standards or industry norms.

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In its tariffs and billing, the Companies use obscure acronyms. As such, the tariff is not clearly expressed so that a reasonable customer can understand it. A customer cannot compute his or her bill without the aid of the Company provided conversion charts or Company assistance. In some instances, Commission staff have been unable to calculate bills and assist customers.

The pricing and billing of the service involves long processes to calculate the charges for each call. Use of obscure terms and definitions not only makes the tariff difficult to understand, but also violates the intent of Rule 25-24.485 (1)(d), Florida Administrative Code.

**c. Understandable**

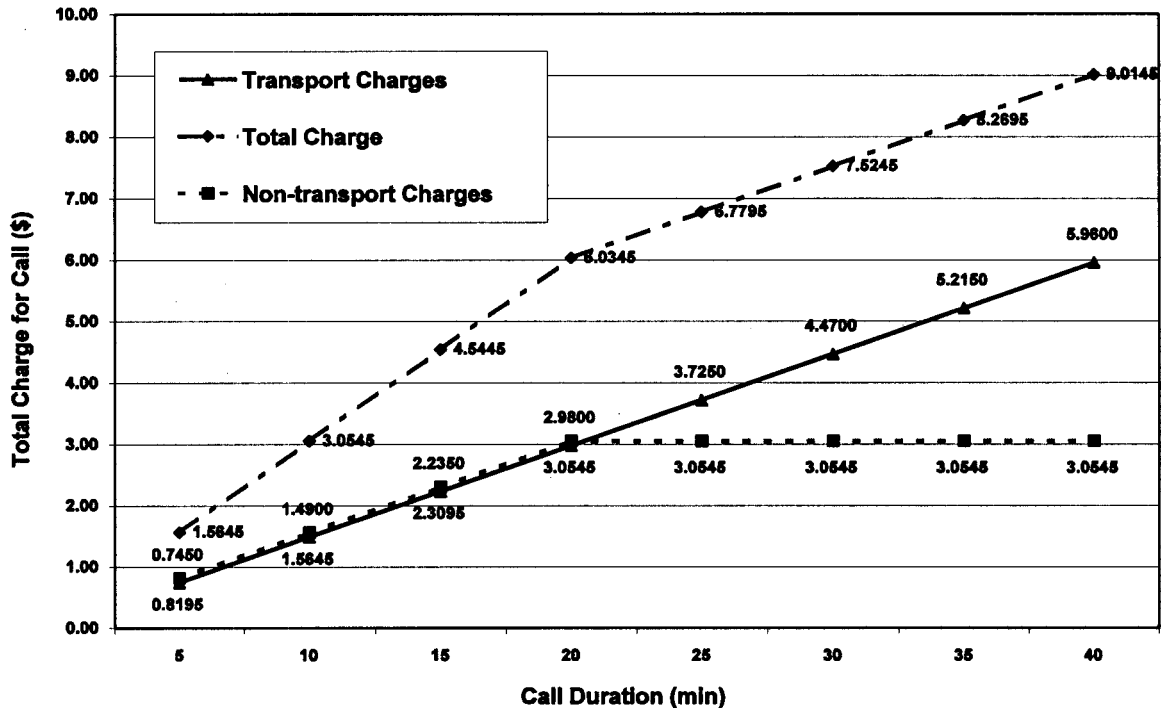
If a customer utilizes the Companies' services, he or she must follow several steps to determine the rates for the services rendered. The introductory offering, Freedom Plan for Business Users, requires conversion charts provided by the Companies in order to calculate call charges. According to the Companies' tariffs, a customer must first determine whether a call was made during the peak or off-peak period. After determining this, a customer must then determine the appropriate calculation to calculate the charge for each call during the introductory period. For the standard offering, the customer must follow additional steps to calculate each call. In an effort to educate staff on its unique billing method, the Companies provided staff with over thirty pages of documentation outlining how to properly calculate the charges for each call made.

Staff believes the complexity of the multi-part rate structure is unnecessary. Staff proposed that the easiest and simplest way for the company to accomplish its goals is to charge one per minute rate for the first twenty minutes and to charge a lower rate for additional minutes over twenty. The chart below indicates that after twenty minutes, non-transport charges are capped, thus proving the point that two different per minute rates, one for the first twenty minutes and one for additional minutes over twenty, accomplishes the same goal as the multi-part rate structure currently in use.



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**Freedom Plan for Business Users**



**Proposed Tariff Revision and Disclosure Language**

On May 18, 2000, the Companies' attorney filed with this office a proposed tariff revision as well as disclosure language which it intends to place prominently on its faxibles.

The Companies have proposed to add multiple instances of disclosure language to their marketing materials, Letters Of Agency, and monthly invoices. While staff is pleased the Companies are doing this, it should be noted that disclosure is a requirement of Commission Rules, specifically Commission Rule 25-24.490(3), Florida Administrative Code. (emphasis added)

**Conclusion**

While the Companies have made some strides in addressing staff's concerns, significant issues still remain. Tariff revisions have not resolved the complexity issue and still require consumers to rely on formulae to determine whether they are being

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billed accurately. While staff acknowledges that there is an element of subjectivity with Rule 25-24.485(1)(d), Florida Administrative Code, we believe that the Companies' tariffs cannot be construed to fall within any reasonable interpretation of this rule. Moreover, the Companies express rates in one manner for marketing purposes and in another manner for tariffing and billing purposes, which appears to be squarely at odds with Rule 25-24.485(1)(e), Florida Administrative Code.

Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Inasmuch as these issues of rule compliance involve written representations of the Companies' services, staff believes that the Companies' have been "willful" in the sense intended by Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule." Thus, any intentional act, such as the Companies' conduct at issue here, would meet the standard for a "willful violation."

Based on the foregoing, staff recommends that the Commission order NOS and its affiliated companies to show cause in writing within 21 days of the issuance of the Commission's Order why each company should not be fined \$100,000 or have its respective certificate canceled for violation of Rule 24-24.485, Florida Administrative Code. Each company's response should contain specific allegations of fact and law. If any company fails to respond to the show cause order, or request a hearing pursuant to Chapter 120, Florida Statutes, within the 21-day response period and the fine is not paid within 10 business days after the conclusion of the 21-day period, the facts should be deemed admitted, and the right to a hearing waived. Thus, the Company's respective certificates should be canceled. If the fine is paid, it should be remitted by the Commission to the State of Florida General Revenue Fund, pursuant to Section 364.285, Florida Statutes.

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**Issue 2:** Should this docket be closed?

**RECOMMENDATION:** If staff's recommendation in Issue 1 is approved, NOS and its affiliated companies will have 21 days from the issuance of the Commission's show cause order to respond in writing why it should not be fined in the amount proposed, or, if the fine is not paid, have their certificates revoked. If the Companies timely respond to the show cause order, this docket should remain open pending resolution of the show cause proceeding. If the Companies do not respond to the Show Cause Order, the fines should be deemed assessed. Staff recommends that if the Companies fail to respond to the Order to Show Cause, and the fines are not received within 10 business days after the expiration of the show cause response period, then the Companies' certificates should be revoked. This docket can then be closed administratively. If after reasonable efforts the Commission is unable to collect the fine, then it should be forwarded to the Comptroller's Office for collection. (Fordham)

**STAFF ANALYSIS:** If staff's recommendation in Issue 1 is approved, NOS and its affiliated companies will have 21 days from the issuance of the Commission's show cause order to respond in writing why it should not be fined in the amount proposed, or, if the fine is not paid, have their certificates revoked. If the Companies timely respond to the show cause order, this docket should remain open pending resolution of the show cause proceeding. If the Companies do not respond to the Show Cause Order, the fines should be deemed assessed. Staff recommends that if the Companies fail to respond to the Order to Show Cause, and the fines are not received within 10 business days after the expiration of the show cause response period, then the Companies certificates should be revoked. This docket can then be closed administratively. If after reasonable efforts the Commission is unable to collect the fine, then it should be forwarded to the Comptroller's Office for collection.