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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB DOCKET NO. 03-96
	)	
NOS COMMUNICATIONS, INC., AFFINITY NETWORK INCORPORATED and NOSVA LIMITED PARTNERSHIP	)	File No. EB-02-TC-119
	)	NAL/Acct. No. 200332170003
	)	
Order to Show Cause and Notice of Opportunity for Hearing	)	FRN: 0004942538

To: The Commission

ENFORCEMENT BUREAU'S OPPOSITION TO MOTION TO STRIKE

1. On June 23, 2003, NOS Communications, Inc. ("NOS") filed a Motion to Strike (the "Motion") footnote 4 of the Enforcement Bureau's June 16, 2003, Reply to Opposition to Motion to Strike (the "Reply"). Pursuant to section 1.45(b) of the Commission's rules,[1] the Enforcement Bureau (the "Bureau") hereby submits its Opposition to NOS's Motion. For the following reasons, the Commission should deny the Motion and consider the Bureau's Reply in its entirety.

2. The subject Motion relates to certain pleadings pending before the Commission in connection with the May 7, 2003, Petition for Reconsideration of the Commission's *Order to Show Cause and Notice of Opportunity for Hearing* (the "*OSC/NOH*")[2] in this proceeding filed by NOS, Affinity Network Incorporated ("ANI") and NOSVA Limited Partnership ("NOSVA") (collectively, the "Companies"). On May 20, the Bureau

[1] 47 C.F.R. § 1.45(b).

[2] 18 FCC Rcd 6950 (2003).

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responded to the Petition, demonstrating that it should be dismissed because it is both unauthorized by the Commission's rules[3] and, even if considered, devoid of substantive merit. Because of these fatal procedural and substantive flaws, the Bureau styled its May 20 responsive pleading a "Motion to Strike and Opposition to Petition for Reconsideration." On May 30, the Companies filed a pleading entitled "Opposition to Motion to Strike and Reply to Opposition to Petition for Reconsideration" (the "Opposition/Reply"). Although filed as a single pleading, the Companies' Opposition/Reply segregated its arguments as if the Bureau's May 20 pleading had been two filings, an opposition to the Petition for Reconsideration and a motion to strike that Petition. Notwithstanding the rather unwieldy structure of the Companies' May 30 filing, in its Reply, the Bureau appropriately responded to all arguments contained therein in a single pleading, including, in footnote 4, the Companies' contention that the Commission should totally disregard the Bureau's May 20 pleading because it was untimely filed.

3. In its instant Motion, NOS now asks the Commission to disregard footnote 4 of the Bureau's Reply, arguing that the substance of the footnote goes beyond matters raised by NOS in the "Opposition" section of its May 30 pleading, and therefore violates Section 1.45(c) of the Commission's rules.[4] Thus, according to NOS, "the Companies never claimed the Bureau's *motion* was untimely. What they actually argued was under the rubric

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[3] Section 1.106(a)(1) of the rules limits the filing of a petitions for reconsideration of a hearing designation order to situations "if, and insofar as, the petition relates to an adverse ruling with respect to the petitioner's participation in the proceeding." 47 C.F.R.. § 1.106(a)(1). As the Bureau has demonstrated, the *OSC/NOH* contains no such ruling with regard to the Companies, who are each parties to the subject hearing.

[4] 47 C.F.R. § 1.45(c). NOS ominously claims that the footnote "appears at first blush to be a run-of-the-mill violation of § 1.45(c) . . . .[i]t is the manner by which the Bureau violated the rule, and the substance of the justification, that elevates the seriousness of the matter." Motion at 3.

'The Bureau's Oppostion Was Late-Filed.[5]'" This is utter nonsense. Notwithstanding the Companies' structuring of their May 30 pleading as if they were responding to two filings by the Bureau on May 20, they filed a single pleading, to which the Bureau appropriately responded on June 16, as authorized by section 1.45(c) of the rules.

4. NOS also argues in its Motion that the Bureau's reliance on the Certificate of Service attached to the Petition for Reconsideration as support for the timeliness of the Bureau's May 20 pleading is misplaced. In demonstrating that its pleading was, in fact, timely filed pursuant to Section 1.4(h) of the Commission's rules,[6] the Bureau noted its reliance on the Companies' representation in the Certificate of Service to their Petition for Reconsideration that they had hand delivered a copy of the Petition to what they characterized in the Certificate as one of the "parties listed below." Consistent with Section 1.4(h) of the rules and the pertinent precedent cited in the footnote, the Bureau accordingly calculated the due date of its response to include three additional non-business days for mailing. In the Motion, NOS now claims that, notwithstanding the statement in its Certificate, the party to which it mailed the Petition was not a party and was "mistakenly added" to the Certificate.[7] Particularly in light of the fact that the Companies failed to

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[5] Motion at 2. (Emphasis in original).

[6] 47 C.F.R. § 1.4(h).

[7] Notwithstanding NOS's backpedaling in its instant Motion, the characterization in the Certificate of Service appended to its Petition for Reconsideration's of Kelley Drye & Warren LLP as the "party" to which it and the other the Companies had served the Petition by mail appears to have been accurate. Motion at 4. Although NOS is correct that Kelley Drye is a signatory to the Petition on behalf of the other two Companies, in the subject hearing, it not only represents those companies, but also the principals of all three Companies, including NOS. Those principals, Kelley Drye's clients, who are subject to the sanctions proposed in the *OSC/HDO* and parties to the hearing proceeding, did not sponsor the Petition. Accordingly, the Bureau's observation in footnote 4 of its Reply that its having been required to have filed its pleading without the benefit of the three additional mailing days would have provided Kelley Drye, as counsel for the principals, the opportunity to preview their pleading before filing their own was a valid one. This is precisely the situation that section 1.4(h) was promulgated to avoid. Particularly in light of the lack of merit to NOS's contention that footnote 4 of the Reply is somehow improper, NOS's subject Motion

advise Bureau counsel of this claimed error, the Bureau's reliance on their representations was fully appropriate and its May 20 pleading was, in fact, timely filed and should be fully considered by the Commission.[8]

5. By its May 20 Motion, the Bureau demonstrated that the Companies' Petition for Reconsideration of the *OSC/NOH* should be dismissed or denied, in part, because the Companies' contention that the *OSC/NOH* contained a ruling adverse to their participation in the subject hearing is simply untrue. One can only conclude by the ill-advised and frivolous nature of NOS's latest Motion that it is desperately attempting to prevent Commission consideration of the Bureau's showing, which will result in its dismissal of the Companies' improper Petition.[9] This attempt must fail. For the reasons noted herein, the Commission should deny the Motion and fully consider the Bureau's pending May 20 and June 16 pleadings.

Respectfully submitted,
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Chief, Enforcement Bureau

Maureen F. Del Duca,
Chief, Investigations and Hearings Division

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seeks to achieve what it could not accomplish with its "error" in the Certificate of Service. The Motion is a thinly disguised attempt to respond to the Bureau's Reply, notwithstanding the fact that no such response is authorized by section 1.45 of the rules.

[8] NOS's contention, at pages 4-5 of its Motion, that the Bureau's use of the term "Motion" in footnote 4 of its Reply to refer to its May 20 pleading was improperly deceptive must be rejected. In the first paragraph of its Reply, the Bureau expressly defined the term "Motion" as its May 30 Motion to Strike and Opposition to Petition for Reconsideration. Reply at 1. Thus, when the Bureau used the term in the footnote, it was, clearly and properly, referring to its entire May 30 pleading.

[9] Of note is the fact that, although Kelley Drye, as counsel for ANI and NOSVA, is a signatory to the Petition for Reconsideration and the May 30 pleading, it does not appear on the subject Motion, which was filed only on behalf of NOS.

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July 2, 2003

CERTIFICATE OF SERVICE

Yolanda Giles, a secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 2nd day of July, 2003, sent by first class United States mail copies of the foregoing "Enforcement Bureau's Opposition to Motion to Strike" to:

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