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FEDERAL COMMUNICATIONS COMMISSION

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PRE-HEARING CONFERENCE

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In the Matter of:	EB Docket No.
BUSINESS OPTIONS, INC.	03-85
Order to Show Cause and Notice of Opportunity for Hearing	File No. EB-02-TC-151

NOV 14 1 40 PM '03

FOO-ONLY RCD

Volume 2

Wednesday
November 5, 2003

The above-entitled matter came on for pre-hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE RICHARD L. SIPPEL
Chief Administrative Law Judge

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APPEARANCES:

ON BEHALF OF BUSINESS OPTIONS, INC.

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ON BEHALF OF THE FEDERAL COMMUNICATIONS COMMISSION:

JAMES W. SHOOK, ESQ.
Enforcement Bureau
445 12th Street, S.W.
Washington, D.C. 20554
(202) 418-1420

1 P-R-O-C-E-E-D-I-N-G-S

2 9:02 a.m.

3 CHIEF ALJ SIPPEL: This is a pre-hearing
4 conference that was set purely at the request of the
5 Enforcement Bureau by my order FCC 03M-43, released
6 October 29th, 2003.

7 And it's been a while since we've met on
8 this case, so I'm going to ask counsel, counsel for
9 BOI, to reintroduce themselves again. This should be
10 Mr. Kemal Hawa and Mr. Dana Frix, is that correct?

11 MR. FRIX: That's correct, Your Honor.

12 MR. HAWA: Kemal.

13 CHIEF ALJ SIPPEL: I'm sorry. Say that
14 again, sir?

15 MR. HAWA: Kemal.

16 CHIEF ALJ SIPPEL: Kemal. Okay. And on
17 behalf of the Bureau?

18 MR. SHOOK: James Shook and --

19 CHIEF ALJ SIPPEL: Okay. Mr. Shook, it's
20 your issue.

21 MR. SHOOK: Thank you, Your Honor. Your
22 Honor, this concerns the memorandum opinion and order
23 that you issued August 20, 2003, FCC 03M-33. And in
24 particular, issue (J). Issue (J) has a number of
25 matters more or less combined in it, one of which

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1 concerns Telecommunications Relay Service, one of
2 which concerns the filing of forms 499.

3 There are proposed forfeiture limits set
4 for the failure to file the form 499, as well as a
5 proposed forfeiture limit for the failure to make
6 required contributions to the Telecommunications Relay
7 Services Fund.

8 Conversely, there is no forfeiture amount
9 set with respect to any failures to pay universal
10 service contributions in a timely fashion. And we
11 think that as a matter of practice, that it would be
12 best to establish an upper limit to what that
13 forfeiture liability could be.

14 And to that end, we believe the Globecom,
15 Inc. notice of apparent liability for the forfeiture
16 and order that was released September 30, 2003 by the
17 Commission, FCC 03-231, a copy of which I can give
18 Your Honor today, if you wish --

19 CHIEF ALJ SIPPEL: I have it. I have it.
20 I have it and I've looked at it.

21 MR. SHOOK: It sets forth the analysis and
22 provides a methodology for reaching the upper limit,
23 which we believe to be appropriate for this situation.

24 CHIEF ALJ SIPPEL: Let me -- let me just
25 ask a question or two. I want to -- first of all, I

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1 want to point one thing out, and that is my MO and O
2 that you're referring to, 03M-33, the language in
3 issue (J), as I'm sure the language in (G), (H) and
4 (I), were taken -- my recollection, were taken
5 verbatim from what was proposed to me in your motion.

6 MR. SHOOK: We recognize that, Your Honor.

7 CHIEF ALJ SIPPEL: Yeah. This is nothing
8 that I constructed.

9 MR. SHOOK: Yes, sir.

10 CHIEF ALJ SIPPEL: So -- all right.
11 Secondly, is your position today that without this
12 modification, that there has been insufficient notice
13 given?

14 MR. SHOOK: We believe that there's a
15 possibility that such an argument could be made.
16 Section 1.80(G) of the rules, which concerns notices
17 of opportunity for hearing, and is the hearing
18 counterpart to a notice of apparent liability, does
19 not specify that the proposed forfeiture amount must
20 be set in the notice of opportunity.

21 Conversely, if you look at the 1.80(F),
22 which is the notice of apparent liability portion, it
23 does require, among other things, that the proposed
24 forfeiture amount be set forth.

25 Now Commission practice, with respect to

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1 orders to show cause and hearing designation orders,
2 which also include notices of opportunity for hearing,
3 as a general proposition set forth with respect to
4 each potential forfeiture matter, what the upper limit
5 of the forfeiture should be.

6 So we think that in order to conform this
7 order, the order that I have referenced and that, as
8 you say, was based on something that the Bureau had
9 provided and you had taken essentially word for word,
10 should note an upper limit, a potential upper limit to
11 what the forfeiture should be. And that's strictly
12 from a notice standpoint. It gives --

13 CHIEF ALJ SIPPEL: Yeah, go ahead.

14 MR. SHOOK: It just -- it goes everybody
15 concerned what the maximum potential forfeiture could
16 be. Now that doesn't -- that doesn't say that that's
17 what it's going to be. It is simply the maximum
18 potential.

19 CHIEF ALJ SIPPEL: Well, that was going to
20 be my next question. But these limits are spelled --
21 I haven't parsed this thing through -- but these
22 limits
23 that you wish to insert and that you're asking for the
24 correction on, I take it, these limits are set in the
25 rules on forfeitures. In other words --

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1 MR. SHOOK: They're either set out in the
2 rules generally or, in the case of universal service
3 contributions, they're set out in the case law. And
4 particularly, the relevant case law, we believe, is
5 the Globecom case.

6 CHIEF ALJ SIPPEL: Which came -- what --
7 which came after -- September 30, was that --

8 MR. SHOOK: That's the release date of
9 Globecom, yes, sir.

10 CHIEF ALJ SIPPEL: And --

11 MR. SHOOK: And it references --

12 CHIEF ALJ SIPPEL: My MO and O is dated
13 what?

14 MR. SHOOK: Your MO and O is dated August
15 20.

16 CHIEF ALJ SIPPEL: Okay. So it came out
17 after. All right. Do you want to say anything more
18 before we hear from the other side?

19 MR. SHOOK: If Your Honor wishes, I could
20 provide summaries of various other cases that include
21 within them the upper limit to the proposed
22 forfeitures in hearing cases, just to show Your Honor
23 that there is a series of cases that date back many
24 years where this is the general practice of the
25 Commission.

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1 CHIEF ALJ SIPPEL: Okay. Well, let me
2 see. Let me hold off on that for now.

3 Who wants to speak for BOI?

4 MR. HAWA: Kemal Hawa.

5 CHIEF ALJ SIPPEL: Sure.

6 MR. HAWA: Your Honor, use of the -- the
7 Enforcement Bureau seeking to use the Globecom NAL as
8 a precedent in this matter is inappropriate.

9 CHIEF ALJ SIPPEL: Let me just ask you a
10 question up front. Do you object?

11 MR. HAWA: Yes, we do.

12 CHIEF ALJ SIPPEL: Okay. And you seek the
13 -- okay. So you're telling me Globecom is not -- your
14 position is it's not relevant or it's not -- well, go
15 ahead. You finish your -- I'm sorry. I interrupted
16 you. Go ahead.

17 MR. HAWA: Notice would clearly be
18 insufficient, but more than that, I think it's
19 important to note what is going on here. The
20 enforcement bureau has fabricated this Globecom
21 precedent to accommodate its ongoing litigations,
22 including the Business Options litigation.

23 We don't have the luxury of doing that on
24 the Business Options side. I'd like to just go
25 through some of the facts a bit and tell you about how

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1 this -- where the Globecom precedent last month, what
2 its genesis was.

3 When the Commission instituted the
4 litigation against Business Options, obviously one of
5 the issues in the case, that was later expanded to be
6 explicit, was failure to pay universal service.

7 The potential forfeiture penalties in the
8 -- for failure to pay universal service were well
9 established in August in prior -- when the FCC filed
10 its motion to enlarge.

11 The Commission has addressed the issue
12 five times, and each time, in each case, the
13 Commission set a base forfeiture amount of 20,000
14 dollars, and said you failed to file -- if you fail to
15 pay universal service, the forfeiture penalty is
16 20,000 dollars. And there was actually two cases in
17 which they doubled it because of the particularly
18 egregious nature. But the base forfeiture is 20,000.
19 Forty thousand is the most that's ever been imposed.

20 When the motion to enlarge was filed,
21 Business Options didn't oppose it. We knew what the
22 maximum forfeiture permissible. We knew what
23 Commission precedent said on this point. We conveyed
24 that to the Enforcement Bureau. Our discussions were
25 quite clear on this issue and specific.

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1 I would go so far as to say that the
2 Enforcement Bureau recognized the validity of our
3 argument at the time, and then a month later a notice
4 of apparent liability is issued against Globecom,
5 potentially seeking to -- proposing a forfeiture that
6 is 12 times what the forfeiture penalty -- the maximum
7 forfeiture penalty that existed previously.

8 Then, couple of weeks later, I get a phone
9 call. And big surprise, the Enforcement Bureau
10 informs us that they want to use Globecom, the
11 precedent established -- rather, it is not a precedent
12 at all -- a case -- a notice of apparent liability
13 issued a month ago to increase tenfold or more the
14 maximum potential forfeiture in this case.

15 The use of Globecom NAL as a precedent is
16 inappropriate for several reasons. First, it's not a
17 precedent at all. It's a notice of apparent
18 liability. It hasn't been adjudicated. There's been
19 no determination that such a forfeiture penalty is
20 appropriate in this context. And it's not a final
21 order.

22 Second, it would be an impermissible,
23 retroactive application of the Commission's
24 regulations. There's a five prong test to determine
25 whether an order -- and this is no order, this is a

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1 notice, an NAL -- of whether you can retroactively
2 apply subsequent Commission rulings to preexisting
3 matters.

4 The Commission would fail each of the five
5 prongs. I don't know if you want me to go through
6 each of the five prongs right now or not. I'd be glad
7 to.

8 CHIEF ALJ SIPPEL: No, it's not really --
9 I don't think it's really necessary. I just want to
10 get the -- you know. Go ahead. You keep going.

11 MR. HAWA: I'll just close out with one
12 final point, in that this is not a modest
13 clarification of an existing issue in this case. This
14 is a material enlargement of the issue of potential
15 liability that would properly have been the subject of
16 a motion to enlarge.

17 They filed a motion to enlarge. It did
18 not address this issue. We didn't oppose it. We
19 relied on the state of the existing case law as
20 establishing the maximum forfeiture penalty. It
21 wasn't until last month that the Commission came out
22 with this proposed new policy that seeks to increase
23 the forfeiture penalty tenfold.

24 CHIEF ALJ SIPPEL: Okay. Let me ask this
25 question. I don't know who is going to answer it

1 first, but does the -- was the state of the law with
2 respect to forfeiture amounts for failure to make the
3 universal service contribution, was it as stated by
4 Mr. Hawa, or is this -- in other words, was new law
5 created under the -- yeah, Globecom apparently
6 liability issue?

7 MR. SHOOK: As Mr. Hawa indicated, there
8 have been a number of forfeiture proceedings with
9 respect to failures to make universal service
10 contributions, that have been released by the
11 Commission since 1998.

12 The first such order used a methodology of
13 20,000 dollars for the single failure to file a timely
14 universal service -- to make a timely universal
15 service payment. And in addition to the 20,000
16 dollars, took one-half of what was due for that
17 particular bill and added it to the 20,000 dollars.

18 So the proposed forfeiture amount, and
19 then the ultimate forfeiture amount, because in that
20 particular case there was no reduction between the
21 notice of apparent liability, and the forfeiture order
22 was some figure higher than 20,000 dollars.

23 Subsequently, in orders that were issued
24 in 2000, the Commission used two failures to pay of
25 20,000 dollars each as the base forfeiture amount.

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1 And then added to that, again, one-half of the amount
2 that was due for the two bills that were not timely
3 paid. So that in the America's Telenetwork Corp.
4 situation, the forfeiture order, for which was
5 released December 5, 2000, FCC 00-423, the proposed,
6 or the forfeiture that was imposed in that case, was
7 154,000 dollars.

8 That included the 20,000 dollars for each
9 of two failures to pay in a timely manner. So that's
10 40,000 dollars, plus one-half of the amounts that were
11 billed to America's Telenetwork Corporation, plus the
12 Commission increased the forfeiture in order to get to
13 154,000 dollars because of what was perceived to be
14 America's Telenetwork's egregious behavior in this
15 situation.

16 So that when Globecom was issued in
17 September of 2003, yes, there was a policy change
18 announced by the Commission that certainly increased
19 what could -- or what the Commission believed should
20 be imposed as a forfeiture for failures to pay
21 universal service.

22 And in the case of Globecom, it was 12
23 bills that had not been paid in a timely manner, as
24 opposed to two, plus again one-half of what was owed,
25 and in the Globecom case, whatever that figure was.

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1 It was, again, one-half of it was used and added to
2 the 240,000 dollars in order to get to the proposed
3 forfeiture amount.

4 CHIEF ALJ SIPPEL: Did I hear you right in
5 saying that Globecom, then, that constituted what you
6 stated is a policy change --

7 MR. SHOOK: Yes. The Commission --

8 CHIEF ALJ SIPPEL: -- going from two to
9 12?

10 MR. SHOOK: The Commission announced the
11 policy change in terms of how it was going to
12 determine what forfeitures should be for failures to
13 pay universal service.

14 CHIEF ALJ SIPPEL: Well, then, what I
15 would -- what obviously has happened here, then, is
16 that you got a policy change in September after an
17 issue was added in August. There's a change in
18 policy, and you want the issue to comport with the new
19 policy.

20 MR. SHOOK: Yes, sir.

21 CHIEF ALJ SIPPEL: Well, isn't that kind
22 of -- I mean, that's really kind of difficult on
23 opposing party, isn't it? I mean, supposing they
24 change it again? I mean, I could -- we could go
25 through this process all the way up to hearing date if

1 they keep changing policy. There has to be --

2 MR. SHOOK: I suppose potentially that's
3 possible, but it would entail us coming back in and
4 asking for, you know, the additional amount based on
5 the new Commission thinking.

6 CHIEF ALJ SIPPEL: Well, yeah, I know, but
7 this is an APA hearing. I mean, you know, I mean this
8 goes back to the basics of notice and fairness and
9 everything that was done back in 1942 or something by
10 this great commission and committee that put this APA
11 together.

12 MR. FRIX: Your Honor, isn't it --

13 CHIEF ALJ SIPPEL: I'm sorry?

14 MR. FRIX: -- I have a comment.

15 CHIEF ALJ SIPPEL: Yeah. Well, I'm
16 obviously -- I'm concerned about this. But let me
17 hear -- let me hear from you.

18 MR. FRIX: Your Honor, it's actually
19 slightly one level more insidious than in fact what
20 we're discussing right now, we think.

21 The matter is -- the Globecom matter is
22 not only a new policy, clearly a new policy, that
23 would increase the penalty ten times or 12 times, it
24 has also not been tested as a matter of law at this
25 point. I happen to know Globecom's counsel -- and Mr.

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1 Hawa and I represented Globecom as a result of that
2 notice of apparent liability.

3 CHIEF ALJ SIPPEL: This isn't going to get
4 incestuous or anything, is it?

5 MR. FRIX: No, nothing like that, Your
6 Honor. And that issue of whether or not the FCC has
7 the legal authority to adopt that new policy in the
8 manner that it did has not yet been tested. And that
9 issue will be tested as a matter of law.

10 This whole case, and this area of
11 enforcement, is a very awkward intersection of law and
12 policy. And I think it's -- I think it's our
13 perspective, as counsel for Business Options, that
14 perhaps the -- that as important as it is for the
15 Commission to adopt new policies, it needs to be
16 conducted -- it needs to be adopted in accordance with
17 law. And simply the changing winds of circumstance or
18 political pleasure as it may be don't justify changes
19 of law that have -- or prospective changes -- changes
20 in law that have retroactive effect.

21 The overall case here, I think, if I could
22 pull back for one second, is to give you what I think
23 is the appropriate picture of the case from our
24 perspective, is that there is a case -- this case was
25 brought as a result of slamming violations. And

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1 specifically, there's eight allegations of customers
2 who were slammed.

3 There are, I think it would be fair to
4 say, a hundred, 200 cases each year where the FCC has
5 issued orders dining a given carrier for a slam. So
6 there are maybe a hundred, maybe 50, maybe 200. I
7 haven't done the math to count them up, and I don't
8 mean to prejudice anyone, but in which the FCC has
9 issued more than eight notices against a carrier
10 saying you've slammed. So it would have been more
11 than eight adjudicated slams in a particular year
12 against any given carrier. ATT&T has hundreds.

13 CHIEF ALJ SIPPEL: Under different
14 designation orders or under --

15 MR. FRIX: Under different designations or
16 some together, some different. But every week, the
17 Commission issues ten, 20, 30 orders, saying a given
18 carrier has slammed somebody.

19 In the case of Business Options, in the
20 case of AT&T, MCI and a hundred smaller carriers,
21 there's eight or more slams in a year adjudicated
22 against that carrier.

23 In the case of Business Options, there's
24 an allegation of eight slams. And by the way, the
25 punishment, with regard to those other cases, is

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1 essentially something in the neighborhood of ten, 20,
2 50 dollars per case.

3 There was a -- the Commission has a policy
4 and a set of rules governing the penalty that applies.
5 And it is essentially give back the money you've
6 gained and 50 percent more. That's a gross
7 oversimplification, but essentially that nature.

8 So for those 20 or ten or 50
9 cases that get adjudicated each week, the penalty is
10 ten, 50, a hundred dollars. In the case of Business
11 Options, an entirely different tactic is being
12 applied, and it is a enforcement mechanism that has
13 the very clear ability to cause the dissolution of a
14 small family business.

15 There's problems there that we have not
16 yet addressed. And the manner in which this case has
17 proceeded has not called for us to address that.
18 We're in the factual inquiry part of the case.

19 And the question, a number of questions,
20 important questions, arise as to what remedy lawfully
21 applies, even given, presuming, the Commission's case.
22 Those issues will have to be dealt with, and they'll
23 have to be dealt with, presumably, after the hearing,
24 because the hearing will deal with the factual issues.

25 But the point that I guess I'm trying to

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1 get is that I think that Mr. Shook's request today is
2 really irrelevant to the proceeding at this point in
3 time. And there's no need for it to be considered by
4 Your Honor today or frankly any time in the near
5 future.

6 This is an issue that I think that, as Mr.
7 Shook mentions, there is a question of notice. There
8 is some -- there is a legal question as to whether
9 notice has been given. I don't see any reason to
10 resolve that issue today or in the near future, until
11 such time as we've had a hearing in which the facts
12 are attested to.

13 The issue of notice, I don't see any
14 benefit necessarily to it being resolved today. In
15 addition, we are concerned as counsel to carriers in
16 this industry, that the Commission is seeking to have
17 this issue resolved.

18 And I presume, frankly, that Mr. Shook is
19 suggesting ultimately that motions be filed and this
20 issue be dealt with in a more formal manner, because
21 I would be surprised if it's his presumption that we
22 have enough evidence, information, before Your Honor
23 for you to make a decision right now. But if you were
24 to make a decision --

25 CHIEF ALJ SIPPEL: I absorb things pretty

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1 well, but this is getting to be a little bit --

2 MR. FRIX: It is -- it's quite complicated
3 as a matter of law is the issue, not factually.

4 CHIEF ALJ SIPPEL: I was just kidding. Go
5 ahead.

6 MR. FRIX: But I think the point is that
7 there is -- the Commission is seeking -- the
8 Enforcement Bureau is seeking to use this case right
9 here as a mechanism to support the legal validity of
10 the Globecom notice of apparent liability, of the
11 Commission's actions in the Globecom notice of
12 apparent liability.

13 But I think really what the Enforcement
14 Bureau is seeking to do is ancillary to this case
15 entirely. And I see it -- and it seems to me it's
16 irrelevant to what is happening in this case at this
17 stage.

18 I think more to the point, perhaps, the
19 case is proceeding. There frankly is very little
20 factual dispute between both sides at this point. And
21 resolution of this case seems possible, and it's
22 certainly something that we have been actively working
23 on, both sides, for a period of months.

24 So we were surprised to receive this
25 request, this particular request. It seems to us

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1 irrelevant at this stage of the case. There's nothing
2 that is won or -- there's nothing that is lost in this
3 case if Your Honor was simply to deal with this issue
4 at a later time, in the event there is a hearing and
5 that we get to the issue of what are the lawful
6 remedies for any behavior.

7 CHIEF ALJ SIPPEL: All right. Then is it
8 -- well, are you willing to go so far as to say that
9 if this case goes down through litigation, that as far
10 as notice is concerned, that it would be appropriate
11 to set a penalty in line with Globecom down the road?

12 MR. FRIX: Yes.

13 CHIEF ALJ SIPPEL: Without this same --
14 without Mr. Shook's amendment? Do you understand my
15 question?

16 MR. FRIX: If this is --

17 CHIEF ALJ SIPPEL: Hypothetically, if this
18 case
19 went down through the hearing process, okay? And I
20 had to make an initial decision based on the evidence,
21 and I decided on the evidence that were some serious
22 violations here with respect to universal service, and
23 I use Globecom as authority for imposing something to
24 what Globecom did, what would be your position then
25 with respect to the notice that we're talking about

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1 today?

2 MR. FRIX: Quite frankly, we haven't
3 formulated our position at this point. I don't know
4 what I think.

5 CHIEF ALJ SIPPEL: I don't blame you. But
6 the point is, is that this is why I think this is now
7 an appropriate time to address this issue, if, you
8 know, whatever is -- I want to be sure that I'm
9 careful about getting -- recognizing the fact that
10 there are settlement efforts being made. I don't want
11 to -- obviously, you know as well I do that I can't
12 get myself impacted with, you know, who is doing what
13 in that context.

14 MR. FRIX: Understood.

15 CHIEF ALJ SIPPEL: But I certainly want --
16 I encourage it. And if something develops that's
17 final, let me know, as you will. But the point is it
18 hasn't gotten there yet. As far as I'm concerned, the
19 case is still in adjudication.

20 And I have a question that's been raised
21 by one of the parties that's concerned -- raises a
22 concern about what, as I say, I think is the
23 fundamental -- is a fundamental issue to hearings of
24 this type, whether there's been appropriate notice
25 giving under the APA.

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1 MR. FRIX: Well, there is --

2 CHIEF ALJ SIPPEL: Now if that's the case,
3 I can't -- I certainly cannot decide that from here.
4 And based on your response to my hypothetical, I don't
5 see how I can just ignore it now and face it later, if
6 -- well, that's essentially where I'm coming out on
7 this.

8 And the logical thing, the next logical
9 step, of course, would be to set a briefing schedule
10 for however we want to characterize this, a motion to
11 amend an issue or just a motion for -- I don't know
12 how you want do it.

13 But go ahead. I'm sorry.

14 MR. FRIX: Perhaps it would be clearer if
15 I were to answer that there's no question that under
16 (J) there has been notice of a kind given. But mere
17 notice --

18 CHIEF ALJ SIPPEL: Right, yes. It's
19 adequate notice that we're talking about.

20 MR. FRIX: Right. The question --

21 CHIEF ALJ SIPPEL: Fairness, this kind of
22 thing. You know, this is all a question of fairness.
23 It's not a question of I gave you something like a
24 notice. Was the notice given? If the notice hasn't
25 been given, you know, then there's an issue.

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1 MR. FRIX: There was notice -- there was -
2 -

3 CHIEF ALJ SIPPEL: And they're entitled to
4 have the issue resolved before -- you know, before we
5 start bringing in the evidence that may go against
6 them. I mean, I'm not saying that they're entitled to
7 get it resolved in their favor. But I'm simply saying
8 they're certainly entitled to raise it at this -- it
9 seems to me. I mean, at least -- I'm hearing this for
10 the first time, so --

11 MR. FRIX: The question would be what is
12 to be advanced? And let me be practical about this.
13 What is to be advanced by, in this case, by dealing
14 with this particular issue at this time. Not
15 generally, not at some point in the case, but at this
16 particular time?

17 And the background for my position and my
18 request frankly is that Globecom -- excuse me --
19 Business Options is a small, struggling family
20 business. And we have done everything we possibly can
21 to minimize the costs, the legal costs, associated
22 with prosecuting this case and getting to a fair
23 resolution.

24 And I think Mr. Shook will join me that we
25 have -- this is an issue that we have repeatedly taken

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1 from day one. I know in some senses, that's
2 irrelevant to the legal process, and yet it does have
3 a practical effect.

4 The type of fees that are incurred by the
5 legal process here itself have the ability to simply
6 cause the dissolution of this business.

7 And I don't meant to overstate that case,
8 and I understand there's an element that has no
9 meaning here, but when things are in the balance of
10 this nature, and if there is not something particular
11 to be gained for it to be resolved at this stage of
12 the case, as opposed to a later stage of the case, it
13 would be my request that we now resolve it right now.

14 CHIEF ALJ SIPPEL: All right. Let me hear
15 Mr. Shook's response to that.

16 MR. SHOOK: Your Honor, actually, a
17 variety of issues have come up as a result of Mr.
18 Frix's response to your questions. And I'll simply
19 raise them. I don't intend to go into great detail at
20 this point.

21 First of all, with respect to the
22 slamming, Mr. Frix had made a number of arguments
23 about how the Commission dealt with slamming. But one
24 of the ways in which the Commission has dealt with
25 slamming is to impose forfeitures of 40,000 dollars as

1 a base amount for a violation of the slamming rules,
2 which is a penalty separate and apart from any
3 restitution that may be required under the rules. And
4 there are an number of cases in which this has
5 occurred.

6 So to suggest that the slamming aspect of
7 this case is unprecedented or relatively new or
8 something that, you know, we're simply picking on
9 Business Options is totally uncalled for.

10 There's a great deal of precedent out
11 there already with respect to carriers being forced to
12 pay 40,000 dollars or more per slam, depending on the
13 circumstances of their situation.

14 With respect to the notice that was given
15 here with respect to universal service contributions,
16 the failure to make those contributions, there are
17 upper limits set in the rules with respect to what a
18 common carrier can be required to pay.

19 We're not seeking those upper limits.
20 Those could be in the millions of dollars, depending
21 on whether or not the various failures to pay are
22 viewed as continuing violations, and that you can get
23 to 1.2 million dollars per continuing violation.

24 That's an astronomical sum. We're not
25 asking for that. We're not seeking that. We don't

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1 expect to be able to prove that, and we don't think
2 it's appropriate, with respect to the upper limit,
3 that could be set with respect to Business Options.

4 We do believe that the Globecom case does
5 set an appropriate amount with respect to an upper
6 limit. We also think it would be appropriate to have
7 that upper limit spelled out completely, as opposed to
8 being left fuzzy, which is what it is right now.

9 And so we're suggesting use of Globecom as
10 the basis for determining what an upper limit could
11 be. It's not necessarily what a forfeiture would be.
12 That's a matter of proof at hearing. For all I know,
13 we would not even get remotely close to that,
14 depending on how the facts of this played out.

15 But we do think that as a matter of
16 Commission practice, it would be more appropriate to
17 set the upper limit and to make it crystal clear what
18 it could be or at least as clear as possible under the
19 circumstances, as opposed to simply leaving it fuzzy,
20 which is, I think, what the case is now.

21 CHIEF ALJ SIPPEL: Let me ask you this.
22 I'm not trying to put you on the spot, but I just --
23 I really can't help it. When it was -- when the
24 amendment, when the gen. language was proposed to me,
25 was given to me, was that -- was the omission of a

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1 dollar amount in that section, was that just an
2 oversight? I'm not trying to embarrass anybody, but
3 I'm trying to figure out has something happened since
4 then that made this important --

5 MR. SHOOK: I can speak --

6 CHIEF ALJ SIPPEL: -- as opposed to it not
7 having been so important at that time?

8 MR. SHOOK: Your Honor, unfortunately, I
9 wish I knew, you know, exactly the answer to that
10 question, but I really don't.

11 CHIEF ALJ SIPPEL: All right. That's all
12 -- I'm not going to pursue it.

13 Look, I'm going to have to have this --
14 I'm going to have to have the question briefed. I am
15 -- obviously, I'm certainly not going to give a bench
16 ruling on, you know, on giving Mr. Shook the relief
17 you're looking for, you know, when we have, you know,
18 ex post facto issues. We've got notice issues. We've
19 got all kinds of issues here.

20 But on the other hand, I don't think it's
21 all that complicated either, that it's going to be
22 overburdensome on BOI. I mean, you know, I know I
23 keep hearing that BOI is on the fringe of bankruptcy
24 or is -- look, I mean, there's nothing I can do about
25 that. It's -- I've got no intention of hurting

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1 anybody.

2 But if it gets so bad, I mean, you can --
3 you know, BOI can always walk away. There's nothing
4 I can do about that.

5 I mean, but I've got to give the other
6 party an opportunity to put its case in the way it
7 feels it needs to and to preserve the integrity of an
8 issue. I mean, you could go the other -- I mean, it
9 could have come in the other way. You could have come
10 in to dismiss that issue as being inadequate notice,
11 and I would have had to address it.

12 So, I mean, there's no sense of debating,
13 you know, whether this is the proper time to do this
14 kind of a thing.

15 Let's get a schedule down. And I think we
16 probably ought to treat this, at least in terms of the
17 pleading cycle, as though it were a motion to amend,
18 which means a motion in opposition and a reply.

19 All right. So when --

20 MR. SHOOK: So in other words, it's --
21 we're viewing this as, I guess, a secondary motion to
22 enlarge?

23 CHIEF ALJ SIPPEL: Well, you can
24 characterize it any way you want, if you want to go
25 back and think about it. I don't care how you want to

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1 do it. But in terms of the pleading cycle, I want to
2 see -- I want to see a motion. I want to see an
3 opposition. I want to see a reply to the opposition.

4 Now whether this could be a motion to
5 amend an issue, the motion for clarification of an
6 issue, you know, you can characterize it any way you
7 want.

8 MR. SHOOK: We'll figure out what title to
9 put on it.

10 CHIEF ALJ SIPPEL: You can figure out your
11 title. That's -- you're entitled to your title
12 rights.

13 But let's get dates. That's my big --

14 MR. FRIX: Your Honor, if I could take one
15 more moment.

16 CHIEF ALJ SIPPEL: Yeah, I didn't mean to
17 shut you off, but I mean, I'm, you know -- go ahead.
18 Go ahead.

19 MR. FRIX: And I do understand what you
20 had said and understand what you're ruling. I'm now
21 seeking reconsideration of that, effectively.

22 I think the point that you -- the sentence
23 that you said right before you ordered us to file
24 these two -- to respond by motions, it is exactly the
25 heart of the case, is exactly the heart of the issue.

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1 Is there something that makes it important at this
2 moment, that the issue -- that we insert the issue of
3 200,000 dollars in this (J) that didn't require that
4 insertion before? I think that's exactly right.

5 And frankly, we -- if I could -- we relied
6 upon this issue (J) as it was. We looked at it,
7 reviewed it, relied upon it, and we did not oppose it.

8 CHIEF ALJ SIPPEL: I know. I understand
9 what you're telling. That --

10 MR. FRIX: So now essentially they're --
11 essentially opposition is that the Commission is now
12 trying to insert, by the way, just draw a line,
13 200,000 dollars in here. Now it didn't feel the need
14 to put the 20,000 that was the prior case, the prior
15 standard in there. And we understood that, and our
16 position was that issue did not need to be dealt with
17 right here.

18 The mission struck us as not particularly
19 meaningful at that point in time because it was such
20 a very clear precedent, this 20,000 dollars. And
21 frankly, the Commission -- the Bureau will argue
22 whatever they want to argue in the event that we get
23 to the point of a remedy.

24 But with all due respect, I don't
25 understand any reason why we're at this point, now,

1 allowing the insertion, basically drawing in a 200,000
2 dollar figure at the --

3 CHIEF ALJ SIPPEL: We haven't gotten there
4 yet. I mean, I wish you'd bear with me. We haven't
5 gotten there yet. And the point that you're making is
6 why I have -- which, you know, you picked up on my
7 question. Okay.

8 But that's one of the reasons why I want
9 to have opposition and reply. Because whatever you're
10 going to raise on this kind of an issue, the Bureau is
11 going to have to respond to it. And I can't rule on
12 this until I get the whole thing laid out. You know,
13 it's all got to be laid out.

14 MR. FRIX: My question would be is there
15 a reason for ruling at this time at all?

16 CHIEF ALJ SIPPEL: Well, I think I -- I
17 think I've already decided that yes, there is.
18 Because they have a right to a ruling, not because I'm
19 saying that, boy, this is a great time to do this. I
20 mean, I think it would have been a greater time to do
21 it back in August. And I think it might have even
22 been a greater time to do it when the notice of
23 apparent liability was issued back in whenever.

24 But, no, we don't have that here. What
25 I'm talking -- we have an order to show cause.

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1 So this -- I'm not -- that was back in
2 April of 2003. That would have been a great time to
3 do it. So I'm not getting into that business of, gee,
4 this is not a nifty time to do it.

5 I'm saying that they have a right.
6 They're a party to this case and they have a right to
7 have this clarified one way or the -- up or down. And
8 you have a right, certainly, to respond to it. And
9 I've told you, I've been very candid right up front
10 here in terms of I've got concerns. So --

11 MR. FRIX: We'll --

12 CHIEF ALJ SIPPEL: That's as much as I can
13 do.

14 MR. FRIX: I imagine that other parties
15 will actually have -- there are a number of other
16 parties who potentially could be affected by this
17 issue that are not in this case right now.

18 CHIEF ALJ SIPPEL: Well, they're not going
19 to come in. They're not invited to come in and file
20 anything. They're not going to intervene for that
21 reason, if that's what you're -- I'm not sure what you
22 -- why you're telling me that.

23 MR. FRIX: Well, as a member of the
24 private bar, we're concerned the Commission has
25 adopted a new policy without proper rulemaking

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1 authority for the new policy.

2 CHIEF ALJ SIPPEL: That's a policy
3 question. I'm concerned about a notice. You can take
4 this policy issue all the way up to the Court of
5 Appeals with this case, if it goes all the way there.

6 But the only thing that I have to do is be
7 sure that this case is being run in accordance with
8 the APA. That's all I have to do at this point. And
9 I certainly am not criticizing any Commission policy
10 or anything like that. It's up to the Commission to
11 set the policy.

12 But I have to run this case under the APA
13 with adequate notice. And that's the guts -- what I
14 think is the guts of what's going on here, plus giving
15 the parties the right to ask for relief in an
16 appropriate way, at an appropriate time.

17 So let's go back to dates, please. You
18 want to set the dates now? Why don't we do it now?

19 MR. SHOOK: We may as well.

20 CHIEF ALJ SIPPEL: I don't have a calendar
21 with me, but how much time would you need to file your
22 motion? You all want to discuss --

23 MR. HAWA: Well, this will involve
24 revising the entire procedural schedule. So we should
25 probably look at all the dates, don't you think?

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1 CHIEF ALJ SIPPEL: Well, I don't know that
2 I'm going to do that. That's not what we're going to
3 do. Let's go off the record --

4 CHIEF ALJ SIPPEL: I don't think that's
5 necessary, and two weeks should suffice for us to get
6 the motion to you.

7 CHIEF ALJ SIPPEL: All right. Let's stay
8 on the record. You say two weeks. You need two weeks
9 to get your motion in?

10 MR. SHOOK: Right.

11 CHIEF ALJ SIPPEL: All right. How much
12 time would you need to oppose it?

13 MR. HAWA: Well, two weeks would be
14 roughly -- you want to say -- if you were to say
15 Friday the 21st, which would be two weeks and two
16 days. That's the week before Thanksgiving.

17 CHIEF ALJ SIPPEL: Sure. That's -- well,
18 that doesn't cut into Thanksgiving, then, on that side
19 of it. That's 11/21.

20 MR. HAWA: So --

21 CHIEF ALJ SIPPEL: What day of the week is
22 that?

23 MR. HAWA: Friday the 21st is --

24 CHIEF ALJ SIPPEL: So Friday. Okay.

25 MR. HAWA: It's two weeks and two days, so

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1 if you had until the end of that week.

2 CHIEF ALJ SIPPEL: So would that be --
3 would that give you enough lead time to get it in?

4 MR. SHOOK: Oh, certainly.

5 CHIEF ALJ SIPPEL: Can you get it in
6 before then?

7 MR. SHOOK: If we can, we will.

8 CHIEF ALJ SIPPEL: All right. That would
9 be a bye date. And then how much time would you need
10 to respond to him? I mean, you know what the issues
11 are. What do the rules give in terms of an opposition
12 to a motion to --

13 MR. SHOOK: I believe it's ten days, but
14 then depending on whether the motion is viewed as
15 mailed or --

16 CHIEF ALJ SIPPEL: Well --

17 MR. SHOOK: We have typically, even though
18 we have sometimes given each other either electronic
19 service or hand delivery on the same day --

20 CHIEF ALJ SIPPEL: Okay.

21 MR. SHOOK: -- we've reflected on the
22 certificate of service that the document was mailed.

23 CHIEF ALJ SIPPEL: Okay.

24 MR. SHOOK: -- so as to give them the
25 extra mail days.

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1 CHIEF ALJ SIPPEL: Okay.

2 MR. SHOOK: And we would continue that
3 practice here.

4 CHIEF ALJ SIPPEL: All right. Well, why
5 don't we do that? Why don't we do it with the mail
6 dates, and then that should get you over the hump of
7 the --

8 MR. HAWA: Could we set the reply at
9 Friday --

10 CHIEF ALJ SIPPEL: Let me just finish. I
11 want to finish my thought. I'm trying to acknowledge
12 the fact that there is a Thanksgiving holiday in here.
13 So if you get the three-day add-on, the ten plus the
14 three, even though you're going to have it before,
15 that should give you enough time.

16 Now, I'm sorry, now go ahead. You tell me
17 what you want to say.

18 MR. HAWA: That would basically be
19 Thursday the 4th. We were going to propose Friday the
20 5th.

21 CHIEF ALJ SIPPEL: Friday the 5th. Is
22 that okay with you, Mr. Shook?

23 MR. SHOOK: That's fine.

24 CHIEF ALJ SIPPEL: Okay. So that -- these
25 are going to be -- okay, 12/5. And then you have how

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1 many days after that? Usually --

2 MR. SHOOK: I believe it's five.

3 CHIEF ALJ SIPPEL: Five.

4 MR. SHOOK: And whether or not we exercise
5 the right of reply, I believe will depend entirely on
6 how we perceive the opposition.

7 CHIEF ALJ SIPPEL: All right. Well, you
8 let me know right --

9 MR. SHOOK: -- if there's something in
10 there that we need to respond to, we will. Otherwise,
11 we can alert both Your Honor and Business Options that
12 no reply would be filed.

13 CHIEF ALJ SIPPEL: Okay. Now that's --
14 okay. So that's December 5. What day of the week is
15 that?

16 MR. SHOOK: Friday.

17 CHIEF ALJ SIPPEL: All right. All right.
18 SO then the five days would be -- would get you to --

19 MR. SHOOK: It could get us to the
20 following Friday.

21 CHIEF ALJ SIPPEL: All right.

22 MR. SHOOK: We could forego --

23 CHIEF ALJ SIPPEL: Would that be the 12th?

24 MR. SHOOK: That would be the 12th.

25 CHIEF ALJ SIPPEL: And you can forego

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1 what?

2 MR. SHOOK: The mail days.

3 CHIEF ALJ SIPPEL: Well, we'll just use
4 those as firm dates, 11/21, 12/5 and 12/12.

5 Now, you're suggesting that this might
6 impact the other procedural dates. Now let me tell
7 you a little bit about those procedural dates because
8 I already had -- I bumped another case, another case
9 that was a dead ringer, never to be litigated. And
10 guess what happened? It's back in litigation.]

11 So I'm worried about these things. And I
12 don't see any reason, particularly in light of your
13 argument, that -- Mr. Frix's argument -- that it
14 doesn't make any difference when we decide this
15 question, whether it's now or after all the evidence
16 is in. And that's my point. This should not distract
17 from preparation for the hearings. It's just I don't
18 see how it should. It is not that -- it is not that -
19 - such a complicated issue. It certainly is not going
20 to require depositions and affidavits and all this
21 other kind of thing. It shouldn't. And I don't see
22 why this can't be done. You've got two able lawyers
23 on your team. There's no reason -- plus whatever you
24 have back. I don't know what you have back at the
25 ranch. I can't believe that this can't be done. So

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1 I don't want to --I really -- I don't want to hear
2 this as an excuse to change the procedural and the
3 hearing date. So please bear with me.

4 Okay? You understand each other?

5 MR. SHOOK: We had no intention of --

6 CHIEF ALJ SIPPEL: No, I'm not -- I wasn't
7 talking to your side of the table on this one, Mr.
8 Shook.

9 Okay. Now I don't have anything really
10 more to discuss. I mean, we do have dates, and that's
11 really what I'm here to determine. There is -- and
12 any time that there is a question, any time you think
13 that you've got a solution to this case by way of
14 settlement, whatever -- I'm using that term very
15 generically -- please let me know right away. And I
16 take it we don't have anything to talk about there?

17 MR. SHOOK: Well, only that we have
18 received an offer from Business Options, which we are
19 currently considering.

20 CHIEF ALJ SIPPEL: All right. That
21 doesn't impact anything that we're going here today or
22 in January?

23 MR. SHOOK: I would say not at this point.

24 CHIEF ALJ SIPPEL: Okay. Well, I just
25 want to be sure that that message gets relayed back to

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1 Mr. Tincel, that, you know, we're still in business.
2 We're still sticking with these dates.

3 Thank you very much. We're in recess
4 until whatever the next date is. Thank you.

5 (Whereupon, the above-entitled matter was
6 adjourned at 9:48 a.m.)

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CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: Business Options, Inc.
Order to Show Cause and Notice
Of Opportunity for Hearing
Pre-Hearing Conference

Before: Federal Communications Commission

Date: November 5, 2003

Place: Washington, D.C.

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



Alex Patton