

precisely the same issue, or how the circumstances of Business Options' errors differ from those of other carriers.

As a result, the Commission's proposed forfeiture is arbitrary and capricious under the Administrative Procedure Act or APA.⁴⁶ As articulated by the Supreme Court, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."⁴⁷ The "relevant factors" here are set forth in Section 503(b)(2)(D) of the Communications Act: "[i]n determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account 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."⁴⁸ In view of these factors, an increase in the proposed forfeiture against Business Options cannot reasonably be sustained.

First, there are numerous other decisions by the Commission where carriers were found to have intentionally filed their Telecommunications Reporting Worksheets improperly (or failed

⁴⁶ See 5 U.S.C. § 706 (2002)

⁴⁷ See *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted)

⁴⁸ See 47 U.S.C. § 503(b)(2)(D) (2002)

to file entirely), and did not pay into federal universal service support mechanisms, yet the proposed forfeitures against them were a small fraction of that proposed here.⁴⁹ It is difficult to imagine a distinction between the “nature and circumstances” of Business Options’ failure to properly report its revenues and pay into federal universal service mechanisms, and the failure of other carriers to do precisely the same thing. The Enforcement Bureau certainly has not articulated such a distinction. Second, as for the “gravity of the violation,” other carriers owed substantially more to federal universal service support mechanisms than Business Options, but the proposed forfeiture against these other carriers was substantially less.⁵⁰ Third, with respect to the company itself, Business Options has routinely paid its state universal service contributions, but was unaware of the federal universal service program, and thus has had no other enforcement actions taken against it for failure to pay into universal service funds.

In short, the Commission has established a base forfeiture amount for failure to pay into federal universal service support mechanisms, and has set forth utterly no basis for departing from it here.

⁴⁹ See *infra* note 9

⁵⁰ See *Intellicall* at 13540 ¶ 3

Conclusion

For the foregoing reasons, Business Options, Inc respectfully submits that the Enforcement Bureau's Motion should be denied and an order should be issued setting the maximum potential forfeiture for any failure to contribute to universal service mechanisms at a Base Forfeiture of \$40,000 (\$20,000 for each of two months of nonpayment), plus an Additional Penalty in an amount that is approximately one half of the unpaid universal service contributions for two representative months.

Respectfully submitted,



Dana Frix
Kemal Hawa
Chadbourne & Parke LLP
1200 New Hampshire Ave NW
Washington, DC 20036
(202) 974-5600 (phone)
(202) 974-5602 (fax)

Counsel for Business Options, Inc.

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ATTACHMENT

TRANSCRIPT

APPEARANCES.

ON BEHALF OF BUSINESS OPTIONS, INC.

KEMAL HAWA, ESQ.
DANA FRIX, ESQ.
of: Chadbourne & Parke, LLP
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 974-5645
(202) 974-5691

ON BEHALF OF THE FEDERAL COMMUNICATIONS COMMISSION:

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

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

9:02 a.m.

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

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

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

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

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

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

25 CHIEF ALJ SIPPEL: Let me -- let me just

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

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

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

10 MR. SHOOK: Yes, sir.

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

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

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

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

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

14 CHIEF ALJ SIPPEL: Yeah, go ahead.

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

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

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1 the rules on forfeitures. In other words --

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

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

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

11 CHIEF ALJ SIPPEL: And --

12 MR. SHOOK: And it references --

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

15 MR. SHOOK: Your MO and O is dated August
16 20.

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

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

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1 Commission.

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

4 Who wants to speak for BOI?

5 MR. HAWA: Kemal Hawa.

6 CHIEF ALJ SIPPEL: Sure.

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

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

12 MR. HAWA: Yes, we do.

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

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

24 We don't have the luxury of doing that on
25 the Business Options side. I'd like to just go

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1 through some of the facts a bit and tell you about how
2 this -- where the Globecom precedent last month, what
3 its genesis was.

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

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

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

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

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1 quite clear on this issue and specific.

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

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

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

23 Second, it would be an impermissible,
24 retroactive application of the Commission's
25 regulations. There's a five prong test to determine

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1 whether an order -- and this is no order, this is a
2 notice, an NAL -- of whether you can retroactively
3 apply subsequent Commission rulings to preexisting
4 matters.

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

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

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

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

25 CHIEF ALJ SIPPEL: Okay. Let me ask this

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1 question. I don't know who is going to answer it
2 first, but does the -- was the state of the law with
3 respect to forfeiture amounts for failure to make the
4 universal service contribution, was it as stated by
5 Mr. Hawa, or is this -- in other words, was new law
6 created under the -- the Globecom apparently liability
7 issue?

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

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

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

24 Subsequently, in orders that were issued
25 in 2000, the Commission used two failures to pay of

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1 20,000 dollars each as the base forfeiture amount.
2 And then added to that, again, one-half of the amount
3 that was due for the two bills that were not timely
4 paid. So that in the America's Telenetwork Corp.
5 situation, the forfeiture order, for which was
6 released December 5, 2000, FCC 00-423, the proposed,
7 or the forfeiture that was imposed in that case, was
8 154,000 dollars.

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

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

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

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

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

8 MR. SHOOK: Yes. The Commission --

9 CHIEF ALJ SIPPEL: -- going from two to
10 12?

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

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

21 MR SHOOK: Yes, sir.

22 CHIEF ALJ SIPPEL Well, isn't that kind
23 of -- I mean, that's really kind of difficult on
24 opposing party, isn't it? I mean, supposing they
25 change it again? I mean, I could -- we could go

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1 through this process all the way up to hearing date if
2 they keep changing policy. There has to be --

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

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

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

14 CHIEF ALJ SIPPEL: I'm sorry?

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

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

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

22 The matter is -- the Globecom matter is
23 not only a new policy, clearly a new policy, that
24 would increase the penalty ten times or 12 times, it
25 has also not been tested as a matter of law at this

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1 point. I happen to know Globecom's counsel -- and Mr.
2 Hawa and I represented Globecom as a result of that
3 notice of apparent liability.

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

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

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

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

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1 brought as a result of slamming violations. And
2 specifically, there's eight allegations of customers
3 who were slammed.

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

14 CHIEF ALJ SIPPEL. Under different
15 designation orders or under --

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

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

24 In the case of Business Options, there's
25 an allegation of eight slams. And by the way, the

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1 punishment, with regard to those other cases, is
2 essentially something in the neighborhood of ten, 20,
3 50 dollars per case.

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

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

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

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

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

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

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

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

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1 CHIEF ALJ SIPPEL: I absorb things pretty
2 well, but this is getting to be a little bit --

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

5 CHIEF ALJ SIPPEL. I was just kidding. Go
6 ahead.

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

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

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

25 So we were surprised to receive this

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

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

13 MR. FRIX: Yes.

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

17 MR. FRIX. If this is --

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

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