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

FCC 03M-57
02888

In the Matter of)	EB Docket No. 03-85
)	
BUSINESS OPTIONS, INC.)	File No. EB-02-TC-151
)	
Order to Show Cause and Notice of)	NAL/Acct. No. 200332170002
Opportunity for Hearing)	FRN: 0007179054
)	

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MEMORANDUM OPINION AND ORDER

Issued: December 22, 2003 Released: December 23, 2003

PRELIMINARY STATEMENT

1. This case was commenced by Commission *Order to Show Cause and Notice of Opportunity for Hearing*, FCC 03-68, released April 17, 2003 ("ODSC"). Seven months later, on November 21, 2003, the Enforcement Bureau ("Bureau") filed a Motion to Clarify Issue (j) ("Motion")¹ By its Motion, the Bureau seeks to "clarify" a post-designation issue that had been added as requested by the Bureau.² On December 5, 2003, Business Options, Inc. ("BOI") filed its Opposition. On December 12, 2003, the Bureau filed its Reply.³

2. The Bureau would change a previously designated issue⁴ to read, as italicized, as follows:

¹ The Bureau's Motion followed a Prehearing Conference conducted on November 5, 2003. The Presiding Judge heard arguments as to whether Issue (j) needed clarification, and, if so, how the issue might be worded. The Presiding Judge set November 21, 2003, as the date by which the Bureau was to file the instant Motion. See Prehearing Conference, November 5, 2003, Tr. 44-48.

² See Order FCC 03M-33, released August 20, 2003.

³ See Order FCC 03M-47, released November 7, 2003.

⁴ Initially, designated Issue (j) read: "[for] failure to make the required universal service contributions in a timely manner," --- , without specifying any dollar amount.

- (j) To determine whether an Order for Forfeiture should be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), against Business Options, Inc., Buzz Telecom Corp., U.S. Bell, Inc. and/or Link Technologies for: (a) \$20,000 for each month of non-payment, plus one-half of the total amount due, for failures to make the required universal service contributions in a timely manner, in violation of § 254(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 254(d) and Section 54.706 of the Commission's Rules, 47 C.F.R. § 54.706; (b) \$10,000 for each failure to file the required Forms 499 in a timely manner, in violation of §§ 54.711, 54.713, 64.604(c)(5)(iii)(B) of the Commission's Rules, 47 C.F.R. §§ 54.711, 54.713, 64.604(c)(5)(iii)(B); and (c) \$10,000 for each failure to file required contributions to the Telecommunications Relay Services Fund, in violation of § 64.604(c)(5)(iii)(A) of the Commission's Rules, 47 C.F.R. §64.604(c)(5)(iii)(A).

The Bureau advocates that \$20,000 for each month of non-payment be used as a base amount, with appropriate adjustments after hearing evidence is received. The Bureau further asks that standards be applied that were recently established under a Notice of Apparent Liability in the case of *Globcom, Inc.*, 30 Communications Reg. (P&F) 538 (2003).

Background

3. On July 15, 2003, the Bureau filed a Motion to Enlarge Issues. The Motion to Enlarge sought the addition of four issues (three substantive and one forfeiture), each of which was predicated on the admitted omissions of BOI to file Telecommunications Reporting Worksheets ("Worksheets"), failures to make contributions for universal services, and failures to make payments for telecommunications relay services. BOI did not oppose that Motion to Enlarge. By *Order*, FCC 03M-33, released August 20, 2003, the Presiding Judge added all requested issues. The wording of the added issues, including Issue (j), is identical to the wording of the issues as then requested by the Bureau.

4. Issue (j), as currently constituted, seeks to determine whether forfeitures should be imposed on BOI for three distinct substantive violations. The issue sets a possible forfeiture of \$10,000 for each failure to file FCC Forms 499 (or "Worksheet") in a timely manner, as well as a possible base amount forfeiture of \$10,000 for each failure to contribute to the Telecommunications Relay Services ("TRS") Fund. However, no base amount was asked to be set for the failure to have made required universal service contributions. The Bureau contends that the absence of such an amount in the issue is

inconsistent with the FCC practice that “in initiating hearing cases, the Commission will indicate an approximate maximum forfeiture amount in light of the specific facts at issue....”⁵ The Bureau finally argues that “[i]t is for this reason that the Bureau seeks to clarify Issue (j).” See Motion at 2, ¶ 3. It is in the context of this clarification of an “approximate maximum forfeiture” that the Bureau would apply the expanded forfeitures under *Globcom, Inc.*

BOI’s Position

5. BOI argues that the Bureau’s Motion should be treated as a motion to enlarge or a motion to change an issue, and contends that the Bureau has failed to meet the requirements of Section 1.229. BOI further contends that the Motion fails to meet notice requirements of the Administrative Procedure Act and fundamental principles of fairness. BOI argues that retroactive imposition of a post designated standard would contravene the general proscription against retroactive imposition of rules and policies. In summary, BOI argues that *Globcom, Inc.*, a Notice of Apparent Liability, does not constitute a final order and therefore cannot be relied upon as precedent; that *Globcom, Inc.* contains significant errors that may result in its dismissal and is unusable in this case; and that a proposed increase in forfeiture liability under *Globcom, Inc.* is not warranted in this case, and would be arbitrary, capricious and excessive.

6. In its pleadings, BOI has admitted that it failed to file required Worksheets, failed to contribute to the TRS Fund, and failed to make universal service payments, claiming that it was unaware of its obligations. What remains to be decided are the factual circumstances of BOI’s omissions, and the amount of an appropriate forfeiture for BOI’s admitted failures under those circumstances.

Discussion

7. Section 503(b)(2)(B) of the Communications Act of 1934, as amended (the “Act”),⁶ authorizes the Commission to assess a forfeiture against a common carrier of up to \$120,000 for each violation, or each day of a continuing violation, up to a statutory

⁵ *In the Matter of the Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 F.C.C. Rcd 17087, 17109, ¶ 50 (1997), recon. denied, 15 F.C.C. Rcd 303 (1999).

⁶ 47 U.S.C. § 503(b)(2)(B).

maximum of \$1,200,000 for a single act or failure to act.⁷ Although the note to 47 C.F.R. § 1.80(b)(4) provides guidelines for base forfeiture amounts for certain misconduct, the Bureau notes that no base amount is specified for the failure to make timely universal service payments.⁸ As a consequence, Issue (j) was submitted by the Bureau as noted in fn. 4 above, without specifying a dollar amount. *The Equal Access to Justice Act* requires that omission to be corrected to reflect “an appropriate maximum forfeiture amount. *Forfeiture Guidelines*, 12 FCC Rcd 17087, 17109 (1997).

8. The Bureau calculates that the maximum potential forfeiture for BOI for each failure to have timely made universal service contributions is \$1,200,000, based on the fact that each failure to pay the amount due each month constituted a violation that continued for more than ten (10) days. Inasmuch as there were twelve (12) such failures during the twelve (12) months preceding the addition of Issue (j),⁹ none of which apparently have been cured, BOI’s potential exposure for this omission is calculated by the Bureau at \$14,400,000,¹⁰ citing *SBC Communications, Inc.*, 17 F.C.C. Rcd 19923, n. 5, 19934-36, ¶¶ 23-26 (2002).¹¹ The critical amount of any forfeiture will be determined by application of the “adjustment” standard after evidence of relevant circumstances is reviewed. See *Forfeiture Guidelines*, *supra* at 17100-01. In the event liability is established, there also must be taken into account BOI’s “ability to pay in determining the amount of the forfeiture.” *SBC Communications, Inc.*, *supra* at 19935, ¶ 24.

9. According to the Bureau, the Commission’s practice in dealing with alleged universal service violators is to not set a forfeiture amount which automatically references the statutory maximum forfeiture that can be levied against a common carrier.¹² Rather,

⁷ See also 47 C.F.R. § 1.80(b)(2); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 F.C.C. Rcd 18221 (2000); 47 C.F.R. § 1.80(b)(5).

⁸ Section 1.80(b) specifies upward and downward adjustment criteria, which, singly or in combination, can affect the ultimate forfeiture amount determination.

⁹ USAC bills monthly and has done so since February 1998. See, e.g., *Intellicall Operator Services*, 15 F.C.C. Rcd 21771, ¶ 2 and n. 4 (2000). See also *Globcom, Inc.*, FCC 03-231, p. 3, ¶ 5, p. 8, ¶ 16, released September 30, 2003.

¹⁰ See Bureau Motion at 2-3, ¶ 4.

¹¹ This potential exposure of over \$14 million apparently could apply in this case without requiring the post-issue forfeiture standards of *Globcom, Inc.*

¹² Such a “practice” would seem to run counter to the notice required by the *Equal Access to Justice Act*, *supra*.

the Commission sets forfeiture amounts that take into account the “delinquent carrier’s culpability and the consequential damage it causes to the goal of universal service...” *Matrix Telecom, Inc.*, (Notice of Apparent Liability) 15 F.C.C. Rcd 13544, 13546-47, (2000). At the time that Issue (j) was added in this proceeding, the most recently reported cases that were directly on point were NALs that resulted in assessed forfeitures for two months of nonpayment, even though the alleged violator had failed to pay many more monthly invoices from USAC than the two cited. *America’s Tele-Network Corp.* (Notice of Apparent Liability for Forfeiture), 15 F.C.C. Rcd 20903, 20906, ¶ 9 (2000), (Forfeiture Order), 15 F.C.C. Rcd 24391 (2000) (“*ATNC*”). In *Matrix* and in *ATNC*, both of which cases involved failures to make universal service payments, for each violation the Commission started with a base amount of \$20,000 for each of the two months of nonpayment, or \$40,000, and then added one-half of the amounts that appeared on each of the two unpaid monthly bills. The sums of those base figures were then adjusted up or down depending on the facts of the case.¹³ Those were the Commission forfeiture standards that applied when Issue (j) was added at the Bureau’s request.

10. Soon after Issue (j) was added, the Commission found it appropriate, in the context of a notice of apparent liability for forfeiture, to implement a greater forfeiture amount in order to deter future violations of universal service rules. In that case, *Globcom, Inc.*, the Commission made a “sea change” in forfeiture policy to substantially increase forfeitures for repetitive failures to make universal payments. In the Commission’s words:

Previously, even in cases of long standing failures to pay universal service contributions, we assessed forfeitures *on only a portion of the violations*. --- [T]he time has come to implement a substantially greater forfeiture amount *in order to deter* carriers from violating our universal service contribution and reporting rules. (Emphasis added.)

Globcom, Inc. at 11, ¶25.

¹³ *E.g.*, *ATNC.*, 15 F.C.C. Rcd at 20905-07, ¶¶ 5, 9-10 (upward adjustment of slightly less than 50 percent where carrier deliberately chose not to pay anything for more than two years and sought to justify nonpayment with inconsistent, specious arguments after receiving Enforcement Bureau inquiries; forfeiture assessed and imposed notwithstanding alleged violator’s payment of more than \$300,000 prior to the issuance of the notice of apparent liability); *Matrix Telecom, Inc.*, *supra*, 15 F.C.C. Rcd at 13547, ¶ 9 (downward adjustment of 40 percent because of payments made and plan to eliminate arrearages, which occurred before Enforcement Bureau contact).

11. In *Globcom, Inc.*, the Commission proposed a forfeiture amount that consisted of \$20,000 for each month of nonpayment during the prescribed period (*i.e.*, twelve months, for a total of \$240,000), plus one-half of the total unpaid universal service contributions. *Globcom, Inc.* at 12, ¶27. The violator in *Globcom, Inc.* was a long distance reseller that had filed only two quarterly worksheets out of the ten due, and two out of the three required annual worksheets for 2001 and 2002. Despite ultimately reporting long distance revenues of more than \$10,000,000 for the two years for which it did provide information, it made no contributions to federal universal service. In this case, at the time that Issue (j) was added on August 20, 2003, BOI had filed no quarterly worksheets, and the only annual worksheet that it had filed reported no income during a period when BOI had earned more than \$5,000,000. Nor had BOI contributed anything to universal service although it had been collecting a line item charge from its residential customers for more than a year.

12. The Bureau argues that “under the circumstances presented, BOI’s apparent violations are far more egregious than those cited in *ATNC* and are noticeably worse than those involved in *Globcom, Inc.*”¹⁴ The Bureau further argues that “modifying Issue (j) as proposed would be consistent with the Commission’s approach in *Globcom, Inc.* and would serve the ends of justice by subjecting BOI to a potential forfeiture that is similar to that proposed in *Globcom, Inc.*, for similar violations covering virtually the same timeframe.”¹⁵ Thus, under the Bureau’s modified approach to forfeiture, “the potential forfeiture would start at \$240,000, plus one-half of the outstanding universal service obligations due in the previous year.”¹⁶ In effect, the Bureau is asking for a modification of Issue (j) that would permit using in this case an approach identical to that used by the Commission in *Globcom, Inc.* Alternatively, the Bureau asks that Issue (j) be modified in accordance with the approach taken by the Commission in *ATNC*. *See Motion at 6 n. 15.*

¹⁴ The purpose for a hearing is to take testimony under cross-examination of the circumstances under which BOI failed to follow procedures and failed to make required payments.

¹⁵ *Cf. Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (similarly situated applicants should be treated similarly; if treated differently, Commission must explain why differing treatment is warranted).

¹⁶ Alternatively, the Bureau requests that Issue (j) be modified to make the proposed forfeiture consistent with the approach taken in *ATNC, supra*. Thus, the potential forfeiture for BOI would start at \$40,000 (\$20,000 for each of two months of nonpayment), plus one-half of the contributions that BOI should have paid for federal universal service for any two of the 12 months preceding the addition of Issue (j) (the exact amount will have to await further information), and then adjust that sum upward by an appropriate percentage (at least 50 percent) to account for BOI’s failure to pay anything toward universal service, notwithstanding its collection from its customers of a line item charge for universal service and notwithstanding the knowledge of its principals that BOI owed contributions but had not yet made any.

Analysis

13. The “clarification” sought is based on a new Commission position on forfeiture first applied in *Globcom, Inc.*, an NAL decision reached after the Bureau’s issues had been added in this case. It is important to recognize that there was existing precedent for a base amount forfeiture which could be adjusted upwards in connection with failing to make universal payments that applied at the time that the Bureau filed its motion to enlarge issues for alleged failures to make universal service payments. See *ATNC* and *Matrix, supra*. In the *ATNC* and *Matrix* cases, the Commission authorized forfeitures for failing to make universal service payments and assessed a base amount of \$40,000 as a general penalty of \$20,000 for each of two violations. To that base amount, the Commission added an amount equal to one half of unpaid universal service contributions for a two month period. A lesser amount was assessed against *Matrix* because of corrective actions taken by the licensee. See fn. 13, *supra*.

14. BOI was equally on notice of the Commission’s position on relevant forfeiture as announced in the *ATNC* and *Matrix* cases, and is presumed to have known of *ATNC* and *Matrix* when it decided not to oppose the added issues. So when BOI chose to not oppose adding the issues it knew (or should have known) of its potential liability under the existing *ATNC/Matrix* standards. Conversely, BOI never knowingly waived opposing the added issues that could carry greater forfeiture liability based on a later decided case, *Globcom, Inc.* Therefore, to accommodate the *Equal Access to Justice Act*, the Bureau should be permitted at this time to “clarify” maximum liability forfeitures in connection with failures to pay universal service fees consistent, but only as limited by the standards articulated in *ATNC* and *Matrix* which were the standards in effect when the new issues were added and BOI decided to waive opposition to those new issues.¹⁷

15. Another argument advanced by BOI for rejecting the *Globcom* forfeiture standard for application in this case is the “Retroactivity Doctrine.” See *Retail, Wholesale & Department Store Union v. NLRB*, 466 F. 2d 380, 389 (D.C. Cir. 1972) (new rule will not be applied against private party in agency adjudication which represents “an abrupt departure from well established practice,” especially where the party has relied on the former rule). In this case, BOI could reasonably have relied on the *ATNC/Matrix* standard (a less harsh forfeiture standard than *Globcom*) in deciding to accept the adding of new issues exposing BOI to forfeiture liability. To subject BOI to the harsher standards of *Globcom, Inc.* could be found to detract from “notions of equity and fairness” and raise at least an appearance of “manifest injustice.” *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998). But cf. *Verizon Telephone Companies v. FCC*, 269 F3d 1098, 1109-11 (D.C. Cir. 2001) (absent change of well-established rule, retroactive liability may not actually impose a “manifest injustice.”) However, any final findings and conclusions on “equity and fairness” must await consideration of relevant evidence of attendant circumstances.

¹⁷ It is noted that the Bureau specifically asks for the *ATNC* forfeiture standard as an alternate to applying *Globcom* standards. See Motion to Clarify at 6 n. 15.

16. For the “Retroactivity Doctrine” is not a hard and fast rule that can readily be applied in an interlocutory ruling. In an *en banc* decision, *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F. 2d 1074, 1080-84 (D.C. Cir. 1987), the *en banc* court refers to *Retail, Wholesale, supra* as “the framework for evaluating retroactive application of rules announced in agency adjudication.” *Id.* at 1080. In each case, there must be applied a “non-exhaustive” five factors test in determining whether to grant an exception to the general rule permitting retroactive application of a rule enunciated in agency adjudication:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in a unsettled area of law,
- (3) the extent to which the party against whom the new rule is applied relied on the former rule,
- (4) the degree of the burden which a retroactive order imposed on a party, and
- (5) the statutory interests in applying a new rule despite the reliance of a party on the old standard.

Id. at 1081.

17. Without an evidentiary record, it is premature to definitively apply these factors.¹⁸ However, even now there are unanswered questions under these judicial factors, such as, whether *Globcom* represents an “abrupt departure” from *ATNC/Matrix* well established practices; the extent to which BOI relied on *ATNC/Matrix* when it decided to not oppose the new issues;¹⁹ the degree of the burden that *Globcom* would impose on BOI; and the Commission’s interest in applying *Globcom* here despite BOI’s reliance on *ATNC/Matrix*. None of those questions can be resolved in an interlocutory ruling.

18. Finally, the use in this case of an *ATNC/Matrix* paradigm will not adversely effect current and prospective application of the *Globcom* standard. See *Forfeiture Guidelines*, 12 F.C.C. Rcd at 17108-09, ¶ 49 (recent case law to be used in “analysis of pending cases” and in evaluating when the “case-by-case approach in effect *when the violation occurred*,” i.e., *ATNC/Matrix*.) (Emphasis added.) See *Retail, Wholesale & Department Store Union, supra*. It is important to recall that in its holding in *Globcom, Inc.*, the Commission justified the change in forfeiture methodology “in order to deter” future violations of the rules regarding universal service payments. *Globcom, Inc.* at 11,

¹⁸ BOI’s counsel has requested deferring any rulings on the appropriate measure of forfeiture until “after the hearing, because the hearing will deal with factual issues.” See Prehearing Conference, November 5, 2003, Tr. 27-28.

¹⁹ BOI’s counsel has represented in open-court that when the motion to enlarge was filed, BOI did not oppose it because BOI was aware of the then prevailing Commission precedent on forfeiture which was discussed with the Bureau before the issues were added. See Prehearing Conference, November 5, 2003, Tr. 18-19.

¶ 25. There is no deterrent need shown that would require applying the *Globcom* standard in this case which was initiated before *Globcom* and which arose from facts that predated *Globcom*. Also, there is no direction in the *Globcom* ruling that the increased forfeiture standard must be applied to forfeiture issues that were added before *Globcom*. As indicated above, it is premature to rule *Globcom* in or out.

Ultimate Conclusions

19. Adequate justice can be accomplished and the Commission's forfeiture policy will not be adversely impacted by going forward with this case under the *ATNC/Matrix* standards. Moreover, it would be an "abuse of discretion" to apply *Globcom, Inc.* forfeiture standards retroactively against BOI in this case and at this time without first considering evidence of the surrounding circumstances of the violations.²⁰

20. The Presiding Judge has authority and discretion to "act on motions to enlarge, modify or delete the hearing issues." 47 C.F.R. § 1.243(k). *Cf. Revised Processing of Broadcast Applications*, 72 F.C.C. 2d 202, 214-15 (1979) (presiding judges to decide whether to add post-designation issues under authority of Section 1.243(k)). A motion to clarify a hearing issue also would fall into that same category of discretion. The Bureau acknowledges that the undersigned "has the same discretion as that exercised by the Commission in *Globcom* in setting the maximum potential penalty." *See Enforcement Bureau's Reply to BOI's Opposition to Motion to Clarify* at 5, ¶ 6. In the exercise of that authority and discretion, the Bureau's request for *Globcom* forfeiture will be denied for now, but its alternative request to apply *ATNC/Matrix* forfeiture standards will be permitted as a "clarification."²¹

ORDER

Accordingly, IT IS ORDERED that the Motion to Clarify Issue (j) filed by the Enforcement Bureau on November 21, 2003, IS DENIED in part and IS GRANTED in part to the extent indicated above.

²⁰ The Administrative Procedure Act prohibits agency action that would be: "an abuse of discretion." 5 U.S.C. § 706(2)(A).

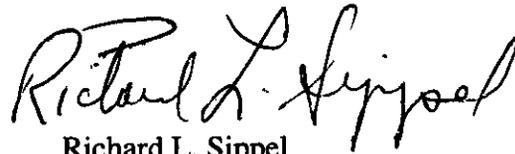
²¹ The Bureau cites *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) which holds that similarly situated licensees must be treated similarly, unless explained. The explanation is that fair notice and discretion of the Presiding Judge require application of standards existing when issues were added and BOI decided not to oppose, unless analysis of the "five factors" requires otherwise after a full hearing.

IT IS FURTHER ORDERED in accordance with the Enforcement Bureau's alternate request, that the forfeiture standards applied in the case of *America's Tele- Network Corp.* (Notice of Apparent Liability), 15 F.C.C. Rcd 20903 (2000), (Forfeiture Order), 15 F.C.C. Rcd 24391 (2000) SHALL APPLY.

IT IS FURTHER ORDERED that when the Enforcement Bureau files its Proposed Findings of Fact and Conclusions of Law, and if it believes that the evidence warrants, it may request increased forfeitures to be imposed on Business Options, Inc. in this case in accordance with *Globcom, Inc.*, 30 Communications Reg. (P&F) 538 (2003), based on analysis of the "five factors."²²

IT IS FURTHER ORDERED that the Enforcement Bureau SHALL SUBMIT any proposed clarified Issue(s) by **January 14, 2004.**

FEDERAL COMMUNICATIONS COMMISSION²³



Richard L. Sippel
Chief Administrative Law Judge

²² *Verizon Telephone Companies v. FCC*, *supra* at 1108-1111; and *Clark – Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (*en banc*).

²³ Courtesy copies of this *Order* were sent to counsel for the parties by fax or e-mail on the date of issuance.