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

In the Matter of	)	
	)	File No. EB-00-TC-005
NOS Communications, Inc. and	)	
Affinity Network Incorporated	)	
	)	
Apparent Liability for Forfeiture	)	NAL/Acct. No. 200132170011

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 28, 2001 Released: April 2, 2001

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a separate statement.

I. INTRODUCTION

1. By this Notice of Apparent Liability for Forfeiture ("NAL"), we find that NOS Communications, Inc. ("NOS") and Affinity Network Incorporated ("ANI")[1] have apparently willfully or repeatedly violated section 201(b) of the Communications Act of 1934, as amended ("Act"),[2] by engaging in unjust and unreasonable practices in connection with their provision of interstate communication services. As discussed more fully below, we find that NOS and ANI have apparently engaged in deceptive marketing of their interstate communication services by failing to disclose clearly and conspicuously material facts regarding their promotional plan offerings and pricing methodology.

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[1] NOS, is a Maryland corporation, whose principal address is 4380 Boulder Highway, Las Vegas, NV 89121. NOS also conducts business under the following business names: International Plus, O11, INETBA (or Internet Business Association), and I-Vantage. ANI is a California corporation, whose principal address is 3660 Wilshire Boulevard, Suite 400, Los Angeles, CA 90010. ANI also conducts business under the business names HorizonOne Communications ("HorizonOne") and QuantumLink Communications ("QuantumLink"). All of the entities identified herein have in common either the same principals or officers. For purposes of this NAL, the term "NOS" or the term "ANI" (collectively "companies") includes all of NOS's and ANI's respective identified entities, including any of their respective successors or assigns.

[2] 47 U.S.C. § 201(b).

2. The Commission received almost 900 consumer complaints against NOS and ANI. Based upon our review of the facts and surrounding circumstances, we find that NOS Communications, Inc. and Affinity Network Incorporated are apparently liable for proposed forfeitures in the amount of $500,000 each, resulting in a total proposed forfeiture amount of $1,000,000.

II. BACKGROUND

3. NOS and ANI are long distance service resellers that primarily market to small and medium-sized companies. NOS and ANI solicit new customers through telemarketing calls. As described more fully below, NOS and ANI employ what they term a "call unit rate structure" for their long distance pricing methodology. Under that pricing methodology, which appears to be unique to these companies, rates are billed not in terms of cents per minute, but in cents per call unit ("CPCUs").[3] The call unit is made up of usage and non-usage charges, and generally does not equal a minute.[4] Thus, determining total per call charges requires a conversion calculation. NOS and ANI state that, during telemarketing calls, they provide potential customers with both verbal[5] and written disclosures explaining their plan offerings and charges. They also state that in addition to information conveyed by their telemarketing representatives, they routinely fax prospective customers two written disclosures, a "rate sheet" and an enrollment form or Letter of Agency ("LOA") to explain their service and pricing.

4. Despite the purported pricing explanations by NOS and ANI, consumers have filed almost 900 complaints with the Commission against the companies since 1997. These

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[3] According to NOS and ANI, the limited residential plans, sold under the International Plus and O11 company names, do not employ the call unit rate structure but are sold, tariffed, and billed as cents per minute offerings. For this reason, the International Plus and O11 service plans will not be addressed in this NAL. *See* NOS and ANI's September 14, 2000 joint response to our September 28, 2000 letter of inquiry, Attachment B, page 1 ("Response").

NOS and ANI requested confidential treatment of certain information they submitted in response to written requests from the Enforcement Bureau. On November 3, 2000, the Bureau released an Order denying the request for failing to comply with the standards set forth in section 0.459(b) of the Commission's rules. *NOS Communications, Inc.*, DA 00-2479 (Enf. Bur., Nov. 3, 2000), citing 47 C.F.R. § 0.459(b). On November 9, 2000, NOS and ANI filed an Application for Review of the Order. Because, in this NAL, we use only materials submitted by complainants and make no specific reference to information provided by NOS and Affinity under their request for confidential treatment, we decline to address the merits of the pending Application for Review. The Application for Review will be addressed separately.

[4] The call unit may equal a minute under very limited circumstances, such as for facsimile calls and during certain limited promotional periods.

[5] *See* footnote 29, *infra.*

complaints suggest widespread consumer confusion regarding the companies' plan offerings and charges. Common themes in these complaints are that NOS and ANI misrepresent their rates, resulting in rates charged that are substantially higher than what the companies promised. Consumers also complain that NOS's and ANI's call unit pricing methodology is complicated and confusing and appears designed for the purpose of cheating the public.[6] Complainants allege that when they complain directly to the companies, the companies are unresponsive or claim ignorance or error, often promising credits and discounts which never materialize.[7] Many complainants also allege that when they refused to pay disputed bill amounts, they were threatened with collection or legal action, or their toll-free numbers were "held hostage" by the companies.[8] Additionally, complainants state that when they attempted to discontinue service with NOS or ANI, they experienced undue delays or difficulties switching carriers, or continued to be billed for services by the companies after the switch was complete.[9]

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6 *See e.g*, Informal Complaint No. G2000010809, filed December 8, 1999; Informal Complaint No. P-20826, filed June 6, 2000; Informal Complaint No. G2000017422, filed February 23, 2000; Informal Complaint No. G2000009619, filed December 3, 1999; Informal Complaint No. 00-G6806, filed August 22, 2000; Informal Complaint No. G2000015040, filed February 2, 2000; and Informal Complaint No. G2000010163, filed December 17, 1999.

7 *See e.g*, Informal Complaint No. G2000016345, filed February 1, 2000 ("I am at my wits end. I cannot take trying to communicate with these people. I believe they are trained to lie and deceive.'); Informal Complaint No. 00-G6806, filed August 22, 2000 ("Affinity always said they couldn't figure out how the rate kept going up. It was always the same song and dance. A credit was issued after many phone calls to clarify the problem and after months had gone by. Sometimes they would offer us a discounted rate if we would excuse their errors."); Informal Complaint No. G2000009619, filed December 3, 1999; and Informal Complaint No. 00-G6806, filed August 22, 2000.

8 *See e.g*, Informal Complaint No. G2000005500, filed November 12, 1999 ("They are virtually holding my toll free numbers hostage. My only choice seems to be to pay the disputed invoice at these exhorbitant rates or lose my toll free numbers that I have had for so many years."); Informal Complaint No. 00-G943, filed May 24, 2000 ("I was also told my 800 number has been taken over by NOS. They will not allow me to have MCI World Com take over until I pay the entire bill."); Informal Complaint No. G2000000524, filed November 15, 1999 ("I had made several attempts with MCI to have all our lines switched to MCI but somehow Affinity would not let go of our 800 numbers."); Informal Complaint No. P5493, filed January 18, 2000 ("They have sent me a letter threatening legal action since I only paid 75% of my Nov. 18, 1999 invoice as told to do by their customer service representative."); and Informal Complaint No. G2000016345, filed February 1, 2000 ("I then received my first threatening letter from NOS . . . telling me they would shut off my service if I did not pay . . . and send me to collections. The frustrating thing is that everyone I spoke to in the company directed me NOT to pay the bill until the credit was applied.')

9 *See e.g.*, Informal Complaint No. 00-G372, filed May 24, 2000 ("NOS refused to switch me back to my previous long distance provider . . . and local toll provider . . . when I was not satisfied with its services."); Informal Complaint No. G2000016321, filed February 1, 2000 ("I have asked repeatedly to have my long distance service terminated, but to date they have not terminated my service. I can't find a way to get away from the company.").

5. In addition to complaints filed with the Commission, NOS and ANI have received complaints directly from consumers, but have requested confidential treatment of the number of such complaints as well as the number of requested cancellations of service that they receive.[10] Hence, this information will not be revealed here.

III. DISCUSSION

6. Section 201(b) of the Act, states, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."[11] The FCC has found that unfair and deceptive marketing practices by interstate common carriers may constitute unjust and unreasonable practices under section 201(b).[12]

A. Calculating the Rate

7. Understanding how NOS and ANI calculate their charges is central to any discussion of whether the companies have unjustly and unreasonably marketed their services. Although the companies assert that calculation is not difficult, we disagree, finding the process both complicated and confusing.[13]

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10 *See* footnote 3, *supra.*

11 47 U.S.C. § 201(b).

12 *Business Discount Plan, Inc.*, Order of Forfeiture, 15 FCC Rcd 14461 (2000) ("BDP"), *recon. granted in part and denied in part*, FCC 00-424 (2000); *AT&T Corp.*, 71 RR2d 775 (1992); *Telecommunications Research and Action Center and Consumer Action*, 4 FCC Rcd 2157 (Com.Car.Bur. 1989); *see also Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers*, 15 FCC Rcd 8654 (2000).

13 This opinion is reflected in many of the consumer complaints received by the Commission. One complainant writes: "It took me about 2 hours to simplify their 'magic formula' (I am a software engineer with a strong math background). I didn't like it, because it looked to me as a good way for confusing and cheating customers." Informal Complaint No. 00-G372, filed May 24, 2000. Another complainant writes that NOS's call unit rate structure "turns out to be a convoluted formula constructed to gouge customers." Informal Complaint No. G2000017422, filed February 23, 2000. Another writes, "[T]he Total Calling Unit, which doesn't easily translate to cost per minute charges but serves to confuse the customer into thinking that costs are less than they are." Informal Complaint No. P13117, filed March 20, 2000. Still, another complains: "Upon review we noticed we were not being billed in minutes, but in 'TCU's'. What's that? Who can calculate it?" Informal Complaint No. G2000009309, filed December 8, 1999.

8. To illustrate, we borrow from materials that ANI provided to a customer. The example concerns a nine-minute, interstate call at 14.9 cents per call unit.[14] The first step in calculating total charges under the call unit rate structure is to identify the call duration in seconds. A nine-minute call equals 540 seconds (9 x 60). Next, to determine the usage charges, the minimum call unit (MCU) and any additional call unit increments (ICUs) must be determined. For interstate calls the MCU is 30 seconds, which is described as being the same as 5 ICUs. Additional ICUs are added in increments of 5 for each additional 30 seconds. Thus, at 14.9 cents, the MCU equals $0.745 ($0.149 x 5 ICUs).[15] After adjusting for the 30-second MCU (540 seconds – 30 seconds), the remaining seconds are divided by 30 seconds to determine the additional ICUs (510 seconds ÷ 30 seconds = 17). At 14.9 cents, the additional ICUs equal $12.665 ($0.149 x 5 ICUs x 17 or $0.149 x 85 ICUs).[16] To determine non-usage charges, the equivalent call units (ECUs), must be determined. ECUs are provided by a table, and are based upon call duration. For 540 seconds, the table states that the total ECUs are 95. At 14.9 cents, the ECUs equal $14.155 ($0.149 x 95).[17] The sum of the charges for the MCU, ICUs, and ECUs equal $27.565.[18] This amount is then rounded to $27.6 and divided by 10 to get the final bill amount ($27.6 ÷ 10 = $2.76).[19] If we take this example one step further and divide the total charge of $2.76 by 9 minutes (the duration of the call), the result is an actual per call rate of 30.6 cents per minute, as compared to 14.9 cents per call unit.

9. We believe the foregoing example demonstrates the complexity of the call unit pricing methodology, which employs MCUs, ICUs, and ECUs to determine usage and non-usage charges. To determine the total charge of a call under call unit based rates, the customer must have detailed information regarding each of the aforementioned call unit components, as well as

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14 Although NOS and ANI represent that they widely disseminate documents similar to this one to customers and prospective customers, they have requested that we afford confidential treatment to those they have submitted in response to our requests. *See supra*, footnote 3. Since we obtained this document not from NOS or ANI, but from a consumer complaint file, the companies' request for confidentiality does not pertain to this document. *See* Informal Complaint No. G2000007824, filed November 26, 1999.

15 The example states "5 ICUs/1 MCU = $0.0754." It appears that the sum of the product has been divided by 10 and that certain numbers have been transposed in error, as $0.149 x 5 ICUs equals $0.745 and not $0.0754.

16 The example states "85 ICUs = $1.2665." Again, the sum of the product appears to have been divided by 10 to arrive at $1.2665, instead of $12.665.

17 The example states "95 ECUs = $1.4155." Once again, the sum of the product appears to have been divided by 10 to arrive at $1.4155, instead of $14.155.

18 The example states that the sum of the charges ($0.0754 + $1.2665 + $1.4155) equals $2.7574.

19 We divided by 10 to bring our calculation in conformity with the example.

instructions on conversion calculation.[20] Based upon the foregoing, NOS's and ANI's use of the call unit rate structure would almost certainly be misleading to consumers in the absence of clear and conspicuous disclosure regarding the nature and components of the rate structure, as well as clear and conspicuous disclosure on how to calculate the total cost of a call.

B. Plan Disclosures

10. Until recently,[21] NOS and ANI used promotional plan offerings as their primary vehicle for marketing their communication services to customers. These promotional plan offerings were not expressly denominated as promotional, however. The companies marketed and sold these plans in terms of cents per minute. Then, following the second billing period, the companies calculated the charges based on the call unit rate structure. According to NOS and ANI, the companies calculated the cents-per-minute rate by waiving non-usage charges for peak domestic calls during the first two invoices. After the second invoice, non-usage charges did apply.

11. We believe that consumers would likely view the limited duration of NOS's and ANI's promotional rates as significant qualifications. NOS's and ANI's promotional plan offerings, although marketed in cents per minute, are really equal to a call unit based rate with non-usage charges waived for the first two invoices only. As can be seen from the example of the 9-minute, interstate call, non-usage charges make up a significant portion of the total cost of a call (almost half, in the example). Thus, the application of non-usage charges to a call after a customer's second invoice could result in double the cost of that call as compared to a similar call made during the promotional period. Therefore, although NOS and ANI clearly disclosed the cents-per-minute rate, we must determine whether they clearly and conspicuously disclosed the limited duration of that rate and the rates to be charged thereafter.

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20 NOS's and ANI's customer invoices detail the duration of each call, not in minutes, but in total call units. From the foregoing example, the call duration in minutes is a necessary component for performing the conversion calculation. Thus, without the call duration in minutes, the customer is unable to perform the conversion calculation and unable to verify the accuracy of the amount, or determine the cent per minute rate, being billed per call. One complainant writes that "[s]ince the invoice does not indicate the amount of time utilized on each call it is not possible to calculate the precise charge." Informal Complaint No. P-16219, filed April 10, 2000 . Yet another complains that "[t]he billing was not understandable in a clear and simple manner because it was based on `call units', and not minutes." Informal Complaint No. P-20826, filed June 6, 2000.

21 We are continuing to review NOS's and ANI's current plan offerings for compliance with section 201(b) and will not hesitate to take further action if deemed necessary.

a. "Rate Sheet"

12. During sales calls, NOS and ANI appear to have faxed prospective customers a "rate sheet" which sets forth the companies' rates and plan offerings. The rate sheet states the rate in cents per minute in bold letters at the very top of the page.[22] Nowhere does the rate sheet expressly state that the advertised per minute price is a "promotional" or "introductory" rate. Near the bottom of the rate sheet, under a heading entitled "No Contracts or Term Plans," the sheet states that "[s]tandard tariffs on file with the FCC apply to all calls after the first two invoices and, during the first two invoices, to all calls except peak interstate & peak intrastate calls." The rate sheet further states that "[n]on-transport/usage charges apply per carrier's tariff" and that "[p]romotion terms per tariff on file."

13. We believe these purported qualifications on the rates expressly set forth in NOS's and ANI's rate sheets lack clarity and understandability. Rather than provide clear and conspicuous disclosure of the promotional nature of their cents-per-minute offering and of the rates that will apply after that period, the language serves only to obfuscate and to confuse. The language does not clearly indicate to the consumer that the advertised cent-per-minute rates are of limited duration, particularly given the unrelated heading. We believe that a reasonable consumer would not gather that the quoted rates are promotional.

14. Additionally, we believe the reasonable consumer would not understand that the companies would use anything other than the widely used and understood cents-per-minute pricing methodology. First, there is no clear language on the rate sheets indicating otherwise. Second, the only quoted rates are set forth in cents per minute. Third, only vague references regarding the call unit rate structure are provided. While the term "non-transport/non-usage charges" is used, it is not defined or explained. In short, nothing in the rate sheets notify the customer that the call unit pricing methodology would be used after the undefined promotion, or what that pricing methodology entails.[23]

15. In light of the foregoing, and our review of the confidential materials submitted by the companies, we believe that the rate sheets distributed by NOS and ANI mislead consumers about the fact that the quoted rate is a promotional rate, fail to inform consumers that a different pricing plan will apply after that period, and fail to inform consumers how the non-promotional

22 Although NOS and ANI represent that they widely disseminate documents similar to this one to customers and prospective customers, they have requested that we afford confidential treatment to the ones they have submitted in response to our requests. *See supra*, footnote 3. Since we obtained this document not from the companies, but from a consumer complaint file, their request for confidentiality does not pertain to this document. *See* Informal Complaint No. G2000014881, filed February 1, 2000.

23 In other examples of the rate sheet submitted by NOS and ANI, the purportedly limiting or qualifying information directs the consumer to a "Welcome Package" for additional information. We believe that the fact that additional information might be available elsewhere is insufficient to form the required disclosure.

pricing plan will operate.[24] Therefore, by widely distributing the rate sheet to consumers in the marketing of its long distance plans, we find that NOS and ANI have apparently engaged in unjust or unreasonable marketing practices in violation of section 201(b) of the Act.

b. Letters of Agency (LOAs)

16. NOS and ANI fax what they refer to as an LOA to prospective customers together with the rate sheet.[25] The ostensible purpose of this document is to secure the customer's written consent to have its interexchange carrier switched to NOS or ANI. However, the document contains additional information beyond what is allowed by our LOA rules.[26] Therefore, as an LOA, the document is invalid.[27] A valid LOA may contain only certain authorizing language as set forth in our rules.[28] While we do not mean to suggest that a carrier may cure a misrepresentation that violates section 201(b) with a violation of our LOA rules, we reviewed the document to see if NOS and ANI made any attempts to clarify the terms of their promotional plan offering and the nature of their rate structure for the consumer. The document states, near the end of a fairly lengthy paragraph, that "[s]tandard tariff rates on file with the FCC and state commissions apply to all calls." It also states that "[n]on-usage charges apply per carrier's tariff," and that "[p]romotion terms per tariff on file." This language suffers from the same lack of clarity and understandability as the rate sheets. Further, the language does not alert the consumer that anything other than the cents-per-minute pricing methodology is applicable, and makes only vague references to the call unit rate structure. Here again, the term "non-usage charges" is used, but not defined or explained. Thus, as with the rate sheet, the language does not provide the consumer with enough information to determine total per call charges after the expiration of the promotional period.[29]

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24 The materials submitted by NOS and ANI under a confidentiality request include additional rate sheets. Those rate sheets appear similarly to mislead consumers.

25 Although NOS and ANI represent that they widely disseminate documents similar to this one to customers and prospective customers, they have requested that we afford confidential treatment to the ones they have submitted in response to our requests. *See supra*, footnote 3. Since we obtained this document, not from the companies, but from a consumer complaint file, their request for confidentiality does not pertain to this document. *See* Informal Complaint No. G2000016321, filed February 1, 2000.

26 47 CFR § 64.1160.

27 *Id.* at (a).

28 *Id.* at (b).

29 We also find that NOS and ANI did not cure the apparent violations of section 201(b) by verbal disclosures. Although NOS and ANI, in their Response, allege that sales representatives make required verbal disclosures during telemarketing calls that the pricing offered is in cents per call unit, such disclosures appear only relevant to the companies' current plan offerings, which do not include a cents-per-

C. Forfeiture Authority

17. Section 503(b)(1) of the Act states that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.[30] Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $100,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,000,000 for a single act or failure to act.[31] In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "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."

18. NOS's and ANI's failure to make clear and conspicuous disclosures in their rate sheets appear to demonstrate conscious disregard for section 201(b)'s prohibition against unfair and unreasonable marketing practices. The rate sheets support a conclusion that the companies intentionally employed "bait and switch" marketing techniques and withheld information regarding their promotional offerings and call unit rate structure from consumers. And the number of consumer complaints filed with the FCC against NOS and ANI, along with the number of complaints and service cancellations reported by the companies, further suggest widespread consumer confusion.

19. Each rate sheet sent to consumers constitutes a separate violation of section 201(b). In *Business Discount Plan, Inc.*,[32] the Commission assessed a forfeiture amount of $40,000 for each instance in which the carrier engaged in an unjust and unreasonable

minute rate. Additionally, consumer complaints further suggest that verbal disclosures did not cure the apparent defects. *See e.g.* Informal Complaint No. G2000009619, filed December 19, 1999 ("I do not recall ever being told by anyone at ANI that this was a promotional rate, which would last for 2 months only. . . I also do not recall anyone telling me about ANI's policy of automatically converting 'minutes' to 'total call units' (TCU's) on the third month."); Informal Complaint No. G2000010809, filed December 8, 1999 ("My decision to switch to ANI was based on their advertised rate. This was further supported during phone conversations. . . during which the 7.9 cents per minute rate was confirmed. . .'); and Informal Complaint No. G2000006122, filed November 17, 1999 ("From my first conversation with NOS, the cost per minute for long-distance has been discussed. . . Always I received a response with no correction as to the 'per minute' term.").

30 47 U.S.C. §503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

31 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2) (*Amendment of Section 1.80 of the Commission's Rules,* Order, 12 FCC Rcd 1038 (1997)(inflation adjustment to $100,000/$1,100,000); *Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18,221 (2000)(inflation adjustment to $120,000/$1,200,000)).

32 15 FCC Rcd 14461 at 14471-72.

telemarketing practice in violation of section 201(b). In light of the *BDP* precedent, and weighing the facts before us, we find that a total forfeiture amount of $500,000 per company is appropriate. Although a straightforward application of a $40,000 base forfeiture amount would likely produce a proposed forfeiture in the millions of dollars, we believe that a forfeiture of $500,000 per company is sufficient to protect the interests of consumers and to deter future violations of the Act.[33] In the event the companies continue to violate section 201(b)'s prohibition against unjust and unreasonable marketing practices, such violations could result in future NALs proposing substantially greater forfeitures, or could result in issuance of a show cause order to revoke their operating authority.[34] NOS and ANI shall have the opportunity to submit facts and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.

IV. CONCLUSION AND ORDERING CLAUSES

20. We have determined that NOS and ANI have apparently violated section 201(b) of the Act and the Commission's rules and orders as identified above. We have further determined NOS Communications, Inc. and Affinity Network Incorporated are apparently liable for forfeitures in the amount of $500,000 each.

21. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Act, as amended, 47 U.S.C. § 503(b)(5), section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that NOS Communications, Inc. and Affinity Network Incorporated ARE HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of $500,000 each, for willful or repeated violations of section 201(b) of the Act and the Commission's rules and orders in the paragraphs described above.

22. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice, NOS Communications, Inc. and Affinity Network Incorporated SHALL PAY the full amount of the proposed forfeiture OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.[35]

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[33] The total volume of rate sheets submitted by the companies appears to number in the hundreds. At the total proposed forfeiture amount of $500,000 per company, this would equal just 12.5 violations per company if the Commission were to impose a forfeiture of $40,000 per violation.

[34] *See CCN, Inc. et al.*, 12 FCC Rcd 8547 (1997).

[35] Payment of the forfeiture amount may be made by mailing a check or similar instrument payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the "NAL/ Acct. No." referenced above. The response, if any, must be mailed to Catherine W. Seidel, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street S.W., Room 3-C365, Washington, D.C., 20554, and must include the

23. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability SHALL BE SENT by Certified Mail/Return Receipt Requested to:

NOS Communications, Inc.
4380 Boulder Highway
Las Vegas, NV 89121

Affinity Network, Inc.
3660 Wilshire Boulevard, Suite 400
Los Angeles, CA 90010

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

"NAL/Acct. No." referenced above.

DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: NOS Communications, Inc. and Affinity Network, Inc. Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture, File No. EB-00-TC-005, NAL/Acct. No. 200132170011.

The Commission has taken this action under section 201(b) of the Communications Act without ever conducting a rulemaking to establish the contours of that provision's applicability to common carrier advertising. Moreover, as I have explained before, section 201(b) does not empower the Commission to regulate common carrier advertising. This enforcement action is therefore illegal, and I urge the affected parties to seek judicial review of this decision.

Background. Although section 201(b) has been on the books for upwards of sixty-five years, the Commission first applied this provision to common carrier advertising in 1998. In a notice of apparent liability issued against a long-distance carrier that had slammed customers, the Commission concluded – without citing a single precedent – that a company's representations regarding its product also constituted "unjust and unreasonable practices" under section 201(b). *See Business Discount Plan, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 340 [¶ 29] (1998). The Commission decided that the company "knowingly misrepresented both its identity as a reseller and the nature of its service offering in an effort to [intentionally] mislead small business customers, who relied, to their detriment, on BDP's misrepresentations of these material facts." *Id.* [¶ 34].[1] Beyond reciting the facts of that case, the Commission did not explain what it meant by the terms "knowing misrepresentation," "detrimental reliance," or "material facts."

The Commission followed up its action in *Business Discount Plan* with a policy statement entitled "Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers," 15 FCC Rcd 8654 (Mar. 1, 2000) (hereinafter "Policy Statement"). There, the Commission acted though it had for years regulated common carrier advertising practices under section 201(b), when in fact it had only ever explicitly addressed that issue in the *Business Discount Plan* dockets.[2] *See id.* [¶ 4]. Borrowing from the FTC's truth-in-advertising rules, the Policy Statement

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[1] The Commission issued an order of forfeiture in the matter last July, 15 FCC Rcd 14,461 (2000), and denied a petition for reconsideration in December, 2000 WL 1785129 (Dec. 7, 2000).

[2] The Commission cited *AT&T Card Issuer Identification Cards.*, Letter, 7 FCC Rcd. 7529 (1992), as standing for the proposition that it had previously "found unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b)." But that case did not squarely raise the section 201(b) issue. It concerned statements that AT&T had made in literature sent to card holders, telling them that "government requirements" required the company to issue new cards and asking them to destroy their old cards. The Commission staff determined that the language might lead customers to destroy cards issued by companies affiliated with AT&T, and it sent a letter of admonishment to AT&T. But it never actually addressed the section 201(b) question, and the Commission's suggestion that the case supports its regulation of common carrier advertising under section 201(b) is disingenuous.

explained if an advertisement makes an "implied or express objective claim" that "conveys a material representation to reasonable consumers," the advertisor must make sure the representation is true and be able to substantiate it. *Id.* [¶ 11]. Advertisements that might be "misleading in the absence of qualifying or limiting information" must contain "any necessary disclosures," which must be "clear and conspicuous." *Id.* [¶ 12].

The Commission went on to set out what amounts to a detailed set of rules interpreting this standard and provided examples of advertisements that would be deceptive. Compliance with all of these requirements is mandatory:

(1) "[A]dvertisers should exercise the greatest care in ensuring the accuracy of their claims related to price, including the clear and conspicuous disclosure of information such as minimum per-call charges, monthly fees, fees for additional minutes beyond the initial calling period, and other information that significantly affects the total charge of a particular call or calling plan or service," *id.* [¶ 13];
(2) "[A]ny significant conditions or limitations on the availability of the advertised rates should also be clearly and conspicuously disclosed," *id.* [¶ 14];
(3) "[T]he advertiser should clearly and conspicuously disclose whether the advertised service includes in-state calls, and the fact that such calls are charged at a higher rate if such is the case," *id.* [¶ 15];
(4) "Advertisers should . . . exercise care to adequately explain phrases such as 'basic rates' in their ads. . . . [W]hen making claims using such terms as 'basic rates' or 'regular rates,' advertisers should be mindful that those terms will be evaluated from the point of view of the reasonable consumer, and may be deceptive," *id.* [¶ 16];
(5) "By representing a competitor's rates, an advertiser is making an implied claim that these rates are reasonably current. As in the case of any other objective claim, the advertiser must have a reasonable basis for this representation," *id.* [¶ 17];
(6) "The fact that information about significant limitations or restrictions on advertised prices may be available by calling a toll-free number or a clicking on a Web site is generally insufficient to cure an otherwise decptive price claim in advertising," *id.* [¶ 18];
(7) "To ensure that disclosures are effective, advertisers should use clear and unambiguous language, avoid small type, place any qualifying information close to the claim being qualified, and avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure," *id.* [¶ 20];
(8) "Disclosures that are large in size, are emphasized through a sharply contrasting color, and, in the case of television advertisements, remain visible and/or audible for a sufficiently long duration are likely to be more effective than those lacking such prominence," *id.* [¶ 28];
(9) "[T]he proximity and placement of disclosures are important factors in determining whether they are clear and conspicuous. . . The placement of

qualifying information away from the triggering representation . . . reduces the effectiveness of the disclosure. Furthermore, when significant qualifying information about the cost of a long-distance plan or service is necessary to prevent the ad from misleading consumers, the user of an asterisk will generally be considered insufficient to draw a consumer's attention to a disclosure placed elsewhere in an ad," *id.* [¶30];

(10) "Even if a disclosure is large in size and long in duration, other elements of an advertisement may distract consumers so that they may fail to notice the disclosure. . . . Advertisers should take care not to undercut the effectiveness of disclosures by placing them in competition with other arresting elements of the ad," *id.* [¶ 31]; and

(11) "[C]onsiderations specific to television ads include volume, cadence, and placement of any audio disclosures. Disclosures generally are more effective when they are made in the same mode (visual or oral) in which the claim necessitating the disclosure is presented," *id.* [¶32].

Today, the Commission applies section 201(b) for the second time to a common carrier's advertising practices. In contrast to the facts in *Business Discount Plan*, however, there are no allegations of slamming in this case. Rather, the Commission bases its finding *solely* on its conclusion that the common carriers here used rate calculations that were "complicated and confusing," *see* Notice of Apparent Liability ¶ 7, and that disclosures the carriers made regarding their promotional rates were inadequate, *id.* ¶ 13. Based on these determinations, the Commission concludes that each company is apparently liable for $500,000.

The Commission's advertising rules have not been promulgated in accordance with the APA. Even assuming that common carrier advertising were an appropriate concern of the Commission, the agency's rules regarding this issue have not been promulgated in accordance with the Administrative Procedure Act. The Commission came up with a brand-new rule in a 1998 enforcement case, greatly expanded on that rule in a so-called "policy statement," and now appears prepared to apply this expanded set of standards against common carriers generally. Affected parties have never had an opportunity to weigh in on the matter. I explain below why the APA does not permit the Commission to apply section 201(b) to common carrier advertising without first conducting a rulemaking.

1. As an initial matter, it was inappropriate for the Commission to apply section 201(b) to common carrier advertising for the first time in an adjudication, as it did in *Business Discount Plan*. The APA distinguishes between "rules" and "orders." A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Rulemaking is the "agency process for formulating, amending, or repealing a rule," *id.* at §551(5), and the APA requires agencies to give public notice of a proposed rulemaking and give interested parties an opportunity to submit comments on the proposal, *id.* at § 553(b). An "order," by contrast, is the "whole or part of a final disposition . . . of an agency in a matter other

than rulemaking," and it is formulated through "adjudication." *Id.* at § 551(6), (7). Notice and comment are not required. *Id.* at § 554. (Also exempt from the APA's notice and comment requirements are "interpretive rules" and "general statements of policy." *Id.* at § 553(d)(2).)

The distinction between rulemaking and adjudication is fundamental: "[T]he entire Act is based upon a dichotomy between rule making and adjudication. . . . Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities." Attorney General's Manual on the Administrative Procedure Act 13-13 (1947).

Section 201(b) imposes on common carriers the immensely broad requirement that their "charges, practices, classifications, and regulations" be "just and reasonable." 47 U.S.C. § 201(b). But the provision, by its plain language, does *not* authorize the Commission to define the scope of a common carrier's section 201(b) obligations through ad hoc adjudicatory proceedings. Rather, it directs the Commission to "prescribe such *rules and regulations* as may be necessary in the public interest to carry out the provisions of this Act." *Id.* (emphasis added). In other words, to support an action against a carrier based on an expanded or new understanding of section 201(b), the plain language of the statute requires the Commission first to promulgate a *rule*, which can be adopted only after public notice and comment. *See American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (noting that the Securities and Exchange Act of 1934 "forbids nothing except acts or omissions to be spelled out by the Commission in 'rules or regulations,'" and that "clearly some agency creation of a duty is a necessary predicate to any enforcement against an [mine] operator [under 30 U.S.C. § 813(h)] for failure to keep records").

Even if the Commission were not precluded by section 201(b)'s plain language from adopting new interpretations of the provision in an adjudication, policy reasons required it to define the contours of a common carrier's section 201(b) advertising obligations in a rulemaking. As the Supreme Court, the federal appeals courts, and this agency itself have recognized, adjudication is most appropriate when an agency seeks incrementally to develop the law, rather than fundamentally change it. For that reason, the Supreme Court has held that "rulemaking is generally a better, fairer, and more effective method" of announcing a new rule than ad hoc adjudication. *See Community Television of Southern California v.* Gottfried, 459 U.S. 498, 511 (1983); *see also Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627-28 (5th Cir. 2001); *Pfaff v. Department of Housing & Urban Development*, 88 F.3d 739, 748 (9th Cir. 1996) ("The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward."); *Curry v. Block*,

738 F.2d 1556, 1563 (11th Cir. 1984); *First Bancorporation v. Board of Governors*, 728 F2d 434, 438 (10th Cir. 1984); *National Small Shipment Traffic Conf. v. I.C.C.*, 725 F.2d 1442, 1447- 48 (D.C. Cir. 1984) ("Trial-like procedures are particularly appropriate for retrospective determination of specific facts . . . [while] [n]otice-and-comment procedures . . . are especially suited to determining legislative facts and policy of general, prospective applicability."). Even where an agency has discretion to announce a new rule in an adjudication, there are limits to this discretion. "Such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, *where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.*" *See Pfaff*, 88 F.3d at 748 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. at 267, 295 (1974)) (emphasis added).

The Commission itself has recognized that "issues of general applicability are more suited to rulemaking than to adjudication," and numerous occasions it has refused to develop broad new rules in an adjudicatory context. *See Application of Alton Rainbow Corp. and Cox Radio*, Memorandum Opinion & Order, 1999 WL 566130 [18] (1999) ("It is generally inappropriate to address this argument in a restricted adjudicatory proceeding, "where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record."); *Application of Great Empire Broadcasting, Inc. and Journal Broadcast Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11145 [¶ 8] (1999) (same); *Rulemaking to Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate the 27.5-29.5 Ghz Frequency Band, to Reallocate the 29.5-30.0 Ghz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 [¶¶ 388-90] (1997); *Stockholders of Renaissance Communications Corp. and Tribune Co.*, Memorandum Opinion & Order, 12 FCC Rcd. 11866, 11887-88 [¶ 50] (1997); *Formulation of Policies And Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, Second Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5179 (1988) ("[I]t is generally the view that such decisions are better left to the rulemaking process where all interested parties can participate. 'Rulemaking,' as the Supreme Court and the Court of Appeals have recognized, 'is generally a better, fairer, and more effective method of implementing a new industrywide policy than is the uneven application of conditions in isolated renewal proceedings.'"); *Nextel Communications Inc.*, Order, 14 FCC Rcd 11678 [¶ 31] (WTB 1999) (declining to proceed through adjudication because to do so would be to establish spectrum policies of general applicability).

In light of these principles, what the Commission did in *Business Discount Plan* was illegitimate. In an enforcement action against a single carrier, it set forth a broad new understanding of section 201(b), generally applicable on a going-forward basis to *all* common carrier advertising. But section 201(b)'s plain language required it to conduct a

rulemaking before it imposed this new obligation on a carrier. And even assuming the agency had some discretion to apply a new interpretation of section 201(b) in an enforcement action, that discretion is not unbounded. Where fines and damages are involved, and the new standard is a broad from an agency's previous regulatory position, as was the case in *Business Discount Plan*, courts have held that adjudication is not a proper vehicle for announcing new law.

2. Not only was the Commission wrong in adopting a new rule regarding common carrier advertising in *Business Discount Plan*, it compounded the problem by expanding on that rule in what it labeled a "policy statement." The agency's detailed description of the kinds of advertising practices that will violate section 201(b) is not a policy statement at all, but rather amounts to a set of substantive new rules, which are subject to the APA's notice and comment requirements. Its attempt to enforce these rules here is therefore improper.

The APA exempts "policy statements" and "interpretive rules" from the statute's notice and comment requirements, 5 U.S.C. § 553 (b)(A), while all other rules – which the courts have often called "substantive" or "legislative" rules – are subject to these provisions. A quick review of these statutory distinctions is helpful.

Although the precise difference between policy statements and interpretive rules is the subject of some dispute, *see Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1021 n.13 (D.C. Cir. 2000), courts have observed that a policy statement "does not seek to impose or elaborate or interpret a legal norm," but rather "represents an agency position with respect to how it will treat – typically enforce – the *governing* legal norm." *Syncor International Corp. v. Shalala*, 127 F.3d 90, 94 (1997) (emphasis added). "By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. . . . Policy statements are binding on neither the public, nor the agency." *Id.* (citations omitted); *see also United States Telephone Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) ("[T]he paradigm of a policy statement [is] an indication of an agency's current position on a particular regulatory issue.").

An interpretive rule, on the other hand, "typically reflects an agency's construction of a statute that has been entrusted to the agency to administer." *Id.* "The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking. . . . Instead, it is construing the product of congressional lawmaking 'based on specific statutory provisions.'" *Id.* For these reasons, "'[t]he distinction between an interpretative and substantive rule . . . likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute.'" *Id.* (citing *Paralyzed Veterans of American v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997).

Substantive rules, in contrast to both interpretive rules and policy statements, *modify* or *add* to a legal norm, based on the agency's *own authority*. *Id.* at 95. "That authority flows from a congressional delegation to promulgate substantive rules, to

engage in supplementary lawmaking." *Id.* Because the agency is engaged in lawmaking, the APA requires it to comply with notice and comment. *Id.*

In determining whether an agency's exercise of regulatory authority qualifies as a substantive rule, courts begin with an examination of the applicable statute. Where the authorizing statute is "very general, using terms like 'equitable' or 'fair,' and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation, because then the agency's rule gives content to the legal norm in question." *Id.* at 94 n.6 (citing *Paralyzed Veterans*, 117 F.3d at 588). As the Seventh Circuit has explained:

> When Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation. Put differently, *when a statute does not impose a duty on the persons subject to it but instead authorizes (or requires – it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency.* Provided that a rule promulgated pursuant to such a delegation is intended to bind, and not merely to be a tentative statement of the agency's view, which would make it just a policy statement, and not a rule at all, the rule would be the clearest possible example of a legislative rule, as to which the notice and comment procedure . . . is mandatory.

Hoctor v. United States Dep't of Agriculture, 82 F.3d 165, 169-70 (7th Cir. 1996) (emphasis added).

Also important to the determination whether an agency publication amounts a substantive rule is whether it prescribes mandatory requirements. *See Syncor*, 127 F.3d at 95 (holding that an agency's decision is substantive if it uses language that is "consistent only with the invocation of its general rulemaking authority to extend its regulatory reach."). In *Syncor*, for example, the court concluded that a "notice" issued by the Food and Drug Administration announcing that a certain category of radioactive drugs should comply with various statutory requirements was substantive. Although the agency described this notice as a "policy statement" and as "guidance," the court ruled that the agency's statement that it had "concluded" that these drugs "should be regulated" amounted to fundamentally new regulation, which must be informed by notice and comment rulemaking. *Id.*; *see also Appalachian Power Co.*, 208 F.3d at 1023 ("[T]he entire Guidance, from beginning to end, reads like a ukase. It commands, it requires, it orders, it dictates. Throughout the guidance, EPA has given the States their 'marching orders' and EPA expects the States to fall into line . . .."); *Sweet v. Sheahan*, 235 F.3d 80, (2d Cir. 2000) ("Legislative [*i.e.*, substantive] rules can impose obligations on members of the public distinct from, and in addition to, those imposed by statute."); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (holding that rules that "impose obligations" are substantive, whereas rules that "merely restate existing duties" are interpretive).

Applying these principles here, it is clear that the advertising guidelines set out in the Commission's so-called policy statement are substantive rules. First, section 201(b) is a classic example of a congressional delegation to an agency of lawmaking authority. The provision requires only that a carrier's "charges, practices, classifications, and regulations" be "just and reasonable," leaving it to the agency to supply content to these enormously broad terms. Despite what the Commission might say, it is certainly not obvious from the text of the statute that a carrier's "practices" necessarily include advertising. Indeed, the word "practices," standing alone, is so broad that it could include virtually any corporate practice. Nor does the statute, on its face, tell us what "just" or "reasonable" mean.

In its "policy statement," the Commission gave new meaning to these terms, and in doing so, acted in its lawmaking capacity. The agency informed carriers that their advertising practices would not meet the "just and reasonable" standard unless they ensured the accuracy of their price-related claims, including information regarding minimum per-call charges, monthly fees, fees for additional minutes beyond the initial calling period, geographic restrictions on rates, and comparative price claims. Policy Statement ¶ 12-15. The Commission also concluded that section 201(b)'s "just and reasonable" standard required advertisers "clearly and conspicuously" to disclose "qualifying information," and it explained in detail the form such disclosures should take. *See id.* ¶ 20-32.

These are plainly new requirements. Even assuming that *Business Discount Plan* legitimately announced a new rule (which it did not), that case dealt only with a carrier's misrepresentations in the slamming context. The carrier there told customers that it was a consolidated billing service and misled them into changing their long-distance carrier. The most one may make of that case is that section 201(b) applies to a carrier's illegal slamming conduct, precluding a carrier from misrepresenting to customers the type of service the carrier offers and from fraudulently inducing them to change their long-distance carrier. *Business Discount Plan* said nothing about the accuracy of price-related advertising or the need for "clear and conspicuous" disclosures, or any of the other issues the Commission addressed in its policy statement.

A second sign that the Commission's "policy statement" is actually a set of substantive rules is the mandatory nature of these new requirements. Section B, for example, is entitled "Material Information that *Should* Be Disclosed in Advertisements for Long-Distance Calling Services." Each paragraph in Section B states that carriers "should" disclose specific pieces of pricing information, and carriers are informed that they "should" also ensure that these disclosures are "clear and conspicuous."

In short, the Commission's so-called policy statement is a substantive rule in masquerade. The agency created a new regime governing common carrier advertising, with legal consequences for common carriers. It went far beyond whatever rule it created in *Business Discount Plan*. The statement simply does not qualify as a mere interpretation of an existing rule or a statement of policy regarding the enforcement of governing law. It is a substantive change in the law. As such, it should have been

promulgated in compliance with the APA's notice and comment rulemaking procedures. It was not, and this enforcement action is therefore illegal.

The Commission Lacks Jurisdiction to Regulate Common Carrier Advertising Under Section 201(b). As I have written before, I do not believe Congress intended to delegate to the Commission the authority to regulate common carrier advertising. *See, e.g.*, *Commission on the Verge of a Jurisdictional Breakdown: The FCC and Its Quest to Regulate Advertising*, 8 CommLaw Conspectus 219 (2000); Dissenting Statement, *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long Distance Services to Consumers*, 15 FCC Rcd 8654 (2000). By specifically giving the Federal Trade Commission authority to regulate pay-per-call service advertising in the 1992 Telephone Disclosure and Dispute Resolution Act, Congress indicated that it did not think this Commission possessed general jurisdiction to regulate common carrier advertising. In the preemption context, moreover, the federal courts have indicated that the Communications Act does not impose a duty on common carriers regarding advertising. For these reasons, it is my view that the Commission lacks jurisdiction to regulate advertising.

* * * *

Although it apparently thinks otherwise, this agency does not have unlimited authority to enforce against parties any standard of conduct it might think is appropriate. If the Commission wishes to regulate common carrier advertising under section 201(b), it must put its proposed position out for comment and be prepared to justify whatever rule it fashions to the public and to the courts. It has not done this here, and this enforcement action is therefore unlawful. I dissent from this decision.