Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of NOS Communications, Inc. (U-5251-C), Blue Ridge Telecomm Systems LLC (U-6925-C), Affinity Networks Incorporated (U-5229-C), NOSVA Limited Partnership (U-5434-C) and Samuel P. Delug for Approval of Change in Control.	Application 06-06-022 (Filed June 22, 2006)

OPINION APPROVING CHANGE IN CONTROL

In this decision we approve an uncontested joint application for approval, pursuant to section 854 of the Public Utilities Code, of a change of control with respect to four affiliated telecommunications companies that hold certificates of public convenience and necessity (CPCNs) from this Commission: (1) NOS Communications, Inc. (NOS), (2) Blue Ridge Telecomm Systems LLC (Blue Ridge), (3) Affinity Networks Incorporated (ANI), and (4) NOSVA Limited Partnership (NOSVA). Under the proposed change of control, Samuel P. Delug (Delug), who currently owns one quarter of each company,[1] would purchase the interests of Robert A. Lichtenstein (Lichtenstein), who currently owns half of each company.

[1] According to the application, Delug currently owns 25% of the shares of both NOS and ANI. He owns a 24.75% limited partnership interest in NOSVA, and a 25% interest in Blue Ridge. In addition, he owns a 25% interest in NOS Communications Inc. of Virginia, an entity that is the general partner of NOSVA. (Application, p. 4.)

The application states that Delug "is already the most active major shareholder in the management of the four certified companies," and that the proposed transaction "will simply permit Mr. Delug to hold an equity interest in the four companies that is commensurate with his role in management." (Application, p. 5.) The application also states that Lichtenstein's role in the companies "has been entirely passive for many years," and that he has "determined that his ownership of interests in the four entities is inconsistent with his investment objectives." (*Id.* at 5, 8.) The application also emphasizes that the proposed change "will be completely transparent to the customers of the carriers," and "will not result in any change in the management of NOS, ANI, NOSVA or Blue Ridge." (*Id.* at 1-2.)

A. Background

The main reason given by the parties for the proposed change of control is the dilution in Delug's ownership brought about by his recent divorce. The application notes that originally, Delug and Lichtenstein each held 50% of the shares of the NOS and ANI, as well as 50% interests in Blue Ridge. Delug and Lichtenstein also each held a 49.5% limited partnership interest in NOSVA; the remaining 1% interest in NOSVA was held by NOS Communications, Inc. of Virginia (NOS Virginia), the general partner of NOSVA. Delug and Lichtenstein also each held 50% of the shares of NOS Virginia.

The application then explains the effect of Delug's divorce as follows:

> "In late 2004, as a result of a property settlement in connection with a dissolution of marriage, Mr. Delug's shares in NOS and ANI were divided between Mr. Delug and his former wife, such that Mr. Delug and his former wife each held 25% of the shares of NOS, ANI and Blue Ridge and Mr. Lichtenstein, who has [had] little or no involvement with the management of the companies for years, holds the remaining 50%."

> "A similar change in ownership structure occurred with respect to NOSVA[,] such that Mr. Lichtenstein holds a 49.5% limited partnership interest in NOSVA while Mr. Delug holds a 24.75% limited partnership interest in NOSVA." (*Id.* at 7; footnote omitted.)

The application continues that if all of the necessary regulatory approvals can be obtained, Delug plans to purchase -- pursuant to a stock purchase agreement that has been filed under seal as Exhibit A to the application -- all of Lichtenstein's interests in the four companies. This will result in Delug having 75% of the shares of NOS and ANI, as well as a 75% interest in Blue Ridge. Delug would also hold a 74.25% limited partnership interest in NOSVA, as well as a 75% interest in NOS Virginia, the general partner of NOSVA. (*Id.* at 7-8.)

The application emphasizes that the change in control would have no effect upon the day-to-day operations of the four companies:

> "[T]he transaction between the two shareholders will be completely transparent to the customers of the carriers. While it will result in a technical change of control, it will not result in any change in the management of NOS, ANI, NOSVA or Blue Ridge. Mr. Delug, the shareholder acquiring voting control by virtue of the acquisition of shares at issue, already effectively controls the management of the companies." (*Id.* at 1-2.)[2]

In the remainder of the joint application, applicants have set forth the other information required by Rule 3.6 of the Commission's Rules of Practice and Procedure in an application to authorize a change of control.

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[2] However, the application also states that "while the transaction for which authority is sought herein will not, in and of itself, result in any change in the nature of the operation of the companies, it is the intent of NOS and ANI to develop a wholesale product to market to carrier-customers." (*Id.* at 6.)

B. Discussion

Although the application before us appears straight-forward, the matter requires some discussion because of the extensive regulatory history before this Commission of NOS, ANI, NOSVA and Blue Ridge.

1. Prior Regulatory Proceedings Involving NOS, ANI and Their Affiliates

More than four years ago, NOS and ANI were named as respondents in Investigation (I.) 02-05-001, in which the Commission's Consumer Protection and Safety Division (CPSD) alleged that the two companies had engaged in deceptive marketing, slamming, and cramming, in violation of Pub. Util. Code §§ 2889.5 and 2890. The Order Instituting Investigation (OII) alleged that NOS and ANI had engaged in this conduct in the following manner:

> "They solicit new customers, primarily small and medium size businesses, by telemarketing. Respondents' telemarketers represent that telephone service will be charged on a per minute usage basis. However, customers are subsequently charged according to a 'Total Call Unit' (TCU) pricing methodology that consists of usage and non-usage charges and [is] not based on cents per minute usage. Determining the TCU charges requires a conversion calculation that few, if any, customers can understand." (OII, p. 2.)

The allegations in I.02-05-001 paralleled those in an investigation by the Federal Communications Commission (FCC) that was also directed at the TCU pricing plan.

Ultimately, CPSD and the respondents entered into a settlement of I.02-05-001. The settlement was first presented to the Commission in

December 2003, and it was conditionally approved in D.04-06-017.[3] One of the conditions imposed by the Commission, however, was the rejection of a term which provided that upon the withdrawal of CPSD's protest to A.01-12-013 (the proceeding in which Blue Ridge sought a CPCN), "the Commission agrees . . . to resolve A.01-12-013 as an unopposed application." D.04-06-017 concluded that this term unreasonably tied the Commission's hands, and that before any CPCN could be granted, (1) Blue Ridge should be required to supplement its application with information regarding its litigation history and that of its affiliates, and (2) the assigned Administrative Law Judge (ALJ) should be free to hold a hearing on Blue Ridge's fitness if the ALJ considered a hearing necessary. Because the respondents objected to this modification of the settlement agreement, they caused the settlement to be rescinded according to its terms and filed an application for rehearing of D.04-06-017.

Eventually, after a hearing was held, the Commission conditionally granted a CPCN to Blue Ridge in D.04-12-021.[4] The parties to I.02-05-001 then submitted a revised settlement agreement, which the Commission approved in D.05-06-032.

The parties' regulatory history with this Commission does not end with the settlement of I.02-05-001, however. One of the conditions that the Commission insisted upon in D.04-06-017 was that in any future application

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[3] D.04-06-017 contains an extensive discussion of the parallel FCC proceeding involving the TCU plan, as well as a second FCC proceeding that alleged marketing abuses in connection with NOS's "Winback Campaign." *See,* D.04-06-017, *mimeo.* at 8, 10, 13-17.

[4] The condition was that a CPCN would issue to Blue Ridge only upon the Commission's approval of a new settlement agreement in I.02-05-001.

under Pub. Util. Code § 854, the respondents in I.02-05-001 would be required to disclose "(a) the fact that [I.02-05-001] was filed, (b) the fact that [I.02-05-001] was settled pursuant to the settlement agreement approved [in D.05-06-032], and (c) the relationship between the applicant and [I.02-05-001]." This requirement was incorporated into the settlement agreement ultimately approved by the Commission as paragraph 5.10.

Compliance with paragraph 5.10 became an issue in A.05-12-007 and A.05-12-008, in which NOS and ANI each sought to expand their operating authority to include facilities-based carriage. On January 12, 2006, CPSD filed protests to both applications on the ground, among others, that neither NOS nor ANI had made timely disclosures about I.02-05-001 in their applications.[5] When NOS and ANI tried to withdraw the applications (apparently after concluding that they were unnecessary), CPSD objected to the purported withdrawals. Eventually, the parties entered into a settlement agreement concerning A.05-12-007 and A.05-12-008, which settlement is still pending before the Commission.[6]

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[5] In their responsive papers to the protests, NOS and ANI asserted that a January 5, 2006 letter from their counsel to the Commission's Executive Director about I.02-05-01 constituted sufficient compliance with paragraph 5.10 of the settlement agreement approved in D.05-06-032.

[6] Under the terms of the settlement, NOS and ANI stipulate that their failure to disclose (a) the existence and settlement of I.02-05-001, and (b) a previous disciplinary action in Wisconsin, even if such failures were inadvertent, constitute a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure. NOS and ANI also agree to pay a $10,000 fine due to their failure to disclose these matters, all but $500 of which will be waived. In consideration of these admissions and the payment, CPSD agrees to drop its objections to the withdrawal of A.05-12-007 and A.05-12-008.

In addition to the controversy surrounding A.05-12-007 and A.05-12-008, the instant application points out that a new investigation of NOS marketing practices is underway at the FCC. The application gives the following explanation of this new investigation:

> "Shortly after the prehearing conference held on March 8, 2006 in [A.] 05-12-007 and 05-12-008, NOS received a communication from the staff of the [FCC] advising NOS that the FCC staff is investigating 'allegations that NOS Communications, Inc. dba International Plus & Zero 11 Communications, or an entity acting on behalf of your company, may have made [calls] to telephone lines that are contained in the National Do Not Call Registry . . .' *The communication also indicated that the Enforcement Bureau was investigating allegations related to representations made to customers to switch their preferred carrier and/or other marketing related allegations.* The communication was in the form of a data request to which NOS was to respond by April 9, 2006. Following an agreement on an extension of time, the Company filed its response on May 15, 2006." (Application, p. 10; emphasis supplied.)

In response to an inquiry from the ALJ assigned to this proceeding, counsel for the applicants stated in a letter dated September 28, 2006 that the FCC staff's investigation of the above-described matters is still ongoing, and has been docketed as file number EB-05-TC-055. The letter also noted that on September 6, 2006, the FCC staff asked NOS to provide further information, that NOS had done so, and that the company "anticipates having a meeting in person with the staff at a date to be set."

2. In View of the Tools Available to the Commission, the Issues Raised by A.05-12-007, A.05-12-008 and the New FCC Inquiries Do Not Justify Denial of the Change of Control Application

While the fact that the FCC staff is conducting a new investigation into the marketing practices of NOS is troubling, we do not think it justifies denying the application here. We have reached this conclusion because, as explained below, (1) the applicants' representations about the ownership interests in the four companies are consistent with statements they have made previously, (2) Delug will be bound by all of the conditions in the CPCNs that have been granted to NOS, ANI, Blue Ridge and NOSVA, and (3) any evidence of marketing abuse that the new FCC investigation discloses can be dealt with in future Commission proceedings.

To begin with, the statements in the application about ownership interests in the four companies are consistent with the statements that Joseph Koppy, the president of NOS and ANI, made during his testimony in A.01-12-013, the proceeding that resulted in the issuance of a CPCN to Blue Ridge. On page 6 of D.04-12-021 (the decision that conditionally granted the CPCN), we gave the following description of Koppy's testimony concerning the ownership of NOS and its affiliates:

> "Although Messrs. Arnau and Koppy are CEO and president, respectively, of NOS and the other companies named in I.02-05-01, neither of them owns any stock in these firms. Instead, 50% of the stock is owned by Robert Lichtenstein, 25% by Samuel Delug, and 25% by Delug's former wife, Rosette Delug. Lichtenstein is a director of NOS and the other companies, but Samuel Delug is not . . . Koppy testified that so far as he is aware, the FCC has brought no proceedings against

> either Lichtenstein or Samuel Delug . . .[7] Koppy also stated that no civil litigation has been brought against the NOS companies based on the conduct described in the FCC's Winback Order to Show Cause; all of the private litigation of which he is aware relates to the marketing of TCU plans. (*Mimeo.* at 20-21; footnote omitted.)

A second reason for approving the change of control sought here is that, as is usual in applications of this kind, we will require the four companies and Delug (who is a named applicant in this proceeding) to abide by all of the terms and conditions set forth in the CPCNs granted to NOS, ANI, Blue Ridge and NOSVA.[8] Conditioning our approval in this manner will help to ensure, as the application promises, that the change of control "will be completely transparent to the customers of the carriers," and "will not result in any change in the management of NOS, ANI, NOSVA or Blue Ridge." (Application, pp. 1-2.)[9]

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[7] However, paragraph 2(g) of the "Winback Consent Decree," which is described on pages 10 and 15-17 of D.04-06-017, includes both Lichtenstein and Delug in its definition of "affiliate."

[8] CPCNs were granted to the applicants in the following Commission decisions: D.92-02-007 (authorizing NOS to resell interLATA services in California); D.98-11-043 (authorizing NOS to resell local exchange services in the service territories of Pacific Bell and GTEC); D.91-03-012 (authorizing ANI to resell interLATA services in California); D.99-05-027 (authorizing ANI to resell local exchange services in the service territories of Pacific Bell and GTEC); D.94-11-059 (authorizing NOSVA to resell interLATA services within California and to terminate calls originating in California to all points in the United States and various international points); D.95-03-038 (authorizing NOSVA to offer intraLATA services); D.04-12-021 (conditionally granting CPCN to Blue Ridge to provide limited facilities-based and resold local exchange services); D.05-06-032 (holding that the condition in D.04-12-021 for issuance of Blue Ridge's CPCN had been satisfied.)

[9] In the joint application, NOS, ANI, NOSVA and Blue Ridge argue that (1) each of them is a non-dominant telecommunications carrier, (2) under D.86-08-057, the

Footnote continued on next page

Finally, as we observed in D.04-12-021 (the decision that conditionally granted a CPCN to Blue Ridge), we have ample authority under the Public Utilities Code to bring enforcement proceedings against, and impose appropriate penalties on, the applicant companies if it turns out that any of them have engaged in or authorized marketing abuses. (D.04-12-021, *mimeo.* at 11-12.) The penalties for such misconduct include fines, penalties, and suspension or revocation of CPCNs.

C. Assignment of Proceeding

Rachelle Chong is the Assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

D. Waiver of Comments on Proposed Decision

This is an uncontested matter in which no hearings were held and the Proposed Decision (PD) grants the relief requested. Accordingly, comments on the PD are waived pursuant to Rule 14.6 (c)(2) of the Commission's Rules of Practice and Procedure.

Commission's Executive Director is authorized "to approve certain noncontroversial applications by [such] carriers for authority to transfer assets or control under §§ 851-855 of the Public Utilities Code," and (3) such approval is appropriate here. While it is true that the Executive Director has been delegated authority under D.86-08-057 to approve uncontested transfers of control, the unusual regulatory history of NOS, ANI, and their affiliates before the FCC and this Commission makes such treatment inappropriate.

Findings of Fact

1. The joint application herein is unopposed.

2. Owing to the recent dissolution of his marriage, Delug currently owns 25% of the shares of NOS and ANI, and a 25% interest in Blue Ridge. In addition, Delug owns a 24.75% limited partnership interest in NOSVA, and 25% of the shares of NOS Virginia, the general partner of NOSVA.

3. Lichtenstein currently owns 50% of the shares of NOS and ANI and a 50% interest in Blue Ridge. In addition, Lichtenstein owns a 49.75% limited partnership interest in NOSVA, and 50% of the shares of NOS Virginia, the general partner of NOSVA.

4. According to the joint application, Delug effectively controls the management of the applicant companies, Lichtenstein has been a passive investor in them for many years, and Delug wishes to increase his ownership interest in a manner commensurate with his actual role in the management of the applicant companies.

5. If the proposed change of control receives all necessary regulatory approvals, Delug plans to purchase all of Lichtenstein's interests in the applicant companies, so that Delug would own 75% of the shares of NOS and ANI and a 75% interest in Blue Ridge. In addition, after the proposed change of control, Delug would own a 74.25% limited partnership interest in NOSVA, as well as a 75% interest in NOS Virginia, the general partner of NOSVA.

6. The above-noted purchases would be made pursuant to a stock purchase agreement and related agreements that comprise Exhibit A to the joint application. Applicants have filed these agreements under seal and have requested that they be treated as confidential pursuant to Pub. Util. Code § 583 and General Order (GO) 66-C.

7. In addition to the documents described in the preceding Finding of Fact (FOF), applicants have also filed under seal combined financial statements for NOS and its affiliates (Exhibit B), as well as a financial summary for Delug (Exhibit C).

8. In the joint application, applicants have disclosed the existence of a new FCC inquiry into (a) calls allegedly made by persons acting on behalf of NOS to numbers listed on the National Do Not Call Registry, and (b) other marketing practices. This new FCC inquiry has been assigned file number EB-05-TC-055.

9. The FCC has not decided whether to take enforcement action against NOS based on the conduct at issue in the new inquiry.

10. In A.05-12-007 and A.05-12-008, CPSD has entered into settlements with NOS and ANI that, if approved, would result in CPSD dropping its objections to the withdrawal of the two applications, which NOS and ANI have contended are unnecessary.

11. The statements in the application about the ownership interests of Delug and Lichtenstein in NOS, ANI, Blue Ridge and NOSVA are consistent with the testimony of Joseph Koppy, NOS's president, in A.01-12-013.

Conclusions of Law

1. A hearing is not necessary in this matter.

2. In view of this Commission's powers to impose appropriate penalties if any of the applicant companies are found to have engaged in unlawful marketing practices, the pendency of the new FCC inquiry into the marketing practices of NOS (file number EB-05-TC-055) is not a reason to delay or disapprove the change of control sought in the joint application.

3. The pendency of the settlements in A.05-12-007 and A.05-12-008, in which CPSD has agreed to drop its objection to the withdrawal of the two applications, and NOS and ANI have agreed to (a) stipulate that their failure to make certain disclosures in the applications constituted a Rule 1 violation, and (b) pay a $10,000 fine (all but $500 of which will be waived), is not a reason to delay or disapprove the change of control sought in the joint application.

4. The authority sought in the joint application should be granted, subject to the conditions set forth in this opinion.

5. The motion to file under seal Exhibits A, B and C to the joint application, pursuant to Pub. Util. Code § 583 and GO 66-C, should be granted to the extent set forth herein.

6. As a condition of granting the authority sought herein, the joint applicants should be required to abide by all of the terms and conditions set forth in the Commission decisions granting CPCNs to them, as well as by all terms and conditions set forth in the tariffs filed pursuant to such decisions.

7. This order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The joint application of NOS Communications, Inc. (NOS), Blue Ridge Telecomm Systems LLC (Blue Ridge), Affinity Networks Incorporated (ANI), NOSVA Limited Partnership (NOSVA), and Samuel P. Delug (Delug), for authorization to allow Delug to purchase the interests of Robert A. Lichtenstein (Lichtenstein) in NOS, Blue Ridge, ANI, and NOSVA, pursuant to the purchase agreement filed as part of Exhibit A to the joint application, is approved

pursuant to Pub. Util. Code § 854, subject to the terms and conditions set forth in the following Ordering Paragraphs (OPs).

2. The joint applicants shall be bound by all of the terms and conditions set forth in Commission decisions that have granted certificates of public convenience and necessity (CPCNs) to NOS, Blue Ridge, ANI, or NOSVA. Joint applicants shall also be bound by all other Commission decisions, rules, and General Orders that have modified or amended the requirements set forth in such decisions, including those arising out of Rulemaking (R.) 95-04-043/ Investigation (I.) 95-04-044 and R.00-02-004.

3. The joint applicants shall also be bound by the terms and conditions of all tariffs filed pursuant to the decisions referenced in OP 2.

4. The change of ownership approved herein qualifies for an exemption from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines § 15061(b)(3), so additional environmental review is not required.

5. The joint applicants' Motion for A Protective Order with respect to confidential material filed under seal as Exhibits A, B, and C to the Joint Application, which motion is dated June 22, 2006, is granted. The aforesaid materials should be placed under seal for a period of two years from the effective date of this decision, through and including December 1, 2008, and during that period the material so protected shall not be made accessible or disclosed to anyone other than Commission staff except upon the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. If the joint applicants believe that further protection of the aforesaid materials is needed after December 1, 2008, any one or more of them may file a motion stating the justification for further withholding of these materials from public inspection, or

for such other relief as the Commission's rules may then provide. Such a motion shall explain with specificity why the designated materials still need protection in light of the passage of time involved, and shall attach a clearly-identified copy of the ordering paragraphs of this decision to the motion. Such a motion shall be filed at least 30 days before expiration of the protective order set forth in this paragraph.

6. Application 06-06-022 is closed.

   This order is effective today.

   Dated _____, at San Francisco, California.