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Decision 04-12-021 December 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Blue Ridge Telecom Systems, LLC, For a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resold Local Exchange Services Within California.	Application 01-12-013 (Filed December 10, 2001)

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OPINION GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE LIMITED FACILITIES-BASED AND RESOLD LOCAL EXCHANGE TELECOMMUNICATION SERVICES

In this decision we grant the application of Blue Ridge Telecom Systems, LLC (Blue Ridge), a Delaware limited liability company, for a certificate of public convenience and necessity (CPCN) to provide limited facilities-based and resold local exchange telecommunications services within California.

As explained below, Blue Ridge is an affiliate of NOS Communications, Inc. (NOS), a Maryland corporation qualified to do business in California that holds CPCNs from this Commission authorizing it to offer resold inter-LATA

and local exchange services.[1] In the recently-issued D.04-06-017, the Commission gave conditional approval to a settlement between NOS (and certain of its affiliates) and the Consumer Protection and Safety Division (CPSD) arising out of Investigation (I.) 02-05-001. In that investigation, CPSD alleged that NOS and its affiliates had engaged in misleading marketing practices and cramming with respect to the sale of "Total Call Unit" (TCU) pricing plans for long distance service. As part of the settlement, the parties agreed that CPSD would withdraw the protest it had filed with respect to this matter, Application (A.) 01-12-013, so that the Commission could "resolve A.01-12-013 as an unopposed application." (D.04-06-017, Attachment A, page 1.)

While conditionally approving the settlement, the Commission noted in D.04-06-017 that it could not "accept the term in the settlement agreement that explicitly ties the settlement of I.02-05-001 to the Commission's agreement . . . to grant A.01-12-013 on an unopposed basis." (*Id.* at 24.) Instead, we directed Blue Ridge to file a supplement to its application within 30 days that would certify, if such a certification could be given, that "no investigation, administrative proceeding, or litigation has been commenced against, or directed at, Blue Ridge, NOS, ANI, or any of their respective affiliates in connection with the provision or marketing of local exchange service." (*Id.*) We also stated that if the assigned Administrative Law Judge (ALJ) was dissatisfied with the supplement in any

[1] The CPCN authorizing NOS to offer resold inter-LATA services was granted in Decision (D.) 92-02-007. "LATA" stands for Local Access and Transport Area, and interLATA services are those that relate to telecommunications originating in one LATA and terminating in another. California is divided into 10 LATAs. NOS was also granted a CPCN to offer resold local exchange service as a competitive local carrier (CLC) in D.98-11-043.

respect, "he or she shall have full discretion to require that the supplement be corrected or amended, or that a hearing be held to take evidence on the fitness of the applicants in A.01-12-013 to receive a CPCN" of the kind they had requested. (*Id.* at 24-25.)

Although NOS and the other respondents in I.02-05-001 filed an application for rehearing of D.04-06-017, Blue Ridge (which is controlled by the same individuals) did file the required supplement on June 21, 2004. At the direction of the assigned ALJ, a hearing was held on the application on July 19, 2004, at which testimony was received from Joseph Koppy, the president of NOS and also one of the key people who will be managing Blue Ridge.

Based on the June 21 supplement and Mr. Koppy's testimony, we are satisfied that it is reasonable to grant Blue Ridge the requested CPCN to provide limited facilities-based and resold local exchange services. Despite the two proceedings brought by the Federal Communications Commission (FCC) against NOS and its affiliates (due first to their marketing of TCU plans, and then to the "Winback Campaign"),[2] it seems clear that there have been no allegations of impropriety with respect to the provision or marketing of local exchange service by NOS or any of its affiliates in the 35 states where they currently offer such service. In view of this situation – as well as the requirements in the two FCC consent decrees and the substantial penalties this Commission could impose if Blue Ridge were to engage in improprieties with respect to local exchange service – we have decided to grant Blue Ridge the requested authority. Our

[2] The allegations in the FCC proceedings, and the terms of the consent decrees settling these proceedings, are described at pages 13-17 of D.04-06-017.

decision today may, as a practical matter, moot the application for rehearing of D.04-06-017 and enable the settlement in I.02-05-001 to go forward.

A. Background

As the caption indicates, this application was filed in December 2001, and requested that the CPCN be granted on an *ex parte* basis. On February 20, 2002, the Consumer Services Division (CSD), predecessor of CPSD, filed a protest.[3] The protest noted that Blue Ridge was under the same management as NOS, and that NOS had been named as a respondent or defendant in a number of regulatory proceedings and civil lawsuits due to allegedly misleading marketing practices. In view of this litigation, and the hundreds of complaints the Commission had received about NOS since 1999, CSD urged that *ex parte* relief should be denied, and that a hearing should be held on the Blue Ridge application. CSD did not suggest, however, that there were any reasons other than the fitness issues raised by the allegations of misleading marketing that might justify a denial of Blue Ridge's application.[4]

On May 2, 2002, the Commission issued the Order Instituting Investigation (OII) in I.02-05-001. With the commencement of that proceeding, the attention of Blue Ridge's management shifted to the investigation, and the instant application

[3] The protest was accompanied by a motion for leave to file it late, since the due date for protests was January 10, 2002. In a ruling dated March 19, 2002, the assigned ALJ granted CSD's motion.

[4] On March 11, 2002, Blue Ridge filed a reply to CSD's protest. In it, Blue Ridge purported to correct what it said were errors in the protest, and argued that "there simply is no good reason for reviewing and granting this application other than in accordance with the Commission's usual *ex parte* process." (Reply, p. 4.) Blue Ridge therefore requested that the protest be dismissed.

was put on the back burner, as a practical matter. Indeed, in D.02-07-045, which denied rehearing of the OII but modified some of its provisions, we directed that Ordering Paragraph (OP) 4 of the OII be amended to state that the Blue Ridge application was consolidated with the NOS investigation and that Blue Ridge was a party to the investigation, inasmuch as there were "common issues of fact and law in the two dockets, and because the outcome of [I.02-05-001] will determine the fitness of the applicant in A.01-12-013." (*Mimeo.* at 7.)

With the issuance of D.04-06-017, the decision conditionally approving the NOS settlement, the Blue Ridge application came back to life. As noted above, the first step in that process occurred on June 21, 2004, when Blue Ridge submitted the supplement required by D.04-06-017. The supplement consisted of an affidavit from Michael W. Arnau, the Chief Executive Officer (CEO) of NOS and the other settling companies in I.02-05-001, in which Mr. Arnau stated:

> "To the best of my knowledge, I hereby independently confirm that no litigation, investigation or administrative proceeding has been brought, or is pending, against or related to Blue Ridge; NOS Communications, Inc.; Affinity Network, Inc.; Nosva Limited Partnership; or any affiliate or dba of any of them in connection with the marketing and/or provision of local exchange services."[5]

[5] Mr. Arnau's declaration also stated that he had reviewed the status report on pending litigation attached to the respondents' April 26, 2004 comments on the draft decision in I.02-05-001, and that "to the best of my knowledge, the contents of the Status Report are true and correct."

B. The July 19, 2004 Hearing on the Application

The next step in the process of revitalizing the Blue Ridge application occurred on July 19, 2004, when a hearing was held on the application. Blue Ridge's only witness at the hearing was Joseph Koppy, the president of NOS and the man who, along with Mr. Arnau, had been identified in the application as one of Blue Ridge's principal managers. Except for a handful of clarification questions, all of the questioning at the July 19 hearing was conducted by the ALJ.

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. (Transcript, pp. 6-7.) Koppy testified that so far as he is aware, the FCC has brought no proceedings against either Lichtenstein or Samuel Delug. (*Id.* at 25-26.)[6] 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;[7] all of the private litigation of which he is aware relates to the marketing of TCU plans. (*Id.* at 20-21.)

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

[7] The formal citation for this order to show cause, which appears in footnote 8 of D.04-06-017, is *NOS Communications, Inc., Affinity Network Incorporated and NOSVA Limited Partnership,* Order to Show Cause and Notice of Opportunity for Hearing, EB Docket No. 03-96, 18 FCC Rcd 6952 (April 7, 2003).

Koppy also described the nature of the local exchange service offered by the NOS companies[8] and the marketing thereof. First, he stated that the NOS companies offer local exchange service in about 40 states, and that in 90% of these states the local service that is offered consists of a combination of resold service and facilities-based service (using the unbundled network element platform, or UNE-P.). (*Id.* at 9, 14.) The only local service that the NOS companies currently offer in California is resold service. (*Id.* at 9-10.)[9]

According to Koppy, the NOS companies currently have about 6000 local exchange customers nationwide, and all the marketing of local exchange service is done in-house. (*Id.* at 14, 28.) In late 2001 and early 2002, the NOS companies employed about 20 people who marketed local exchange service, but today all the marketing of such service is handled by a single person. (*Id.* at 28, 32.) This person (who operates from the company headquarters in Las Vegas) obtains his leads for new customers from the long distance marketing, or "cold call," staff.

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[8] At the July 19 hearing, Koppy confirmed that NOS has the following affiliates and doing-business-as (d/b/a) names: 011 Communications, International Plus, Internet Business Association (INETBA), I-Vantage Network and Cierracom Systems. (*Id.* at 8.) NOS and these entities are collectively referred to hereinafter as the "NOS companies," unless the context requires otherwise. Koppy also testified that of the companies named in the two FCC enforcement proceedings, only the NOS companies are tariffed or certified to provide local exchange service; neither ANI and its affiliates nor NOSVA Limited Partnership and its affiliates are authorized to provide such service. (*Id.* at 12-13.)

[9] On July 22, 2004, counsel for Blue Ridge, Thomas J. MacBride, Jr., sent a letter to the ALJ enclosing certain materials that had been requested at the July 19 hearing and providing more definite answers on points Koppy was unsure about. According to Mr. MacBride, the NOS companies offer local exchange service in 35 of the "lower" 48 states. In all of these states except California and Arizona, the local service is provided through a combination of resale and facilities-based arrangements, the latter using the UNE-P. Hereinafter, the July 22 letter will be referred to as the "MacBride letter."

Koppy stated that as the number of long distance customers of the NOS companies declined between 2000 and 2002, so did the number of local exchange customers. (Id. at 32-33.)[10]

According to Koppy, a principal reason the cold call staff declined during this period was that "it just became financially unfeasible for us to continue to try to sell cold call customers in the United States. Between the labor and the overhead and the drop in the retail price point and the competition, they weren't paying for themselves." (*Id.* at 33.)

As a result of these difficulties, the NOS companies have now outsourced their cold calling operations to a firm in Cairo, Egypt. Trial runs were conducted in Cairo beginning in November 2003, and full cold call operations were underway there by March 2004. (*Id.* at 27, 33.) The NOS management considers the cold calling staff in Cairo to be independent contractors, and they sell long distance service to customers in the United Kingdom and Australia as well as the United States. (*Id.* at 29-30.) Those who sell to the United States work off of standard marketing scripts devised in response to the consent decree that ended the FCC's TCU enforcement proceeding. (*Id.* at 30.) However, the cold call staff in Cairo does not sell local exchange service. Koppy stated that local exchange service is such a complex product that he thought it unlikely the Cairo marketers would be selling it in the foreseeable future. (*Id.* at 38.)

[10] Koppy also noted that cold calling and efforts to win former customers back are considered separate functions within the NOS companies, and that different staffs conduct these activities. However, depending on the companies' needs, some employees have moved from cold calling to the Winback Department, and vice versa. (*Id.* at 19.)

Koppy also testified that a significant fraction of the local exchange customers of the NOS companies receive a discount on this service. The company has a program called "Every Fourth Invoice Free," under which the customer receives a credit every fourth month equal to the average of the customer's monthly use during the three previous months. This promotion, which is in NOS's tariffs, is offered only when necessary to obtain a long distance customer's local exchange business. (*Id.* at 34-37.) The MacBride letter indicates that about 17% of the NOS companies' local exchange customers are on the Every Fourth Invoice Free program, while another 54% receive every sixth or ninth invoice "free."

Koppy conceded that the recent decision of the United States Court of Appeals in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), which invalidated significant portions of the FCC's most recent order on the UNE-P, has raised some doubts about the viability of Blue Ridge's business plan, but he still hopes that the company will be able to offer resold facilities-based service:

> "Q. In light of [the D.C. Circuit decision] and the fact that it may be difficult to purchase UNEs in California in the near future, . . . [d]o you still think it's feasible for you in California to be offering facilities-based local exchange service?
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> "A. Well, if UNE-P truly does go away, then it's probably not very likely that we would be able to provide facilities-based resale. But based upon what our regulatory counsel has told us, there is a chance that, albeit slight, that UNE-P may survive in some form." (*Id.* At 11-12.)

At the conclusion of the July 19 hearing, the application was deemed submitted.

C. Discussion

1. Blue Ridge's Fitness in View of the FCC Proceedings Brought Against Its Affiliates

Although we agree with the ALJ that it was appropriate to hold a hearing on Blue Ridge's fitness because of the two FCC enforcement proceedings described in D.04-06-017, we have concluded that these two proceedings do not preclude the issuance of a CPCN in this case. As noted above, the June 21, 2004 declaration of Michael Arnau, the CEO of NOS and one of Blue Ridge's principal managers, states unambiguously that no litigation, investigation or administrative proceeding has been brought, or is pending against or related to, Blue Ridge, NOS or any of their respective affiliates in connection with the marketing or provision of local exchange services. In view of this statement, which Koppy reaffirmed on the witness stand (*id.* at 23-24), we think that granting a CPCN to Blue Ridge for the authority sought here is unlikely to lead to a Commission enforcement action against the company in the near future.

Moreover, even though the NOS companies have joined in an application for rehearing of D.04-06-017, we are pleased that they sent one of their most senior officers, Mr. Koppy, to testify at the Blue Ridge hearing. His appearance at the hearing, and the direct way in which he answered the questions put to him, reinforce our belief that granting the authority sought here is unlikely to be a prelude to charges of deceptive marketing down the line.

The two reports to the FCC included with the MacBride letter also support this conclusion. For example, the January 27, 2004 letter from the NOS companies' counsel to David Solomon, Chief of the FCC's Enforcement Bureau, states that the companies have received no customer complaints in connection with their compliance with the Winback Consent Decree, nor have any employees been disciplined for infractions of the Code of Conduct that the

companies agreed to implement as part of the Winback Consent Decree. The "Network Analyst/Winback Code of Conduct" and other training materials accompanying the January 27, 2004 letter suggest that the NOS companies take their responsibilities under the FCC consent decrees seriously.

In addition to the reports submitted to the FCC as a result of the two consent decrees, another reason for thinking that the risk of deceptive marketing by Blue Ridge is small is the breadth of the prohibitions against such conduct set forth in the Public Utilities Code and in our recently-promulgated General Order (GO) 168, which sets forth the rules governing telecommunications consumer protection. Pub. Util. Code §2896(a), for example, requires telephone corporations to provide service to customers that includes, among other things, "sufficient information upon which to make informed choices among telecommunications services and providers," including "information regarding the provider's identity, service options, pricing, and terms and conditions of service." Similarly, Pub. Util. Code § 2889.5(a)(1) prohibits any telephone corporation from making a change in the provider of a competitive telephone service, including local exchange service, unless and until "the telephone corporation, its representatives or agents [have] thoroughly inform[ed] the subscriber of the nature and extent of the service being offered."

Rule 1(d)(2) in GO 168 requires every carrier to provide subscribers or members of the public with "a description of the carrier's service offerings that relate to the customer's inquiry and are currently open to individual or small business subscribers in California, and the applicable key rates, terms and conditions." Rule 2(a) of GO 168 provides that "any offer by a carrier that is deceptive, untrue or misleading is prohibited," and that "statements about rates and services that are deceptive, untrue or misleading are prohibited." Rule 2(d)

requires that "when disclosure of qualifying information (including key rates, terms and conditions) is necessary to prevent an offer from being deceptive, untrue or misleading, that information shall be clear and conspicuous."[11]

The penalties that can be imposed for violations of these obligations are substantial. Under Pub. Util. Code § 2107, a penalty of up to $20,000 can be imposed on a public utility for violation of a Code provision or Commission rule or order unless a different penalty is prescribed. Under § 2108, every violation of a Code provision or Commission rule or order "is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

In its June 21, 2004 comments on the Blue Ridge supplement, CPSD – which now supports issuance of the CPCN -- states that "in order to ensure that California customers are protected from improper behavior, if Blue Ridge is granted operating authority by the Commission, CPSD will monitor Blue Ridge for customer complaints and marketing abuse . . ." In our opinion, the penalty provisions in §§ 2107-2108 and CPSD's promise of vigilance, taken together, reduce the risk that granting a CPCN in this case will lead to litigation over Blue Ridge's marketing practices in the future.

Although we have concluded that the two FCC proceedings should not preclude the issuance of a CPCN in this case, we expect Blue Ridge to cooperate fully with any data requests it receives from CPSD (or other members of our

[11] In language similar to Pub. Util. Code § 2896(a), Rule 3(b) of GO 168 also states that "carriers shall provide consumers initiating a service with sufficient information to enable consumers to make informed choices among services, and shall clearly and conspicuously disclose in the course of the sale transaction the customer's right to cancel a term contract. In an oral transaction, the right should be disclosed as well."

staff) pursuant to Pub. Util. Code § 314(a), which confers authority on "the commission, each commissioner, and each officer and person employed by the commission" to "inspect the accounts, books, papers and documents of any public utility," and to "examine under oath any officer, agent, or employee of a public utility in relation to its business and affairs."[12] As we recently stated in D.04-09-061, the authority granted under §314 to obtain information relating to a public utility's affairs -- even in the absence of a specific proceeding -- is plenary, and is limited only by the utility's right in appropriate circumstances to invoke the attorney-client privilege, or to request that confidential and proprietary information be kept under seal pursuant to Pub. Util. Code § 583. (*Mimeo.* at 107-116.)[13]

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[12] Under § 314(b) of the Code, our authority also extends to "inspections of the accounts, books, papers, and documents of any business which is a subsidiary or affiliate of, or of a corporation which holds a controlling interest in, an electrical, gas, or telephone corporation with respect to any transaction between the electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the electrical, gas, or telephone corporation."

[13] In the Proposed Decision (PD) mailed to the parties on October 14, 2004, the assigned ALJ conditioned the issuance of a CPCN on Blue Ridge's agreement to conduct all of its marketing from within the United States for a period of three years. After noting that Koppy had not ruled out the possibility that Blue Ridge might eventually market its local exchange services from Egypt or another foreign country, the PD stated:

> "Because of the difficulties that might be experienced in obtaining jurisdiction over the persons and documents of marketers if Blue Ridge were to begin marketing its local exchange service from outside the United States, we will require, as a condition of granting the authority requested here, that for the first three years after the CPCN is granted, all persons who market local exchange service on behalf of Blue Ridge shall be employees of that company or of a Blue Ridge affiliate holding a CPCN from this Commission, and that all of Blue Ridge's marketing of local

Footnote continued on next page

2. Blue Ridge's Ability to Meet the Other Requirements for CLC Certification

As noted in the introduction, there is no suggestion in CPSD's protest that Blue Ridge does not meet the other criteria laid out in our prior decisions for applicants wishing to operate as facilities-based CLCs. For example, to be

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> exchange services be conducted from within the United States. For the first three years after the issuance of the CPCN, we will also require Blue Ridge to file semi-annual reports stating the number of persons who market local exchange services on its behalf, as well as the names of such persons." (PD, pp. 12-13.)

In the opening comments it filed on November 3, 2004, Blue Ridge strongly objected to these conditions, and made clear that their retention would not assist in bringing the related NOS proceeding, I.02-05-001, to a negotiated conclusion:

> "The PD prohibits Blue Ridge from employing marketing operations outside the United States for three years. Moreover, it is to provide[] a semi-annual enumeration and identification of all employees engaged in marketing local service. We are unaware that any other CLEC in the nation is subject to such restrictions. The operating restrictions are unsupported by any finding in the PD. Even though Blue Ridge may not presently desire to locate its marketing operations outside the US, it may in the future wish to join the other carriers that do so. The imposition of the conditions is stigmatic, unreasonable and tantamount to a denial of the application. The conditions should be removed." (Blue Ridge Opening Comments, p. 2; footnotes omitted .)

Blue Ridge's comments also stated that CPSD's powers under Pub. Util. Code § 314 were sufficient to enable it to review any documents that staff deemed necessary, and that "[n]o certified entity, least of all Blue Ridge, harbors any illusion that it can refuse to respond to data requests submitted by CPSD simply because the documents requested are not located in California or the United States."" (*Id.* at 8.)

After reviewing D.04-09-061, D.01-08-062 and other recent authorities discussing our powers and those of our staff to obtain information under §314, we agree with Blue Ridge that it is unnecessary to require that all marketing of the company's services be conducted from within the United States for the first three years after a CPCN is granted.

granted a CPCN authorizing the provision of facilities-based local exchange service, an applicant must demonstrate that it has $100,000 in cash or cash equivalents to meet the firm's start-up expenses. The applicant must also demonstrate that it has sufficient additional resources to cover all deposits that might be required by other telecommunications carriers.[14]

The instant application states that Blue Ridge expects to operate initially under the interconnection agreement between Pacific and MCIMetro, and that under that agreement, the amount of the deposit it would be required to pay would be $17,000. Based upon the financial showing set forth in Exhibit E to the application (an exhibit that Blue Ridge has moved to keep under seal), it is clear that the company will be able to meet the financial requirements that our decisions impose on applicants for facilities-based CLC authority.

In addition to a showing of financial responsibility, applicants for CLC authority are also required to demonstrate that they have the necessary technical competence in telecommunications, and that they have the requisite managerial qualifications. (D.95-12-056, Appendix A, Rule 4.A.) Based on their success in running the NOS companies, it is evident that Messrs. Arnau and Koppy, who will lead Blue Ridge's proposed management team, have the necessary skills.

To meet the requirements for CLC certification set forth in D.95-12-056, applicants are required to indicate whether anyone associated with or employed by them as an officer, director, partner, affiliate or owner of more than 10% of the company has been sanctioned by the FCC or by any state regulatory agency for failure to comply with any regulatory statute, rule or order.

[14] The financial standards for certification to operate as a CLC are set forth in D.95-12-056, Appendix C, Rule 4.B.

Although the applicant has represented that no one associated with it falls into these categories, it is only because – as explained above – the two FCC proceedings brought against Blue Ridge's affiliates (NOS, Affinity Network, Inc. (ANI) and NOSVA Limited Partnership) have resulted in consent decrees rather than "sanctions." Nonetheless, for the reasons stated previously, the conduct of the NOS companies since the two FCC matters were settled gives us a reasonable degree of assurance that the companies' alleged problems with misleading marketing practices are a thing of the past, and not likely to recur.

Three final points deserve comment. First, since the Commission relaxed the standards for obtaining authority to operate as a non-dominant interexchange carrier (NDIEC) in D.90-08-032, applicants for such authority (and later, CLC authority) are required to state in their applications whether any member of their management team has previously been associated with an NDIEC that went bankrupt.[15] On this question, the instant application states that in 1995, NOS and ANI jointly filed voluntary petitions under Chapter 11 of the Bankruptcy Code in connection with then-pending litigation against AT&T. The Chapter 11 proceedings did not last long, however. A joint plan of reorganization was confirmed in late 1995, and the two bankruptcy cases were closed in September 1997.

NOS disclosed the same information about its Chapter 11 filings in A.98-08-043, in which it sought authority to provide resold local exchange

[15] These representations apparently began to appear in response to the concerns we expressed in D.90-02-019 that because of inadequate capitalization, an increasing number of NDIECs were having to seek bankruptcy protection, and that these bankruptcies were imposing hardship on both NDIEC customers and their underlying carriers. (*Mimeo.* at 19-21.)

services as a CLC. We granted the application in D.98-11-043, noting that "NOS [has] represented in its application that it is now financially sound." (*Mimeo.* at 3.) On the basis of this representation and the company's financial statements, we concluded that NOS possessed the financial resources necessary for CLC operation. In view of the financial success that NOS, ANI and their affiliated companies have apparently enjoyed since 1998, we see no reason to reach a different conclusion with respect to their affiliate, Blue Ridge.

The second issue that deserves mention is the question of construction permits, which raises the issue of compliance with the California Environmental Quality Act (CEQA). On this question, the application states that Blue Ridge will be "provid[ing] its services using facilities and services of other carriers, or its own facilities, which Applicant will install in existing structures." Based on this plan, Blue Ridge requests we find that "no material environmental impacts will result from Applicant's proposed activities because no external construction will be involved." (Application, Exhibit B.)

CEQA requires the Commission as the designated lead agency to assess the potential environmental impacts of a project so that adverse effects can be avoided, alternatives investigated, and environmental quality restored or enhanced to the fullest extent possible. Since Blue Ridge states that it will not be constructing any facilities to provide local exchange service except for equipment to be installed in existing buildings or structures, it can be seen with certainty that there is no possibility that granting this application will have an adverse impact upon the environment. If in the future Blue Ridge wishes to construct any facilities other than equipment to be installed within existing buildings or structures, then applicant will have to file for additional authority and submit to any necessary CEQA review.

The third point that should be mentioned is the issue of tariffs. Blue Ridge submitted a draft tariff as Exhibit D to its application. Commission staff has reviewed this draft tariff for compliance with Commission rules and regulations and has found certain deficiencies that are noted in Attachment A to this decision. In its compliance tariff filing, Blue Ridge is directed to correct these deficiencies as a condition of obtaining Commission approval of its tariff. Blue Ridge's compliance tariff filing should also include any language necessary to

cover the "Every Fourth Invoice Free" program, as well as similar promotional programs.[16]

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[16] In the comments it filed on the PD on November 3, 2004, CPSD not only joined Blue Ridge in objecting to the imposition of the three-year marketing restriction on the company, but also expressed concern that the PD did not clearly address the status of the settlement in the NOS proceeding, and in particular whether "issuing a CPCN to Blue Ridge is contingent on NOS' adherence to the settlement agreement." (CPSD Comments, p. 3.) Elaborating on this point, CPSD stated:

> "NOS has expressed a willingness to abide by the terms of the settlement if the Commission did end up granting the Blue Ridge application as was intended when the parties drafted the settlement. The PD states that it 'may, as a practical matter, moot the application for rehearing of D.04-06-017 and enable the settlement in I.02-05-001 to go forward.' (PD, p.3) What remains unresolved is the fundamental question of whether the PD holds that NOS is bound by the settlement because the Blue Ridge application has been granted with conditions." (*Id.* at 4-5.)

In its November 5, 2004 reply comments, Blue Ridge takes issue with CPSD's characterization of the status of the NOS settlement:

> "At the present time there is no pending settlement agreement. That agreement was rejected by the Commission when it elected not to process the Blue Ridge application on an unopposed basis. Moreover, pursuant to the terms of that agreement Blue Ridge has withdrawn from it. Blue Ridge and CPSD, however, would still like to settle this matter. Accordingly, a new settlement agreement may be resubmitted if this matter is resolved in a fashion consistent with the terms of the original Blue Ridge/CPSD agreement." (Blue Ridge Reply Comments, pp. 2-3; emphasis in original.)

In a footnote elaborating upon this last suggestion, Blue Ridge continues:

> "Since the granting of the Blue Ridge application is envisioned in the now withdrawn settlement in I.02-05-001, the Commission may want to make the effective date of an order granting a CPCN to Blue Ridge coordinate with the date of an order approving a settlement in I.02-05-001. *Blue Ridge would not oppose such a condition.* It would be consistent with the intent of the settlement agreement filed last December." (*Id.* at 3, n. 1; emphasis supplied.)

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D. Comments on Proposed Decision

The proposed decision of ALJ McKenzie in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Commission's Rules of Practice and Procedure. The applicant and CPSD submitted comments on the PD on November 3, 2004, and applicant submitted reply comments on November 5, 2004. In response to these comments, footnotes 13 and 16 and accompanying text have been added to the discussion section of this decision, and other small changes to the decision have also been made.

E. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

F. Categorization and Need for Hearings

By Resolution ALJ 176-3079 dated January 19, 2002, the Commission preliminarily designated this application to be ratesetting and determined that a hearing was not necessary. However, as noted in the text, the assigned ALJ determined, pursuant to the discretion granted him by Conclusion of Law 11 in D.04-06-017, that a hearing was necessary.

Findings of Fact

1. A notice of the filing of the instant application appeared in the Daily Calendar on December 14, 2001.

In view of this statement, we have revised the decision herein to provide that the effective date of this order shall be the same as the effective date of the order, if any, approving a new settlement in I.02-05-001. To give the parties an incentive to bring I.02-05-001 to a conclusion, we have retained the usual language that the authority granted herein shall lapse if not exercised within one year.

2. On March 19, 2002, the assigned ALJ granted CSD's motion to submit a late-filed protest to the application.

3. In D.02-07-045, the Commission consolidated this application with I.02-05-001 and made Blue Ridge a party to I.02-05-001.

4. In D.04-06-017, the Commission conditionally approved a settlement concerning I.02-05-001 between CPSD, on the one hand, and NOS, ANI and NOSVA Limited Partnership, on the other. As a condition of approving the settlement, Conclusion of Law (COL) 9 of D.04-06-017 required that Blue Ridge agree to submit a supplement to this application within 30 days.

5. Blue Ridge filed the supplement required by D.04-06-017 on June 21, 2004. The supplement took for the form of a declaration by Michael W. Arnau, CEO of NOS and one of the principal managers of Blue Ridge.

6. In the June 21, 2004 declaration, Arnau stated that to the best of his knowledge, no litigation, investigation or administrative proceeding has been brought, or is pending, against or related to Blue Ridge, NOS, ANI, NOSVA Limited Partnership or any affiliate or dba of any of them, in connection with the marketing and/or provision of local exchange services.

7. Pursuant to section 7.3 of the settlement agreement described in Finding of Fact (FOF) 4, NOS and the other respondents named in I.02-05-001 filed a written objection on June 29, 2004 to the modifications of the settlement agreement required by D.04-06-017. Since this written objection was not withdrawn within 10 days, respondents consider the settlement agreement to have been rescinded pursuant to its terms.

8. A hearing on this application was held on July 19, 2004, at which the sole witness was Joseph Koppy, the president of NOS and one of the principal managers of Blue Ridge.

9. At the hearing, Koppy testified that to the best of his knowledge, no litigation, investigation or administrative proceeding has been brought, or is pending, against or related to Blue Ridge, NOS, ANI, NOSVA Limited Partnership or any affiliate or dba of any of them, in connection with the marketing and/or provision of local exchange services.

10. According to Koppy, NOS and/or its affiliates offer local exchange services in 35 states. In all of these states except California and Alaska, local exchange service is provided using a combination of resold and facilities-based arrangements, the latter employing the UNE-P.

11. NOS and its affiliates now have about 6000 local exchange customers nationwide.

12. Since early 2004, all of the marketing of the long-distance service offered by the NOS companies (marketing that is known as "cold calling") has been conducted by a contractor located in Cairo, Egypt.

13. All of the marketing of local exchange service to the customers of NOS and its affiliates is done by a single person, who operates out of NOS's headquarters in Las Vegas, Nevada.

14. Koppy testified that because of the complexities of local exchange service as a product, it is unlikely that in the foreseeable future, the marketing of local exchange service by Blue Ridge or any other NOS affiliate will be conducted from outside the United States.

15. Fifty percent (50%) of NOS's stock is owned by Robert Lichtenstein, 25% by Samuel Delug, and 25% by Delug's former wife, Rosette Delug. Neither Koppy nor Arnau own any NOS stock.

16. So far as Koppy is aware, no civil litigation has been commenced against either Robert Lichtenstein or Samuel Delug in connection with either NOS's use

of TCU calling plans, or the Winback Campaign that is the subject of the Winback Order to Show Cause described in D.04-06-017.

17. On July 22, 2004, counsel for Blue Ridge sent to the assigned ALJ copies of the status reports to the FCC that are required by the TCU Consent Decree and the Winback Consent Decree, as described in D.04-06-017.

18. In prior decisions, this Commission has authorized competition in providing local exchange telecommunications services within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), Citizens Telecommunications Company of California, Inc. (CTC), and SureWest Telephone (SureWest).

19. Blue Ridge has a minimum of $100,000 in cash or cash equivalents that are reasonably liquid and readily available to meet applicant's start-up expenses.

20. Blue Ridge has sufficient additional cash or cash equivalents to cover any deposits that may be required by other telecommunications carriers in order to provide the proposed local exchange service.

21. Blue Ridge's management possesses sufficient experience and knowledge to provide local exchange services to the public.

22. The absence of litigation, investigations or administrative proceedings concerning the local exchange service furnished by the NOS companies, coupled with the apparent absence of complaints about the NOS companies' marketing of long distance service since approval by the FCC of the Winback Consent Decree, indicates that the management of Blue Ridge, which will be the same as that of the NOS companies, has sufficient integrity so as to be fit to render the services proposed here.

23. As part of its application, Blue Ridge submitted a draft of its initial tariff that contained the deficiencies identified in Attachment A to this decision.

Except for these deficiencies and any language necessary to cover the "Every Fourth Invoice Free" program (as well as similar promotional programs), Applicant's draft tariffs comply with the Commission's requirements.

24. In order to provide the proposed services, Blue Ridge does not plan to construct any facilities except for equipment to be installed within existing buildings or structures.

25. Public disclosure of the financial information filed under seal would place Blue Ridge at an unfair business disadvantage.

Conclusions of Law

1. Blue Ridge has the financial ability to provide the proposed service.

2. Blue Ridge has made a reasonable showing of technical expertise in telecommunications.

3. Public convenience and necessity require the competitive local exchange services to be offered by Blue Ridge, subject to the terms and conditions set forth herein.

4. The application should be granted to the extent set forth below.

5. Blue Ridge, once granted a CPCN, should be subject to the applicable Commission rules, decisions, General Orders, and statutes that pertain to California public utilities.

6. Blue Ridge's initial tariff filing should correct the deficiencies noted in the draft tariffs submitted with the application (as set forth in Attachment A to this decision), and should add language necessary to cover the "Every Fourth Invoice Free" program, as well as any similar promotional programs.

7. Since Blue Ridge does not propose to construct any facilities except for equipment to be installed within existing buildings or structures, it can be seen

with certainty that granting Blue Ridge authority to offer the proposed services will not have a significant adverse effect upon the environment.

8. Blue Ridge's request to file its financial information under seal should be granted for a period of two years.

9. Because of the public interest in competitive local exchange services, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. On the same date, if any, that the Commission issues a decision approving a settlement agreement in Investigation (I.) 02-05-001 that supersedes the settlement agreement submitted by the parties therein on December 9, 2003, a certificate of public convenience and necessity (CPCN) shall be granted to Blue Ridge Telecom Systems, LLC (Applicant) to provide limited facilities-based and resold local exchange services in the service territories of Pacific Bell Telephone Company, Verizon California Inc., Citizens Telecommunications Company of California, Inc., and SureWest Telephone, subject to the terms and conditions set forth below.

2. Upon the granting of a CPCN as described in Ordering Paragraph (OP) 1, Applicant shall be authorized to file tariff schedules for the provision of competitive local exchange services. Applicant may not offer competitive local exchange services until tariffs are on file. Applicant's initial filing shall be made in accordance with General Order (GO) 96-A, excluding Sections IV, V, and VI, and shall correct the deficiencies noted in Attachment A. The tariff shall be effective not less than one day after approval by the Commission's Telecommunications Division. Applicant shall comply with its tariffs.

3. The certificate granted and the authority to render service under the rates, charges, and rules authorized herein will expire if not exercised within 12 months after the effective date of this order.

4. The corporate identification number assigned to Applicant, U-6925-C, shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

5. Applicant shall comply with all applicable rules adopted in the Local Exchange Competition proceeding (Rulemaking 95-04-043/Investigation 95-04-044), as well as all other applicable Commission rules, decisions, GOs and statutes that pertain to California public utilities, subject to the exemptions granted in this decision.

6. Applicant shall comply with the requirements applicable to competitive local exchange carriers included in Attachment B to this decision.

7. Except for equipment to be installed within existing buildings or structures, Applicant is not authorized to construct facilities.

8. Applicant's request to have the financial information filed with this application kept under seal is granted for a period of two years from the effective date of this decision. During that period, the information shall not be made accessible or disclosed to anyone other than the Commission staff except on 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.

9. If Applicant believes that further protection of the information kept under seal is needed, it may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as the Commission's rules may then provide. This motion shall be filed no later

than one month before the expiration date of the two-year period referred in OP 10.

10. The Commission preliminary determined that hearings would not be required in this proceeding. Hearings were held and the preliminary determination has been changed from no to yes.

11. This proceeding is closed.

This order is effective today.

Dated December 2, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to file a dissent.

/s/ CARL W. WOOD
Commissioner

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
Commissioner

ATTACHMENT A

List of deficiencies in tariff filed by Blue Ridge Telecom Systems, LLC in Application 01-12-013 to be corrected in its tariff compliance filing.

1. Sheet 25, Rule 13: State in the tariff that CLC shall concur with Pacific Bell's Limitation of Liability tariffs regarding credit for interruptions. Refer to Decision 95-12-057.

2. Sheet 45: Include the fee and surcharges shown in Attachment B to this decision.

(END OF ATTACHMENT A)

ATTACHMENT B

REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS

1. Applicant shall file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.

2. Applicant is subject to the following fee and surcharges that must be regularly remitted per the instructions in Appendix E to Decision (D.) 00-10-028. The Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is zero.

   a. The current 1.10% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-16795, dated December 18, 2003, effective January 1, 2004);

   b. The current 0.30% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-16816, dated January 22, 2004, effective February 1, 2004);

   c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.11% of gross intrastate revenue (Resolution M-4810);

   d. The current 0.17% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-16793, dated December 18, 2003, effective January 1, 2004);

   e. The current 2.20% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F.,

Resolution T-16794, dated December 18, 2003, effective January 1, 2004); and

f. The current 0.16% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G, Resolution T-6833, dated July 8, 2004, effective August 1, 2004.)

3. Applicant is a competitive local exchange carrier (CLC). The effectiveness of its future tariffs is subject to the schedules set forth in Appendix C, Section 4.E of D.95-12-056:

> "E. CLCs shall be subject to the following tariff and contract filing, revision and service pricing standards:
>
> "(1) Uniform rate reductions for existing tariff services shall become effective on five (5) working days' notice. Customer notification is not required for rate decreases.
>
> "(2) Uniform major rate increases for existing tariff services shall become effective on thirty (30) days' notice to the Commission, and shall require bill inserts, or first class mail notice to customers at least 30 days in advance of the pending rate increase.
>
> "(3) Uniform minor rate increases, as defined in D.90-11-029, shall become effective on not less than (5) working days' notice to the Commission. Customer notification is not required for such minor rate increases.
>
> "(4) Advice letter filings for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days' notice.

> "(5) Advice letter filings revising the text or location of text material which do not result in an increase in any rate or charge shall become effective on not less than five (5) days' notice to the Commission."
>
> "(6) Contracts shall be subject to GO 96-A rules for NDIECS, except interconnection contracts.
>
> "(7) CLCs shall file tariffs in accordance with PU Code § 876."

4. Applicant may deviate from the following provisions of GO 96-A: (a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers; and (b) paragraph II.C.(4), which requires that "a separate sheet or series of sheets should be used for each rule." Tariff filings incorporating these deviations shall be subject to the approval of the Commission's Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in 2 above.

5. Applicant shall file a service area map as part of its initial tariff.

6. Prior to initiating service, Applicant shall provide the Commission's Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information shall be updated if the name or telephone number changes, or at least annually.

7. Applicant shall notify the Director of the Telecommunications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.

8. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.

9. In the event Applicant's books and records are required for inspection by the Commission or its staff, it shall either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.

10. Applicant shall file an annual report with the Director of the Telecommunications Division, in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

11. Applicant shall file an affiliate transaction report with the Director of the Telecommunications Division, in compliance with D.93-02-019, on a calendar year basis using the form contained in Attachment D.

12. Applicant shall ensure that its employees comply with the provisions of Public Utilities (Pub. Util.) Code § 2889.5 regarding solicitation of customers.

13. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of its compliance.

14. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in 2 above, the Telecommunications Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN unless it has received written permission from the Telecommunications Division to file or remit late.

15. Applicant is exempt from General Order 96-A, subsections III.G(1) and (2), and Commission Rule of Practice and Procedure 18(b).

16. Applicant is exempt from Pub. Util. Code §§ 816-830.

17. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.

18. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Telecommunications Division's Bankruptcy Coordinator.

19. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from the date of this order.

(END OF ATTACHMENT B)

ATTACHMENT C

ANNUAL REPORT

An original hard copy, and a machine-readable electronic copy, on a CD or floppy disk using Microsoft Word or a compatible format, shall be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3107, San Francisco, CA 94102-3298. The filing shall be made no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Public Utilities Code.

Required information:

1. Exact legal name and U # of the reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).

   If incorporated, specify:

   a. Date of filing articles of incorporation with the Secretary of State.
   b. State in which incorporated.
6. Number and date of the Commission decision granting the CPCN.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. List of all affiliated companies and their relationship to the utility. State if affiliate is a:

   a. Regulated public utility.
   b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.

11. Income statement for California operations for the calendar year for which information is submitted.

For answers to any questions concerning this report, call (415) 703-2883.

(END OF ATTACHMENT C)

ATTACHMENT D

CALENDAR YEAR AFFILIATE TRANSACTION REPORT

1. Each utility shall list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction report.

- Form of organization (e.g., corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (e.g., controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership)'
- Voting rights held by the utility and percent;
- Corporate officers.

2. The utility shall prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (e.g. a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels Any regulated subsidiary should be clearly noted.

3. For a utility that has individuals who are classified as "controlling corporations" of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either a) is a public

utility or b) transacts any business with the utility filing the annual report excluding the provision of tariffed services.

4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Section I-F of Decision 93-02-019.

6. Utilities that do no have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT D)