

Decision 07-05-060 May 24, 2007

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of NOS  
Communications, Inc. for Registration as an  
Interexchange Carrier Telephone Corporation  
Pursuant o the Provisions of Public Utilities Code  
Section 1013.

Application 05-12-007  
(Filed December 6, 2005)

In the Matter of the Application of Affinity  
Networks Incorporated, d/b/a/ HorizonOne  
Communications, QuantumLink  
Communications, VoiP Communications, Optic  
Communications and/or ANI Networks for  
Registration as an Interexchange Carrier  
Telephone Corporation Pursuant o the Provisions  
of Public Utilities Code Section 1013.

Application 05-12-008  
(Filed December 6, 2005)

(See Appendix A for a List of Appearances.)

**OPINION ADOPTING SETTLEMENT AGREEMENT**

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**OPINION ADOPTING A SETTLEMENT AGREEMENT  
THAT LEVIES A FINE FOR VIOLATING RULE 1**

**1. Summary**

This opinion adopts an uncontested Settlement Agreement in which NOS Communications, Inc. (NOS) and Affinity Networks Incorporated (ANI) agree to pay a fine of \$10,000 for violating Rule 1 of the Commission's Rules of Practice and Procedure (Rule 1). Of this amount, \$9,500 is suspended and will be waived provided there are no further violations of Rule 1 by NOS or ANI during the two years following submission of the Settlement Agreement.

Applications (A.) 05-12-007 and A.05-12-008 are consolidated into one proceeding for the purpose of addressing the Settlement Agreement, identical versions of which were submitted in both dockets. The consolidated proceeding is closed.

**2. Procedural Background and Chronology**

NOS and ANI share common ownership and management. Each company has its own certificate of public convenience and necessity to provide resold intrastate telephone service in California.

In May 2002, the Commission issued Order Instituting Investigation (I.) 02-05-001 to investigate allegations that NOS and ANI (collectively, NOS/ANI) had engaged in slamming in violation of Calif. Pub. Util. Code § 2889.5.<sup>1</sup> The parties settled the matter, and the settlement was approved with modifications in D.04-06-017. Because NOS and ANI objected to some of the required

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

modifications, the settlement agreement approved in D.04-06-017 was rescinded pursuant to its terms. After further proceedings, NOS, ANI, and the Consumer Protection and Safety Division (CPSD) then entered into a revised settlement agreement that was approved in D.05-06-032. This agreement required NOS/ ANI, among other things, to make a \$2.9 million settlement payment to the Commission over a 24-month period (as well as provide \$50,000 for restitution payments to affected customers), and to disclose, in any application filed pursuant to §§ 851-854, 1001, or 1013, the facts that (a) I.02-05-001 had been issued and settled pursuant to the settlement agreement, and (b) the relationship between the applicant and I.02-05-001.<sup>2</sup>

In December 2005, NOS and ANI filed A.05-12-007 and A.05-12-008, respectively, to expand their authority to include facilities-based carriage. NOS and ANI filed their applications using the Commission's short-form registration procedures. However, NOS and ANI did not disclose in their applications the fact that I.02-05-001 had been issued and settled, as required by D.05-06-032. Further, in response to short-form registration question no. 8, NOS and ANI did not disclose that their certification in the State of Wisconsin had been revoked in May 2001 owing to noncompliance with certain rules in the Wisconsin Administrative Code.<sup>3</sup>

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<sup>2</sup> D.04-06-017, Ordering Paragraph 8.

<sup>3</sup> Question no. 8 requires applicants to answer the following statement as true or false: "To the best of applicant's knowledge, neither applicant, any affiliate, officer, director, partner, nor owner of more than 10% of applicant... has been sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with an regulatory statute, rule or order."

CPSD filed protests in A.05-12-007 and A.05-12-008, asserting that NOS/ANI had failed to make the disclosures described above. On January 20, 2006, NOS/ANI filed responses to the protests stating that their failure to make the disclosures required by the settlement agreement approved in D.05-06-032 had been inadvertent, and that this failure had been rectified in a letter to the Executive Director dated January 5, 2006. In their responses, NOS/ANI also stated that they had not disclosed the Wisconsin proceeding against them in response to question no. 8 because they believed this matter had been investigated by the Commission in I.02-05-001 and resolved by the settlement agreement adopted in D.05-06-032.

NOS/ANI also contended that the issues raised by CPSD were moot because, after further review, NOS/ANI realized that they did not need to file A.05-12-007 and A.05-12-008 in order to provide facilities-based service. On February 10, 2006, NOS and ANI filed notices that they were withdrawing their Applications. On February 22, 2006, CPSD filed a response objecting to the withdrawals, arguing that the Commission should authorize the withdrawals only after finding that NOS/ANI had violated Rule 1 by failing to disclose the facts described above.

On May 3, 2006, CPSD and NOS/ANI jointly filed in A.05-12-007 and A.05-12-008 a Settlement Agreement and Motion to adopt the Settlement Agreement. A copy of this Settlement Agreement is set forth in Appendix B to today's Opinion.

Because CPSD and NOS/ANI (collectively, the Settling Parties) are the only parties in the two proceedings, they did not hold a settlement conference

under Rule 12.1(b).<sup>4</sup> For the same reason, there were no comments submitted on the Settlement Agreement pursuant to Rule 12.2. Thus, the Settlement is unopposed.

### **3. The Settlement Agreement**

In the Settlement Agreement, NOS/ANI admit that they violated Rule 1, “even if inadvertently.” Rule 1 states in relevant part:

Any person who signs a pleading or... transacts business with the Commission, by such act... agrees to... never... mislead the Commission or its staff by an artifice or false statement of fact or law.

As part of the settlement, NOS/ANI agree to pay a fine of \$10,000 for their violation. However, \$9,500 of this amount will be suspended and then waived in the event there are no further violations of Rule 1 by NOS or ANI during a two-year period. The two-year period began on May 3, 2006, the date the settlement agreement was filed at the Commission.<sup>5</sup> Upon approval of the settlement agreement, NOS/ANI will remit \$500 to the Commission. CPSD also agrees to the withdrawal of A.05-12-007 and A.05-12-008.<sup>6</sup>

The Settling Parties contend that the negotiated fine of \$10,000 is consistent with Commission precedent. They state that it is appropriate to suspend \$9,500 of the fine, and to waive this amount after two years if there are no additional violations of Rule 1, because the Commission and its staff have not had to

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<sup>4</sup> Because the Settlement Agreement is an all-party settlement, we hereby waive, as we have in other cases, the usual requirement in our Rules that there be notice of the settlement agreement and a settlement conference. *See* D.07-03-048, n. 1.

<sup>5</sup> Email from NOS/ANI counsel sent on April 30, 2007.

<sup>6</sup> Settlement Motions, p. 7.

expend substantial effort on this matter. CPSD adds that it believes it is appropriate to waive all but \$500 of the fine because CPSD has no basis to question the claimed inadvertence, because of NOS/ANI's misunderstanding about the need to file the applications in the first instance, and because of the cooperation of NOS/ANI in resolving this matter.

#### **4. Discussion**

##### **4.1. Standard of Review**

The standard of review for settlement agreements is set forth in Rule 12.1(d), which states as follows:

The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

The proponents of a settlement have the burden of demonstrating that the settlement satisfies Rule 12.1(d).

The Commission favors the settlement of disputes. This policy supports many goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results. The policy favoring settlements weighs against the Commission's alteration of uncontested settlements such as the one before us here. As long as a settlement is reasonable in light of the whole record, consistent with the law, and in the public interest, it should normally be adopted without alteration.<sup>7</sup>

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<sup>7</sup> D.06-06-014, *mimeo.*, p. 12.

As noted above, the Settlement Agreement requires NOS/ANI to pay a fine of \$10,000, of which \$9,500 is suspended and will be waived after two years if there are no further violations of Rule 1.

The Commission's general criteria for determining the amount of a fine are set forth in D.98-12-075 (84 CPUC2d 155, 188-90). As stated in that decision, in cases where there has been no physical or economic harm to the public, the appropriate criteria are as follows:

**Harm to the Regulatory Process:** A high level of severity will be accorded to violations of statutes or Commission directives.

**Number and Scope of Violations:** A single violation is less severe than multiple offenses. A violation that affects many consumers is worse than one that is limited in scope.

**Utility's Actions to Prevent a Violation:** Utilities are expected to take reasonable steps to comply with applicable laws and regulations. The utility's past record of compliance may be considered in assessing a penalty.

**Utility's Actions to Detect a Violation:** Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, is an aggravating factor.

**Utility's Actions to Disclose and Rectify a Violation:** Steps taken by a utility to promptly report and correct violations may be considered in assessing a penalty.

**Need for Deterrence:** Fines should be set at a level that deters future violations. Effective deterrence requires that the size of a fine reflect the financial resources of the utility.

**Degree of Wrongdoing:** The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that tend to exacerbate the wrongdoing.

**Consistency with Precedent:** Any decision that levies a fine should address previous decisions that involve reasonably comparable circumstances and explain any substantial differences in outcome.



**Public Interest:** In all cases, the harm will be evaluated from the perspective of the public interest.

We will use these criteria for determining whether the Settlement Agreement here is reasonable in light of the whole record, consistent with the law, and in the public interest.

#### **4.2. Reasonable in Light of the Whole Record**

There is an adequate record to decide whether to adopt the Settlement Agreement. The record includes the applications themselves, CPSD's protests, and NOS/ANI's responses to CPSD. The Settlement Agreement also provides sufficient information to enable the Commission to (1) implement the provisions, terms, and conditions of the Settlement, and (2) discharge its future regulatory obligations with respect to the parties and their interests.

The Settlement Agreement resolves a Rule 1 violation by requiring NOS/ANI to pay a fine of \$10,000, of which amount \$9,500 will be waived provided there are no further Rule 1 violations by either NOS or ANI during a two-year period. The \$10,000 fine, the minimum we impose in cases of Rule 1 violations claimed to be inadvertent,<sup>8</sup> is consistent with a record which shows that the violation of Rule 1 apparently was inadvertent, did not cause any physical or economic harm to the public, and was limited in scope. Further, the violation occurred with respect to applications that are now being withdrawn. Consequently, because the violation does not involve any matters that are being decided by the Commission, the harm to the regulatory process has been relatively minor.

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<sup>8</sup> See D.01-08-019, *mimeo.* at 15-16, 18-19.

On the other hand, the fact that the Rule 1 violation did occur and was not disclosed until after CPSD started its investigation shows that NOS/ANI did not do enough to prevent, detect, and disclose the violation. Although these factors could be said to weigh in favor of a larger fine, we find they are offset by the good-faith efforts of NOS/ANI to rectify the violation promptly once it came to light.

The primary purpose of a fine is to deter future wrongdoing. Effective deterrence requires that the size of a fine reflect the financial resources of the utility. NOS and ANI have sizable financial resources, as shown by the settlement payment of \$2.95 million that they have agreed to make as part of the settlement approved in D.05-06-032. Thus, it could be argued that a fine which is likely to amount to \$500 (assuming no future Rule 1 violations) is insufficient to deter future violations by NOS/ANI.

However, as the Settling Parties point out, the Settlement avoids the expenditure of Commission resources that would otherwise have been necessary if the parties had chosen to litigate this matter. Although we believe it is likely that a larger fine would have resulted if this matter been fully litigated, it is also likely that the additional costs incurred by the Commission and its staff would have exceeded the larger fine. Thus, there is a net public benefit to adopting the Settlement Agreement that makes it reasonable in light of the whole record.<sup>9</sup>

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<sup>9</sup> Because of the unique circumstances of this case, we caution future violators of Rule 1 that they should not expect fines of \$500 if they possess substantial financial resources, or if their conduct is more egregious.

#### **4.3. Consistent with the Law**

In deciding whether the Settlement Agreement is consistent with the law, we must assess whether the Settlement complies with all applicable statutes and Commission decisions. Of particular relevance is § 2107, which authorizes the Commission to levy a fine of \$500 to \$20,000 under the following circumstances:

**§ 2107:** Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.

As noted above, NOS/ANI admit that they have violated Rule 1 and have agreed to pay a fine of \$10,000, \$9500 of which will be waived if there are no further Rule 1 violations within a two-year period. We find this outcome consistent with the language of § 2107.

We next assess whether the Settlement is consistent with previous decisions that involve reasonably comparable circumstances. There are several recent decisions where the Commission has levied fines for Rule 1 violations. D.06-04-048 imposed a fine of \$55,000 for violating Rule 1 and several Commission decisions and statutes. D.05-02-001 imposed a fine of \$45,350 for violating Rule 1 and for slamming, cramming, and failing to remit regulatory fees. D.03-01-079 imposed a fine of \$35,000 for two violations of Rule 1 that continued over 35 days. D.01-08-019 imposed a fine of \$200,000 for 20 separate violations of Rule 1.

Although these decisions imposed larger fines for violating Rule 1, we agree with CPSD that what is likely to be a net fine of \$500 is acceptable here

because there is no basis to question the claimed inadvertence by NOS/ANI, because of the companies' cooperation in resolving this matter, and because the Commission and its staff have not had to expend substantial resources on the matter. These circumstances were absent in prior decisions that imposed larger fines for Rule 1 violations.

Thus, we conclude that the Settlement Agreement is consistent with the law.

#### **4.4. The Public Interest**

Our primary concern in deciding whether the Settlement Agreement is in the public interest is whether the likely net fine of \$500 is reasonable based on the circumstances of this case. It is clear that the degree of wrongdoing here was relatively slight because (1) there is no evidence that NOS/ANI intended to deceive the Commission, and (2) there was no harm to others. Further, NOS/ANI made a good-faith effort to rectify the violation promptly once it came to light. In view of these circumstances, we conclude that the Settlement is in the public interest.

#### **4.5. Conclusion and Implementation**

For all of the foregoing reasons, we conclude that the uncontested Settlement Agreement is reasonable in light of the whole record, consistent with the law, and in the public interest. Therefore, we will grant the Settling Parties' Motions filed in A.05-12-007 and A.05-12-008 to adopt the Settlement Agreement. In accordance with Rule 12.5, the adopted Settlement Agreement is binding on all parties. Our adoption of the Settlement does not constitute approval of, or precedent regarding, any principle or issue.

The Settlement Agreement requires NOS/ANI to pay \$500 upon the Commission's adoption of the Settlement. To implement this provision,

NOS/ ANI shall submit a check for \$500 to the Commission's Fiscal Office no later than 10 days from the effective date of today's Opinion. The check shall be made payable to the State of California's General Fund, and the decision number of this Opinion shall be shown on the face of the check.

Finally, NOS/ ANI and CPSD have agreed to the withdrawal of A.05-12-007 and A.05-12-008. We approve of the withdrawal.

## **5. Category and Need for Hearing**

In Resolution ALJ 176-3164, issued on December 15, 2005, the Commission preliminarily determined that the category for this proceeding is ratesetting and that hearings are not needed. We affirm these determinations.

## **6. Assignments for the Proceeding**

John A. Bohn is the assigned Commissioner and A. Kirk McKenzie is the assigned Administrative Law Judge for this proceeding.

## **7. Waiver of the Comment Period**

This is an uncontested matter in which the Commission's decision grants the relief requested. Therefore, the otherwise applicable 30-day period for public review and comment is waived pursuant to § 311(g)(2) and Rule 14.6(c)(2).

## **Findings of Fact**

1. The uncontested Settlement Agreement requires NOS/ ANI to pay a fine of \$10,000 for violating Rule 1, \$9,500 of which will be suspended and then waived provided there are no further Rule 1 violations by either NOS or ANI during the two-year period that began on May 3, 2006.

2. NOS and ANI request that they be allowed to withdraw A.05-12-007 and A.05-12-008, and in light of the settlement approved herein, CPSD supports this request.

### **Conclusions of Law**

1. A.05-12-007 and A.05-12-008 should be consolidated into one proceeding for the purpose of addressing the Settlement Agreement that was submitted in both dockets.
2. The Settlement Agreement is reasonable in light of the whole record, consistent with the law, and in the public interest.
3. The Motions in A.05-12-007 and A.05-12-008 to adopt the Settlement Agreement should be granted.
4. A fine of \$10,000 for violating Rule 1 should be imposed, of which \$9,500 should be suspended and then waived provided there are no further Rule 1 violations by either NOS or ANI during the two-year period that began on May 3, 2006.
5. NOS/ANI should pay \$500 to the Commission's Fiscal Office within 10 days from the effective date of this Order.
6. The request of NOS and ANI to withdraw A.05-12-007 and A.05-12-008 should be approved.
7. The following order should be effective immediately so that the Settlement Agreement adopted herein can be implemented expeditiously.

### **O R D E R**

#### **IT IS ORDERED** that:

1. Applications (A.) 05-12-007 and A.05-12-008 are consolidated for the purpose of addressing the Settlement Agreement that was submitted in both dockets.

2. The Motions to adopt the Settlement Agreement set forth in Appendix B to this Order are granted. Pursuant to this adopted Settlement Agreement, NOS Communications, Inc. (NOS) and Affinity Networks Incorporated (ANI) shall pay a fine of \$10,000 for violating Rule 1 of the Commission's Rules of Practice and Procedures. Of this amount, \$9,500 is suspended and shall be waived if there are no further violations of Rule 1 by NOS or ANI during the two-year period that began on May 3, 2006.

3. Within 10 days from the effective date of this Order, NOS and/or ANI shall submit to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, a check for \$500 made payable to the State of California's General Fund. The decision number of this Order shall be shown on the face of the check.

4. The request of NOS and ANI to withdraw A.05-12-007 and A.05-12-008, respectively, is granted.

5. A.05-12-007 and A.05-12-008 are closed.

This Order is effective today.

Dated May 24, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners

## **Appendix A:**

### **List of Appearances**



**APPENDIX A**

**\*\*\*\*\* SERVICE LIST \*\*\*\*\***

**Last Update on 10-APR-2007 by: CPL  
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**\*\*\*\*\* APPEARANCES \*\*\*\*\***

Thomas J. Macbride, Jr.  
Attorney At Law  
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111  
(415) 392-7900  
tmacbride@gmsr.com  
For: NOS and ANI

Joseph Koppy  
NOS COMMUNICATIONS, INC.  
4380 BOULDER HIGHWAY  
LAS VEGAS NV 89121  
(702) 547-8692  
info@nos.com

Chris Witteman  
Legal Division  
RM. 5129  
505 VAN NESS AVE  
San Francisco CA 94102 3298  
(415) 355-5524  
wit@cpuc.ca.gov

**\*\*\*\*\* STATE EMPLOYEE \*\*\*\*\***

James W. Howard  
Consumer Protection & Safety Division  
770 L STREET, SUITE 1050  
Sacramento CA 95814  
(916) 324-8688  
jwh@cpuc.ca.gov

A Kirk McKenzie  
Administrative Law Judge Division  
RM. 5115  
505 VAN NESS AVE  
San Francisco CA 94102 3298  
(415) 703-4622  
mck@cpuc.ca.gov

**(END OF APPENDIX A)**



## **Appendix B:**

### **Settlement Agreement in A.05-12-007 and A.05-12-008**

**Note:** The signed copy of the Settlement Agreement was entered into on April 25, 2006, and is in the Formal File for this proceeding.

Appendix B of today's Opinion is a copy of the Settlement Agreement that does not show the date the Settlement was entered into or the parties' signatures.

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made and entered into as of this \_\_\_\_ day of April, 2006 (the "Effective Date"), by and between NOS Communications Inc. ("NOS") and Affinity Networks Inc. ("ANI") (sometimes collectively, "NOS/ANI"), and the Consumer Protection and Safety Division of the California Public Utilities Commission ("CPSD") (NOS/ANI and CPSD, each individually a "Party" and, collectively, the "Parties").

### **Statement of Stipulated Facts**

- a. On May 2, 2002, the California Public Utilities Commission ("Commission") issued Order Instituting Investigation 02-05-001 into allegations that NOS/ANI had violated Section 2889.5 of the Public Utilities Code.<sup>1</sup> This matter was initially settled by settlement approved by Commission Decision 04-06-017, which required NOS/ANI to:

in any application filed by any of the respondents herein or their affiliates pursuant to Pub. Util. Code §§ 851-854, 1001, or 1013, ... disclose (a) the fact that this proceeding was filed, (b) the fact that this proceeding was settled pursuant to the settlement agreement approved herein, and (c) the relationship between the applicant and this proceeding.

- b. Because NOS/ANI objected to some of the language in D.04-06-017 (but not to the above paragraph), the settlement approved by D. 04-06-017 was rescinded. A subsequent settlement agreement between the parties, however, was executed in January, 2005, pursuant to which NOS/ANI agreed to withdraw its application for rehearing of D.04-06-017. The January 2005 settlement was approved by Commission Decision 05-06-032.

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<sup>1</sup> All statutory references herein are to the California Public Utilities Code unless otherwise indicated.

- c. On December 6, 2005, NOS/ANI filed Application Nos. 05-12-007 and 05-12-008 for expansion of their operating authority under the Commission's expedited application procedures for non-dominant inter-exchange carriers (NDIECs). At the time these applications were filed, NOS/ANI did not contemporaneously disclose the existence of the investigation and settlement in I.02-05-001, as required by the Commission's Order in D.04-06-017 and by the settlement approved by Commission Decision 05-06-032. In response to short form registration question no. 8, NOS/ANI also did not disclose the revocation of their certifications in the State of Wisconsin for violation of that State's regulatory rules. NOS/ANI asserts that, in both instances, the non-disclosure was inadvertent. NOS/ANI also contends that subsequent review of Commission authorities revealed that it did not need to file the Applications in the first instance in order to provide facilities-based service.
- d. On January 12, 2006, CPSD filed Protests in both Applications 05-12-007 and 05-12-008, objecting to Applicant's failure to make the disclosures described above.
- e. On February 10, 2006, Applicants NOS and ANI filed what they styled as a "Withdrawal of Application" in each of the two application proceedings. CPSD has objected that these purported withdrawals are not self-executing, that the Commission must approve any withdrawal of an application, and that in doing so the Commission should find that NOS/ANI violated Rule 1 by failure to make the disclosures set out above.
- f. After discussions and negotiations concerning the specific facts and circumstances at issue between the Parties, and mindful of the fact that litigating the matters at issue could be costly, time consuming and uncertain, the Parties have determined that they wish to resolve any disputes relating to Application Nos. A05-12-007 and A05-12-008 voluntarily through a settlement without the need for litigation.

#### **Further Stipulations of the Parties**

- g. The Commission has previously found that the failure to make accurate disclosures on the Commission's short Form of Registration (used by non-dominant carriers pursuant to Public Utility Code § 1013 and Decision 97-06-107 and related rulings) constitutes a Rule 1 disclosure. See D.03-01-079. The Commission has also found that the question of the inadvertence of non-disclosures goes to the amount of any fine assessed for a

Rule 1 violation, and has assessed a \$10,000/representation penalty for Rule 1 violations even where inadvertence was claimed. See D.01-08-019.

- h. Because CPSD has no basis to question the claimed inadvertence in this case, because of Applicants' apparent misunderstanding of its need to file the subject applications in the first instance, and because of Applicants' cooperation in resolving these issues, CPSD believes that it is appropriate to waive all but \$500 of any penalty assessed for a Rule 1 violation in this case.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, each on its own behalf and on behalf of its respective successors and assigns, hereby agree as follows:

## **1. Terms and Conditions**

1.1 NOS and ANI admit that they violated, even if inadvertently, Rule 1 of the Commission's Rules of Practice and Procedure. NOS/ANI will pay a fine of \$10,000 to the California Public Utilities Commission ("Commission"), of which \$9,500 is suspended and will be waived upon NOS/ANI's completion of two years without further Rule 1 violations. Such a reduction is justified for the reasons set out above, and in recognition of the fact that the Commission and its staff have not had to expend substantial efforts in connection with this matter. NOS/ANI and CPSD agree to request that the Commission render a Decision in this matter which incorporates the stipulations above. On approval of the settlement, NOS/ANI will pay the Commission the sum of \$500.

## **2. No Admission.**

2.1 NOS/ANI admit that they violated Rule 1 as described in recitation c. *supra*, and paragraph 1.1 above. Except as so admitted, nothing in this Settlement shall constitute, or be considered as, an admission of liability or wrongdoing by NOS or ANI, or agreement by NOS or ANI as to the validity of any of the positions advanced by CPSD in connection with or relating to applications A05-12-007 and A05-12-008, and (except as so limited) neither this Settlement nor any part of it may be used in any way against NOS or ANI in any legal, equitable, or administrative action or arbitration except in an action to enforce, or seek damages for the breach of, this Settlement.

### **3. Enforcement**

3.1 Each material breach of this Settlement will constitute a separate violation and will entitle the Commission to take any necessary action to enforce its orders.

3.2 After payment of the sum described in Paragraph 1.1, this Settlement will release the NOS/ ANI from and constitute a final settlement of any and all costs, direct or indirect, presently known or unknown, accruing to or incurred by the Commission during the course of investigation and review in this proceeding.

3.3 The Parties agree that the Commission has primary jurisdiction over any interpretation, enforcement, or remedies pertaining to this Settlement. No Party may bring an action pertaining to this Settlement in any local, State, Federal court or administrative agency, without first having exhausted its administrative remedies at the Commission. This Settlement shall be governed by and interpreted in accordance with the laws of the State of California and Commission rules and regulations.

3.4 The Commission adoption of this Settlement is binding on all Parties to this action. Except as expressly set forth in Paragraph 1.1 herein, Parties agree that pursuant to Rule 51.8, this Settlement shall not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

3.5 After the Issuance Date, CPSD will initiate no enforcement action, seek no administrative or other penalties against NOS/ ANI based on the evidence of non-disclosure (recited above) in this case. This provision will not apply if NOS/ ANI jointly or severally materially breach this Settlement, violate the Commission order approving it. This provision shall not prohibit the Commission from considering this Rule 1 violation in the event it finds Applicants committed violations of Rule 1 or other Commission rules and regulations, or sections of the Public Utilities Code related to Applicants' operations.

3.6 The Parties agree that they will not take any other action that would in any manner be inconsistent with fully supporting this Settlement. The Parties agree to furnish such additional information, documents, and/or testimony as the Commission or DRA may request to implement the Settlement.

3.7 CPSD agrees that it will not protest an application filed by NOS/ ANI or any of their affiliates pursuant to Sections 851-854, 1001, or 1013 based on the investigation or allegations of non-disclosure (recited above) in this matter, as long as NOS/ ANI do not further violate the Commission's rules, regulations, or sections of the Public Utilities Code related to Applicants' operations.

#### **4. Execution of Settlement**

4.1 This Settlement is subject to approval and adoption by the Commission. The Parties agree to execute or furnish any other additional information, documents, and/or testimony, or take any other action, that the Commission or CPSD may request, as necessary to implement the Joint Motion and Settlement.

4.2 This Settlement may be executed in any number of counterparts and by different Parties hereto in separate counterparts, with the same effect as if all Parties had signed the same document. All such counterparts will be deemed an original and will together constitute the same Settlement. This Settlement is the entire agreement among the Parties, which cannot be amended or modified without the express written consent of all the Parties.

4.3 This Settlement is not severable. If pursuant to Rule 51.7 the Commission materially modifies or negates any provision of this Settlement, the Parties must consent to such change. A Party will be deemed to have consented to the Commission modification unless within 15 Days following the date of issuance of the Commission proposed modification(s), (or such longer period as may be directed by the Commission) that Party notifies in writing the other Party and files with the Commission its objection to the modification(s). After the 10th day following the filing of the objection if the objecting Party has not withdrawn, canceled, or modified its objection, the Settlement will be deemed rescinded. If this settlement is rescinded following payment of any sums by Respondents, those sums shall be refunded within 15 days of rescission.

4.4 Each Party represents that it has investigated the facts and law pertaining to the matters described in this Settlement. No Party has relied or presently relies upon any oral or written statement, promise, or representation by any other Party, except as specifically set forth in this Settlement.

4.5 This Settlement will be binding upon the respective Parties, their successors, assignees, executors and administrators.



4.6 The Parties acknowledge and stipulate that this Settlement is fair and not the result of any fraud, duress, or undue influence by any other Party. Each Party hereby states that it has read and fully understands its rights, privileges, and duties under this Settlement. Moreover, each Party has had its respective attorney or other authorized person review the terms of this Settlement. By executing this Settlement each Party declares that the provisions herein are adequate, reasonable, and mutually agreed upon; and that they are entering this Settlement freely and voluntarily.

IN WITNESS WHEREOF, the Parties hereby execute Agreement on the date first set forth opposite their signatures.

\_\_\_\_\_  
Christopher Witteman  
Attorney for the Consumer Protection  
and Safety Division

Date: \_\_\_\_\_

\_\_\_\_\_  
Thomas J. MacBride, Jr.  
Attorney for NOS/ANI

Date: \_\_\_\_\_

\_\_\_\_\_  
Richard Clark,  
Director of the Consumer Protection  
and Safety Division

Date: \_\_\_\_\_

\_\_\_\_\_  
Joe Koppy,  
President, NOS and ANI

Date: \_\_\_\_\_

**(END OF APPENDIX B)**