Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No. EB-09-SE-126
	)	NAL/Acct. No. 201032100033
Alpheus Communications, LP	)	FRN No. 0005004361

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 2, 2010 **Released: July 6, 2010**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("*NAL*"), we find Alpheus Communications, LP ("Alpheus") apparently liable for forfeiture in the amount of sixty thousand dollars ($60,000) for willfully and repeatedly violating the network outage reporting requirements set forth in Section 4.9(f) of the Commission's Rules ("Rules").[1] The noted apparent violations involve Alpheus's failure to file with the Commission network outage reports for a significant disruption in its network services within the time periods specified in Section 4.9(f) of the Rules.

II. BACKGROUND

2. The Commission's authority to require the submission of network outage reports derives from its responsibility, as set forth in the Communications Act, "to make available, so far as possible to all of the people of the United States … a rapid, efficient, Nationwide, and world-wide wire and radio communications service, with adequate facilities … for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication."[2] Section 4(o) of the Act states that "[f]or the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem."[3]

3. The Commission first imposed network outage reporting requirements on wireline carriers in 1992.[4] The Commission revised these rules in 2004 to require the filing of network outage reports by additional communications providers,[5] adopt a common metric for determining the general

[1] 47 C.F.R. § 4.9(f).

[2] Section 1 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 151.

[3] 47 U.S.C. § 154(o).

[4] *See Notification by Common Carriers of Service Disruptions,* Report and Order, 7 FCC Rcd 2010 (1992); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 8517 (1993); Second Report and Order, 9 FCC Rcd 3911 (1994); Order on Reconsideration of Second Report and Order, 10 FCC Rcd 11764 (1995).

[5] *See* 47 C.F.R. Part 4; *see also New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830, 16833-34, 16882-94 ¶¶ 2, 97-126 (2004) ("*2004 Network Outage Order*") (extending the network outage reporting requirements to paging and wireless, cable circuit-switch telephony, and satellite communications providers).

outage-reporting threshold criteria that applies across all communications platforms,[6] establish specific outage-reporting criteria that account for the unique technical aspects of each communications platform,[7] and require the electronic filing of outage information.[8] In revising the network outage reporting requirements, the Commission sought to ensure that it had prompt access to accurate information regarding the operation and security of crucial segments of the national telecommunications infrastructure.[9] The Commission stated that such access would enable it to prevent disruptions in service that could potentially threaten "homeland security, public health and safety, as well as [our] economic well-being,"[10] and facilitate alternative means of communicating, either through different network routes or different communication facilities.[11] In this way, the Commission could meet its statutory obligation[12] to protect the public's access to secure communications, even "during terrorist attacks, fires, natural disasters (such as hurricanes, earthquakes, and tornadoes) and war."[13]

4. Under Section 4.9(f) of the Rules, wireline service providers must report to the Commission an outage of at least 30 minutes duration that: (1) potentially affects at least 900,000 user minutes[14] of either telephony or paging; (2) affects at least 1,350 DS3 minutes;[15] (3) potentially affects any special offices and facilities;[16] or (4) potentially affects a 911 special facility.[17] Upon discovery of such an outage, wireline service providers must file an electronic Notification within 120 minutes, an Initial Communications Outage Report within 72 hours, and a Final Communications Outage Report within 30 days.[18]

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[6] *2004 Network Outage Order*, 19 FCC Rcd at 16834 n.5, 16861-62 ¶¶ 55-56.

[7] *Id.* at 16876-16894 ¶¶ 82-126.

[8] *Id.* at 16833-34, 16908-9 ¶¶ 2, 156-158.

[9] *Id.* at 16833, 16835-36, 16910 ¶¶ 1, 11, 160.

[10] *Id.* at 16910 ¶ 160.

[11] *Id. at* 16835-36, 16910 ¶¶ 11, 160.

[12] *See* 47 U.S.C. §§ 151, 154(k) and (o).

[13] *2004 Network Outage Order*, 19 FCC Rcd at 16837 ¶ 11. Noting that there are many examples of the critical need for, and our dependence upon, reliable communications service, the Commission offered one illustration – our financial infrastructure – which largely consists of computers, databases, and communications links. The Commission stated that:

> If the communications links were severed, or severely degraded, ATM machines would not be able to supply cash, credit card transactions would not 'go through,' banks would not be able to process financial transactions (including checks), and the financial markets would become dysfunctional. In a short time, economic activity would grind to a halt and consumers' ability to purchase food, fuel or clothing would be severely limited if not destroyed.

Id. at 16836-37 ¶ 11.

[14] "User minutes" are defined as "assigned telephone number minutes … for telephony and for those paging networks in which each individual user is assigned a telephone number" or "the mathematical result of multiplying the duration of an outage, expressed in minutes, by the number of end users potentially affected by the outage for all other forms of communication." 47 C.F.R. § 4.7(e).

[15] "DS3 minutes" are defined as "the mathematical result of multiplying the duration of an outage, expressed in minutes, by the number of previously operating DS3 circuits that were affected by the outage." 47 C.F.R. § 4.7(d).

[16] "Special offices and facilities" include major military installations, key government facilities, nuclear power plants, and certain airports. 47 C.F.R. § 4.5(b)-(d).

[17] *See* 47 C.F.R. § 4.5(e).

[18] *See* 47 C.F.R. § 4.9(f).

5. Alpheus is a non-dominant wireline carrier that provides telecommunications and data center services,[19] and is therefore subject to the network outage reporting rules.[20] In 2009, the Public Safety and Homeland Security Bureau referred Alpheus to the Enforcement Bureau for investigation, because it appeared that Alpheus had failed to file a Notification and an Initial Communications Outage Report for a significant disruption in its network services within the time frames specified in Section 4.9(f) of the Rules. The Enforcement Bureau ("Bureau") through the Spectrum Enforcement Division ("Division") issued Alpheus a Letter of Inquiry ("LOI") on September 10, 2009,[21] directing it to provide certain information and documents regarding its compliance with the network outage reporting requirements. The Bureau received Alpheus's response to the LOI on October 9, 2009.[22]

III. DISCUSSION

A. Alpheus Apparently Violated the Network Outage Reporting Requirements

6. Section 4.9(f) of the Rules requires Alpheus to submit to the Commission an electronic Notification within 120 minutes after discovering that it has experienced a network outage of at least 30 minutes duration that meets certain criteria on any facility that it owns, operates, leases, or otherwise utilizes.[23] Thereafter, Alpheus must file an Initial Communications Outage Report with respect to the outage within 72 hours after discovery of the outage, and a Final Communications Outage Report within 30 days after discovery of the outage. The Notification serves to inform the Commission that a major event has occurred and assists the Commission in determining "whether an immediate response is required (*e.g.*, terrorist attack or systemic failure) and whether patterns of outages are emerging (*e.g.*, phased terrorist attacks) that warrant further coordination or other action."[24] The Initial and Final Communications Outage Reports provide the Commission with more detailed data necessary to analyze outages in order to improve network reliability and security.[25]

7. The record establishes that, within the past year, Alpheus failed to timely file both an electronic Notification within 120 minutes and an Initial Communications Outage Report within 72 hours of discovering a reportable outage. Because our rules treat network outage reports as confidential for national security and commercial and trade secret reasons,[26] we will not describe herein the details of this

[19] A "data center" is defined as a "centralized location where computing resources critical to an organization are maintained in a highly controlled environment." *See* Harry Newton, Newton's Telecom Dictionary, 228 (CMP Books, 17th ed., 2001).

[20] 47 C.F.R. §§ 4.3(b), 4.9(f). *See also* Application for the Transfer of Control of Alpheus Communications, L.P., and Alpheus Data Services, LLC, WC Docket No. 07-246 (filed October 30, 2007).

[21] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to Stephen W. Crawford, Esq., General Counsel and Senior Vice President, Alpheus Communications, LP (September 10, 2009)("LOI").

[22] Letter from Joshua M. Bobeck, Esq., Counsel for Alpheus Communications, LP, to Linda M. Nagel, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (October 9, 2009) ("LOI Response").

[23] 47 C.F.R. § 4.9(f). *See also supra*, ¶ 4.

[24] *2004 Network Outage Order*, 19 FCC Rcd at 16868 ¶ 69.

[25] *See id.* at 16834 ¶ 3, 16868 ¶¶ 73-75.

[26] In the *2004 Network Outage Order,* the Commission afforded confidential treatment to network outage reports. *2004 Network Outage Report*, 19 FCC Rcd at 16853-55, ¶¶ 42-46. Section 4.2 of the Rules specifically states that Part 4 outage reports "will be presumed to be confidential" and that public access to outage reports may be sought only pursuant to the procedures set forth in Section 0.461 of the Rules which addresses requests for inspection of materials not routinely available for public inspection. 47 C.F.R. § 4.2; *see also* 47 C.F.R. 0.461. On March 30, (continued …)

outage, including the basis for determining that it is reportable, its location, duration, or the number and type of customers affected. That information is provided in an Appendix hereto that will remain confidential. As set forth in detail in the confidential Appendix, we conclude that Alpheus apparently willfully[27] and repeatedly[28] violated Section 4.9(f) of the Rules by failing to file an electronic Notification within 120 minutes and an Initial Communications Outage Report within 72 hours of discovering a reportable outage.

B. Proposed Forfeiture

8. Under Section 503(b)(1)(B) of the Act and Section 1.80(a)(1) of the Rules, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[29] To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[30] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[31] We conclude under this standard that Alpheus is apparently liable for forfeiture for its apparent willful and repeated violations of Section 4.9(f) of the Rules.

9. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a common carrier a maximum forfeiture of $150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,500,000 for any single continuing violation.[32] In determining the appropriate

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2009, the Commission added a new Section 0.457(d)(1)(vii) of the Rules, 47 C.F.R. § 0.457(d)(1)(vii), to further codify the confidential treatment of network outage reporting. This new Section became effective on April 29, 2009. *See* 74 FR 14,078 (March 30, 2009).

[27] Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the terms in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.,* Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 ¶ 5 (1991), *recon. denied,* Memorandum Opinion and Order, 7 FCC Rcd 3454 (1992) ("*Southern California*").

[28] Section 312(f)(2) of the Act, which also applies to forfeitures assessed pursuant to Section 503(b) of the Act, provides that "[t]he term 'repeated,' ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2). *See Callais Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 (2001); *Southern California*, 6 FCC Rcd at 4388.

[29] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[30] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[31] *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002) (forfeiture paid).

[32] 47 U.S.C § 503(b)(2)(B). The Commission has amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), three times to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. *See Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845, 9847 (2008) (adjusting the maximum statutory amounts for common carriers from $130,000/$1,325,000 to $150,000/$1,500,000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945, 10947 (2004) (adjusting the maximum statutory amounts for common carriers from $120,000/$1,200,000 to $130,000/$1,300,000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221, 18223 (2000) (adjusting the maximum statutory amounts for common carriers from $100,000/$1,000,000 to $120,000/$1,200,000). The most recent inflation adjustment took effect September 2, 2008 and only applies to (continued …)

forfeiture amount, Section 503(b)(2)(E) of the Act directs the Commission to consider factors, such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[33]

10. The Commission's *Forfeiture Policy Statement* and its implementing rules establish $3,000 as the base forfeiture for failure to file required forms and information.[34] We believe, however, that a substantial upward adjustment of the base forfeiture amount is warranted.[35] Reliable communication services are essential to the operation of virtually all government, business and critical infrastructure, as well as to the nation's economy, and the network outage reporting rules were intended to help ensure the reliability of our communications infrastructure.[36] Indeed, the failure to file timely and accurate network outage reports jeopardizes the ability of the Commission to effectively monitor and respond to network outages that potentially threaten homeland security.

11. Distinctions between the three required network outage reports merit a two-tiered forfeiture approach. As noted above,[37] the Notification alerts the Commission to possible widespread problems, while the Initial and Final Communications Outage Reports supplement the notification and provide more detailed information on the outage. Thus, failure to timely file the Notification has a more critical and significantly higher impact on public safety than does failure to timely file the Initial and Final Communications Outage Reports. In light of the increased impact on public safety of a violation involving the Notification (for the same outage), we adopt a two-tiered forfeiture approach for late-filed reports. We set the base forfeiture at $40,000 per late filing for failure to timely file Notifications and at $20,000 per late filing for failure to timely file Initial and Final Communications Outage Reports. Under the general forfeiture authority contained in Section 503 of the Act[38] and the Commission's *Forfeiture Policy Statement*[39] however, we retain the discretion to depart from this approach and issue forfeitures on

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violations that occur after that date. *See* 73 Fed. Reg. 44663-5. Because Alpheus's apparent violations occurred after September 2, 2008, it is subject to the new forfeiture limits.

[33] 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

[34] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order,12 FCC Rcd 17087, 17117, *recon. denied,* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); *see also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section I. Base Amounts for Section 503 Forfeitures.

[35] We note that the Commission has upwardly adjusted the base forfeiture for the failure to file Telecommunications Reporting Worksheets from $3,000 to $50,000, because of the importance of the Worksheets to the Commission's administration of the Universal Service Fund ("USF"), Telecommunications Relay Services Fund ("TRS fund"), and other telecommunications regulatory programs. *See*, *e.g., InPhonic, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 13277, 13286-67 (2005), *forfeiture ordered*, Order of Forfeiture and Further Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 8689 (2007) ("*In Phonic*"); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, 19905 (2003), *forfeiture ordered*, 21 FCC Rcd 4710 (2006) ("*Globcom*").

[36] *2004 Network Outage Order*, 19 FCC Rcd at 16836 ¶ 11.

[37] *See supra* paragraph 6.

[38] *See* 47 U.S.C. § 503(b)(2)(E).

[39] *See Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 22, 17101 ¶ 29. *See also* 47 C.F.R. §1.80(b)(4) ("The Commission and its staff *may* use these guidelines in particular cases [, and] retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (*emphasis added*).

a case by case basis, including appropriate upward and/or downward adjustments, based on the particular circumstances of a case.

12. Alpheus filed the Notification more than 120 minutes after discovering the outage and the Initial Communications Outage Report more than 72 hours after discovery of the outage. Alpheus's failure to timely file the Notification and the Initial Communications Outage Report had a significant adverse impact on the Commission's ability to ensure the availability of the nation's communications capability and track possible threats to national security. Accordingly, we find that each of Alpheus's failures to file constitutes a separate violation that continued until the violation was cured.[40] In light of Alpheus's failure to timely file the Notification and the Initial Communications Outage Report in this case, we find it apparently liable for a base forfeiture in the amount of forty thousand dollars ($40,000) for the late Notification and twenty thousand dollars ($20,000) for the late Initial Communications Outage Report, for an aggregate base forfeiture amount of sixty thousand dollars ($60,000).

13. As detailed in the attached confidential Appendix, the outage in this case had a relatively limited impact in comparison to other network outages. However, Alpheus did not correct its failure to file until it was contacted by Commission staff.[41] Accordingly, we find that no downward adjustment of the base forfeiture is appropriate. We therefore propose a total forfeiture of $60,000 for Alpheus's failure to file a timely Notification and a timely Initial Communications Outage Report for a reportable network outage in apparent willful and repeated violation of Section 4.9(f) of the Rules.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Rules, Alpheus Communications, LP is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of sixty thousand dollars ($60,000) for its willful and repeated violations of Section 4.9(f) of the Rules.

15. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, Alpheus **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

16. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in

[40] *See Telrite Corporation*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7231, 7244-45 (2008) (determining that the failure to file Telecommunications Reporting Worksheets was a continuing violation) ("*Telrite*"); *Compass Global, Inc*., Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6125, 6138 (2008) (same) ("*Compass Global*"); *VCI Company*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15933, 15940 (2007) (determining that the failure to file Lifeline and Linkup Worksheets was a continuing violation) ("*VCI*"); *American Samoa Telecommunications Authority*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 16432, 16437 (Enf. Bur., Spectrum Enf. Div. 2008), *response received* ("*ASTCA NAL*").

[41] *See* LOI Response, Exhibit 4.

block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Alpheus will also send electronic notification on the date said payment is made to Kathryn Berthot at Kathy.Berthot@fcc.gov and to Linda Nagel at Linda.Nagel@fcc.gov.

17. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The response should also be e-mailed to Kathryn Berthot at Kathy.Berthot@fcc.gov and to Linda Nagel at Linda.Nagel@fcc.gov.

18. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

19. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Stephen W. Crawford, Esq., General Counsel and Senior Vice President, Alpheus Communications, LP, 1301 Fannin St., 20th Floor, Houston, TX 77002 and to counsel for Alpheus, Joshua M. Bobeck, Esq., Bingham McCutchen LLP, 2020 K Street, NW, Washington, DC 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau