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

In the Matter of	)	
	)	
Tennessee Cable Telecommunications	)	
Association, *et al*.,	)	
	)	
and	)	
	)	
Cable Television Association	)	
of Georgia, *et al*.,	)	File No. E-97-10
	)	
Complainants,	)	
	)	
v.	)	
	)	
BellSouth Telecommunications, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 2000 Released: April 20, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a complaint filed by the Tennessee Cable Telecommunications Association (TCTA) and the Cable Television Association of Georgia (CTAG) (collectively, Complainants) against BellSouth Telecommunications, Inc. (BellSouth) pursuant to section 208 of the Communications Act of 1934, as amended (Act or Communications Act).[1] In particular, we deny Complainants' claim that BellSouth is allocating joint and common costs between its telephony and cable services in a manner that violates the Commission's cost allocation rules, because we find that BellSouth's

[1] 47 U.S.C. § 208.

allocation methodology is sufficiently usage-based.[2] In addition, we deny Complainants' claim that BellSouth violated the Commission's affiliate transactions rules[3] by failing to attribute to its cable affiliate the benefits allegedly conveyed when BellSouth constructed cable systems without first obtaining franchises, because we find that the record lacks persuasive evidence that such construction actually transferred or provided any benefit or service to BellSouth's affiliate. Finally, we deny Complainants' claims that BellSouth violated sections 202(a) and 224(g) of the Act[4] by charging its affiliate different pole and conduit rates than it charged non-affiliates, because we find that the record reveals that each of these claims was either settled or abandoned.

II. BACKGROUND

A. The Parties

2. Complainant TCTA is a cable television industry trade association representing cable television operators in Tennessee.[5] Likewise, Complainant CTAG is a cable television industry trade association representing cable television operators in Georgia.[6] Defendant BellSouth is a provider of local exchange service that, at the time the complaint was filed, was preparing to offer cable services in Tennessee and Georgia, both directly and through its affiliate, BellSouth Interactive Media Services (BIMS).[7]

3. Prior to the initiation of this proceeding, BellSouth began constructing communications facilities, including laying fiber optic and coaxial cable, in and around Nashville and Memphis, Tennessee, and Atlanta, Georgia.[8] BellSouth apparently intended to

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[2] *See* 47 C.F.R. § 64.901.

[3] *See* 47 C.F.R. § 32.27.

[4] 47 U.S.C. §§ 202(a), 224(g).

[5] *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.,* Complaint, File No. E-97-10 (filed Jan. 27, 1997) at 2, ¶ 1 (Complaint); *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.,* Response, File No. E-97-10 (filed March 10, 1997), at 2, ¶ 1 (Response).

[6] Complaint at 2, ¶ 2; Response at 2, ¶ 2.

[7] Complaint at 2, ¶ 3; Response at 2, ¶ 3.

[8] Complaint at 3, ¶¶ 7-9; Response at 4, ¶ 10.

use these facilities at some point in the future to provide both telephony service and cable service.[9] At the time of construction, however, neither BellSouth nor any of its affiliates held franchises under section 621(b) of the Act to provide cable service in these locations.[10]

B. The Commission's Cost Allocation and Affiliate Transactions Rules

4. The Communications Act and the Commission's rules seek to prevent common carriers from subsidizing their nonregulated or competitive services with revenues derived from regulated or noncompetitive operations.[11] When a common carrier subject to the Act uses some of the same facilities to provide both telephony service and an unregulated service, the common carrier must allocate the costs of such facilities in a manner prescribed by Part 64 of the Commission's rules.[12] These rules are designed to prevent cross-subsidization of nonregulated activities by establishing a methodology for allocating "joint" and "common" costs between regulated and nonregulated activities.[13] In general, the methodology requires carriers to allocate costs directly, wherever possible, to regulated or nonregulated activities. However, joint and common costs related to central office equipment and outside plant investment must be allocated between regulated and nonregulated activities according to "the

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[9] Despite certain general denials, *see* Response at 3-4, ¶¶ 7-9, BellSouth's cost allocation manual demonstrates that it intended to share the transmission facilities at issue between telephone service and cable service. *See, e.g., BellSouth Telecommunications 1996 Cost Allocation Manual for Apportionment of Costs Between Regulated Telephone Service and Nonregulated Activities*, Sections II, VI (filed Jan. 11, 1996).

[10] *See* Complaint at 4, ¶ 12; Response at 5, ¶ 12. Section 621(b) of the Act states that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b).

[11] *See, e.g., Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539, 17550, ¶ 24 (1996) (*Accounting Safeguards Order*).

[12] 47 C.F.R. § 64.901.

[13] We use the word "joint" to describe costs incurred when two or more services are produced by the same facility or operation. An example of a "joint" cost is central office switching equipment used to provide multiple services, such as voice messaging and alarm monitoring. We use the term "common" to describe costs incurred in the provision of two or more services that would not change appreciably with changes in the quantity provided of a particular service. *See Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, Order, 12 FCC Rcd 6415, 6420 n.25 (1997) (*Section 254(k) Order*). An example of a "common" cost is the cost of the chief executive's desk. A carrier will typically provide multiple services over the same network because the cost of providing these services on shared facilities, under shared management, is less than the cost of providing these services on separate facilities under separate management. A substantial portion of these costs of shared facilities and operations are joint and common costs. It is often difficult to approximate the actual portion of such costs for which each product or service is responsible. *Id.* at 6420, ¶ 8.

relative regulated and nonregulated *usage* of the investment."[14] The Commission established these rules to keep incumbent local exchange carriers from imposing the costs and risks of their competitive ventures on interstate telephone ratepayers, and to ensure that interstate ratepayers share in the economies of scope realized by incumbent local exchange carriers when they expand into additional enterprises.[15]

5. In addition, section 254(k) of the Act provides that incumbent local exchange carriers must "not use services that are not competitive to subsidize services that are subject to competition."[16] Section 254(k) seeks to prevent incumbent local exchange carriers from attempting to gain an unfair advantage in competitive markets by allocating to their less competitive services, for which subscribers have few or no available alternatives, an excessive portion of the costs incurred by their competitive operations.[17]

6. When a common carrier does business with a nonregulated affiliate, it must record the associated costs pursuant to certain Commission requirements known as "affiliate transactions rules." These rules are designed to protect interstate ratepayers from subsidizing the competitive ventures of an incumbent local exchange carrier's affiliates.[18] Specifically, section 32.27 of the Commission's rules requires "transactions with affiliates involving asset transfers into or out of the regulated accounts [to be] recorded" according to a hierarchy of rules.[19] Similar rules apply to certain non-tariffed services provided between a carrier and its affiliate.[20]

C. BellSouth's Cost Allocation Methodology

7. In order to assist in the enforcement of the foregoing cost allocation and affiliate transactions rules, the Commission requires each local exchange carrier with annual

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[14] 47 C.F.R. § 64.901(b)(4)(emphasis added).

[15] *Accounting Safeguards Order*, 11 FCC Rcd at 17550, ¶ 25.

[16] 47 U.S.C. § 254(k). This statutory provision was later codified in the Commission's rules at 47 C.F.R. § 64.901(c).

[17] *See Section 254(k) Order*, 12 FCC Rcd at 6419-21, ¶¶ 7-9.

[18] *See* 47 C.F.R. § 32.27.

[19] 47 C.F.R. § 32.27(a).

[20] 47 C.F.R. § 32.27(c) (Notably, "[f]or all other services provided by a carrier to its affiliate, the services shall be recorded at the higher of fair market value and fully distributed cost.").

operating revenues above a certain threshold to file a Cost Allocation Manual (CAM) with the Commission.[21] Among other things, the CAM must describe each of the carrier's nonregulated activities; identify each affiliate that engages in or will engage in transactions with the carrier and describe the nature, frequency, and terms of each transaction; and show the method used to assign and allocate costs between regulated and nonregulated operations.[22]

8. On June 30, 1995, BellSouth filed with the Commission an amendment to its CAM.[23] This CAM amendment indicated BellSouth's intent to provide cable service through the use of some of the same facilities that it uses to provide telephony service.[24] In order to satisfy the Commission's cost allocation rules, BellSouth devised a methodology for separating and allocating its joint and common costs incurred for the provision of regulated telephone service and nonregulated cable service. Under its methodology, the costs of common investments, such as fiber cable, shared office space, and poles and conduits, were to be allocated based on the relative number of subscriber circuits for each service.[25] In other words, in an effort to satisfy the usage-based standard prescribed by section 64.901(b)(4) of the Commission's rules, BellSouth determines the relative usage of its facilities by telephony and cable services by comparing the projected number of telephone lines used by its subscribers with the projected number of cable service subscribers.[26] For example, if certain

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[21] 47 C.F.R. § 64.903.

[22] *Id.*

[23] *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Opposition Brief of Respondent BellSouth Telecommunications, Inc., File No. E-97-10 (filed Aug. 29, 1997) at 3 (Opposition Brief of BellSouth).

[24] *Id.* The CAM amendment stated that "BellSouth . . . will provide cable system facilities for the provision of cable service either by itself or through affiliated cable operations." *See, e.g.*, *BellSouth Telecommunications 1996 Cost Allocation Manual for Apportionment of Costs Between Regulated Telephone Service and Nonregulated Activities*, Section II, page 5 (filed Jan. 11, 1996). Moreover, the 1996 CAM also indicated that certain circuit equipment would be allocated between telephony and cable services. *See id.* at Section VI, Table 2, page 2.

[25] Opposition Brief of BellSouth at 5. BellSouth's CAM indicates that joint and common costs are to be apportioned between regulated and nonregulated services on the basis of "[p]rojected cable service and telephony subscriber circuit counts." *BellSouth Telecommunications 1996 Cost Allocation Manual for Apportionment of Costs Between Regulated Telephone Service and Nonregulated Activities*, Section VI, Table 2, page 5 (filed Jan. 11, 1996).

[26] *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, BellSouth's Responses to Complainants' Second Set of Interrogatories, File No. E-97-10, Response to Interrogatories No. 2, 3 (BellSouth's Responses to Complainants' Second Set of Interrogatories).

facilities are projected to serve 1,000 telephone lines and 250 cable subscribers, BellSouth will allocate 80% (1000 divided by 1,250) of the joint and common costs of those facilities to telephony.[27]

III. DISCUSSION

9. Complainants allege that BellSouth violated various provisions of the Act and Commission rules by failing to allocate and record properly certain costs and benefits to its cable affiliate.[28] Specifically, Complainants allege that BellSouth (1) violated section 254(k) of the Act[29] and the Commission's cost allocation rules[30] by employing the "subscriber circuit" methodology described above to allocate certain costs between its telephone service and cable service; (2) violated the Commission's affiliate transactions rules[31] by failing to attribute to its cable affiliate the market value of the benefits that its cable affiliate allegedly received when BellSouth constructed cable systems without first obtaining franchises under section 621(b) of the Act;[32] and (3) violated sections 202(a) and 224(g) of the Act by not

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[27] The parties call this a "subscriber circuit" methodology. *See, e.g., Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.,* Complainants' Reply Brief, File No. E-97-10 (filed Sept. 10, 1997) (Complainants' Reply Brief); Opposition Brief of BellSouth at 10.

[28] Complainants filed the instant complaint on January 27, 1997. Complainants had previously filed a complaint against BellSouth on October 22, 1996, however. *Tennessee Cable Telecommunications Association, et al. and the Cable Television Association of Georgia, et al., v. BellSouth Telecommunications, Inc.*, File No. P.A. 96-004. In a Letter Order dated January 13, 1997, the Common Carrier Bureau stated that this initial complaint "raise[d] both conduit rate issues, which would normally be handled under the Commission's pole attachment complaint procedures, and cross-subsidization and imputation issues, which would normally be handled under the Commission's formal complaint procedures." *See Letter from Kurt A. Schroeder, Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, to Michael Tanner and John D. Seiver*, dated January 13, 1997 (citations omitted) (*Schroeder Letter*). At the suggestion of the Common Carrier Bureau, counsel for the parties consented to a bifurcated approach: The conduit rate issues would proceed according to the Commission's pole attachment complaint procedures, 47 C.F.R. §§ 1.1401, *et seq*., and the common carrier issues would proceed according to the Commission's formal complaint procedures, 47 C.F.R. §§ 1.720, *et seq*. The Common Carrier Bureau thus dismissed the common carrier-related claims in the 1996 complaint without prejudice, and invited the complainants to refile the common carrier claims pursuant to section 208 of the Act. *Schroeder Letter*.

[29] 47 U.S.C. § 254(k).

[30] 47 C.F.R. § 64.901.

[31] 47 C.F.R. § 32.27.

[32] 47 U.S.C. § 541(b).

charging its cable affiliate the same pole and conduit rates as it charges other carriers.[33] Complainants seek an order requiring BellSouth, *inter alia*: (1) to remove from its regulated accounts all deployment costs (including conduit, trenching, repaving, and other related underground construction costs) associated with its cable facilities; (2) to account for all affiliate transactions in connection with its cable construction; and (3) to identify and account for all anticipated usage of all unlit fiber optic and coaxial cable deployed throughout its telephone service area.[34]

A. BellSouth's Cost Allocation Methodology Does Not Violate the Commission's Cost Allocation Rules.

10. Complainants principally argue that the "subscriber circuit" cost allocation methodology used by BellSouth allocates joint and common costs between its telephony and cable services in a manner that effectively subsidizes the cable service with revenue collected from the provision of telephony services.[35] Specifically, Complainants assert that BellSouth's subscriber-based methodology misallocates costs because it does not reflect that telephone service and cable service use the capacity of jointly used facilities in vastly different ways. They point out that the number of cable subscribers is independent from the amount of bandwidth used by the service. In other words, "the total capacity used by the video delivery system is essentially unaffected by the number of subscribers";[36] the same video signal is continuously transported across the network regardless of the number of subscribers or the number of subscribers actually using the cable service at any given time. By contrast, as the number of telephone subscriber circuits increases, so does the proportion of the capacity of the transmission path devoted to telephone service.[37]

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[33] 47 U.S.C. §§ 202(a), 224(g).

[34] Complaint at 11-12, ¶ 44.

[35] *See, e.g.*, Complaint at 5, ¶¶ 18-20; *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.,* Complainants' Opening Brief, File No. E-97-10 (filed Aug. 1, 1997) at 3-10 (Complainants' Opening Brief); Complainants' Reply Brief at 9-12.

[36] Complainants' Opening Brief at 4.

[37] BellSouth does not dispute Complainants' characterization of these differences between telephony and cable services. *See, e.g.*, *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.,* BellSouth's Responses to Complainants' First Set of Interrogatories, File No. E-97-10, Response to Interrogatory No. 4 ("[C]able service subscriber circuits connect back to the network through a single coaxial wire cable which services multiple cable service circuits simultaneously (often referred to as a 'bus architecture'), while telephony subscriber circuits connect back to the network through multiple twisted pair wire cable where there is generally one twisted pair wire

11. Complainants maintain that, in light of this difference between cable service and telephone service, the only "sensible way" to measure these services' relative "usage" of a shared communications facility "is by comparing the [*bandwidth*] *capacity* used by the unregulated video transport service as compared to the [bandwidth] capacity used by the regulated voice telephony service."[38] To describe how this bandwidth-based, cost allocation methodology would work, Complainants offer the following example: Assume a 60-channel analog cable video delivery system shares transmission facilities with a telephone system serving 10,000 customers. Each channel of such a cable system would use approximately 6 MHz of analog bandwidth, regardless of the number of cable subscribers, so the cable system's total usage of the transmission facilities' bandwidth would be 360 MHz (60 x 6).[39] Each customer of such a telephone system would use approximately 4,000 Hz, so the telephone system's usage of the transmission facilities' bandwidth would be 40 MHz (10,000 x 4,000).[40] Thus, the cable system would account for 90% of the facilities' "usage" (360/400 MHz), whereas the telephone system would account for 10% of the "usage" (40 MHz/400 MHz). Accordingly, under Complainants' bandwidth-based, cost allocation methodology, 90% of the joint and common costs of the shared transmission facilities would be allocated to the cable system, and only 10% allocated to the telephone system.[41] By contrast, under BellSouth's subscriber circuit methodology, the cost allocation to the cable system could never exceed 50%, and even 50% would be reached only in the unlikely event that each of the telephone system's 10,000 customers had only one telephone line and subscribed to the cable service (in which case, the calculation would be 10,000/20,000).[42] Complainants maintain that

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required for each telephony circuit (often referred to as a 'star architecture.').") (BellSouth's Responses to Complainants' First Set of Interrogatories).

[38] Complainants' Reply Brief at 9 (emphasis added).

[39] It is undisputed that each channel of analog video services uses approximately 6 MHz of bandwidth. *See* BellSouth's Responses to Complainants' First Set of Interrogatories, Response to Interrogatory No. 2.d.ii.

[40] It is undisputed that each analog telephone transmission uses 4 kHz (4,000 Hz). *See* BellSouth's Responses to Complainants' First Set of Interrogatories, Response to Interrogatory No. 2.d.i.

[41] Complainants' Opening Brief at 8-10; Complainants' Reply Brief at 7 n.8.

[42] If we increased the number of telephone service subscribers in this example to 100,000, BellSouth would allocate approximately 47% of the joint and common costs to nonregulated cable service. The shared facilities at issue here, however, are not used to provide telephony service to such a large number of subscribers, because the cable signal is transmitted separately over each local loop. As a result, we do not expect that the proportion of joint and common costs allocated to regulated telephony service would fall to this level.

the bandwidth-based methodology is appropriate "because it is only the proportion of bandwidth used — not the number of subscribers to either service — that reflects the actual usage of the facility by the different services."[43]

12. The parties agree that the rule governing our evaluation of BellSouth's cost allocation methodology is section 64.901(b)(4), which provides:

> The allocation of central office equipment and outside plant investment costs between regulated and nonregulated activities shall be based upon the *relative regulated and nonregulated usage* of the investment during the calendar year *when nonregulated usage is greatest in comparison to regulated usage* during the three calendar years beginning with the calendar year during which the investment usage forecast is filed.[44]

To apply this provision, a carrier must measure the comparative "usage" of the regulated and nonregulated services sharing network facilities. The two activities at issue here, however, use the shared facilities in different ways. To provide telephony service, transmission facilities must carry numerous unique, two-way, voice-grade communications.[45] Each telephony subscriber's use of the network increases the amount of bandwidth used, but the amount of bandwidth needed for each call is small, compared to video signals. By contrast, to provide cable video service, transmission facilities must continuously carry a single, one-way collection of video signals, which any subscriber can access at any time.[46] Each cable subscriber's use of the network has no effect on the total amount of bandwidth used to provide the service, but cable video service does require substantially more bandwidth than voice-grade service. Thus, if the costs associated with jointly-used facilities are allocated on the basis of total bandwidth used by each service, then a relatively large percentage of the costs will necessarily be attributed to the nonregulated service. If other usage measurements are used, however, such as the number of subscribers or the number of unique circuits, then the regulated service will bear a relatively larger percentage of the joint and common costs.

13. Recognizing these differences in the way these two services "use" the

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[43] Complainants' Opening Brief at 8-10; Complainants' Reply Brief at 7 n.8.

[44] 47 C.F.R. § 64.901(b)(4) (emphasis added).

[45] *See Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 17211, 17224, ¶¶ 30-31 (1996) (*Video Cost Allocation NPRM*).

[46] *Id*.

shared facilities, we conclude that Complainants have failed to demonstrate that BellSouth is applying section 64.901(b)(4) of the Commission's rules in an unreasonable manner by allocating costs associated with jointly-used facilities on the basis of the number of telephone lines and cable subscribers. In reaching this conclusion, we must consider the historical underpinnings of section 64.901(b)(4). The Commission adopted the cost allocation rules in 1987 to "inhibit carriers from imposing on ratepayers for regulated interstate services the costs and risks of nonregulated ventures."[47] At that time, the nonregulated services offered by local exchange carriers, such as voice mail, could be measured in much the same way that regulated telephony services are measured — via "minutes of use." Recognizing this fact, the Commission adopted rules that required carriers to allocate central office equipment and outside plant investment costs between regulated and nonregulated activities based upon measurements of the relative regulated and nonregulated *usage* of the investment.[48] At that time, incumbent local exchange carriers were generally not permitted to provide cable video service.[49]

14. After the Telecommunications Act of 1996 lifted the prohibition against incumbent local exchange carriers providing cable video programming directly to subscribers in their telephone service area,[50] the Commission recognized that its usage-based, cost allocation rules would be difficult for a carrier to apply in allocating its joint and common costs between regulated telephony services and nonregulated video services.[51] As noted above, the Commission recognized that the "minutes of use" measurement has little relevance to network usage characteristics of cable video services. Consequently, the Commission released a Notice of Proposed Rulemaking concerning whether and how "to amend [its] cost allocation rules and procedures to accommodate an incumbent local exchange carrier's use of the same network facilities to provide video programming service and other competitive offerings not subject to Title II regulation, as well as telephony and other Title II offerings."[52] The Commission stated

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[47] *Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities*, Report and Order, 2 FCC Rcd 1298, 1299, ¶ 1 (1987) (*Joint Cost Order*).

[48] *Id.* at 1319-1320, ¶¶ 167-170.

[49] *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b) (codified at 47 U.S.C. § 553(b)). The telephone-cable cross-ownership prohibition did not apply "in rural areas" and could be waived by the Commission upon a "showing of good cause." *Id.* at § 613(b)(3), (4).

[50] Telecommunications Act of 1996 § 651, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 571.

[51] *See Video Cost Allocation NPRM*, 11 FCC Rcd at 17213-4, ¶ 2.

[52] *Video Cost Allocation NPRM*, 11 FCC Rcd at 17213, ¶ 2.

that "[its] current cost allocation rules were not designed for this task."[53] The Commission has not yet modified its rules.

15. Given this background, we cannot conclude that BellSouth's allocation based on the number of telephone lines and subscribers is not a reasonable "usage"-based methodology of cost allocation when the nonregulated service at issue is cable. Section 64.901(b)(4) remains in place, and allows for the allocation of joint and common costs on any reasonable basis that measures relative usage. This flexible approach comports with the overall structure established by the Commission's cost accounting rules: The rules primarily provide frameworks within which carriers can craft unique practices that are reasonable, rather than rigid directives that allow carriers no discretion.[54] This approach also comports with the absence in section 64.901(b)(4) of any mandate requiring a particular manner of measuring usage, such as minutes-of-use or the amount of bandwidth used. Applying that approach here, we do not find that Complainants have proven that BellSouth's methodology falls outside the bounds of reasonableness. The "subscriber circuit" methodology employed by BellSouth measures the relative number of customers that use the network with respect to each service provided thereon. BellSouth's methodology thus roughly reflects the relative extent to which the shared facilities are being used by customers of each service. Accordingly, we cannot say that BellSouth's "subscriber circuit" allocation methodology fails to measure the relative regulated and nonregulated usage of shared facilities as required by section 64.901(b)(4).

16. Complainants also claim that, even if BellSouth's subscriber circuit allocation methodology does not violate section 64.901(b)(4) of the Commission's rules, it violates section 254(k) of the Act (and its mirror image, section 64.901(c) of the Commission's rules).[55] As indicated above, section 254(k) prohibits a carrier from "us[ing] services that are not competitive to subsidize services that are subject to competition."[56] In the context of

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[53] *Id.* at 17214, ¶ 2.

[54] For example, section 32.27 of the Commission's rules states that, under certain circumstances, assets transferred and services provided between a carrier and its affiliate must be recorded by the carrier at "fair market value," but the rule does not prescribe how carriers may calculate fair market value. *See* 47 C.F.R. § 32.27.

[55] 47 U.S.C. § 254(k); 47 C.F.R. § 64.901(c). *See* Complaint at 9-10, ¶¶ 36-39; Complainants' Opening Brief at 3, Complainants' Reply Brief at 10. Complainants allege that the nonregulated service at issue here — cable video service — is subject to competition, and that the regulated service — basic telephony service — is non-competitive. Complaint at 9, ¶¶ 37-38. BellSouth denies that it offers non-competitive services, and refuses to admit that cable video service is competitive. Response at 8, ¶¶ 37-38. For the purposes of this analysis, however, we will assume that Complainants' allegations are correct.

[56] 47 U.S.C. § 254(k).

examining sections 260 and 271 through 275 of the Act, the Commission has previously found that compliance with its pre-existing cost allocation rules in Part 64 is sufficient to satisfy section 254(k).[57] The reasoning there is equally applicable in this instance, and we see no reason to conclude otherwise here. Accordingly, our holding with respect to Complainants' claim under section 64.901(b)(4) of the Commission's rules is dispositive of Complainants' claim under section 254(k) of the Act. Accordingly, that claim is denied.

B. Complainants Have Failed To Meet Their Burden of Proving that BellSouth Violated the Commission's Affiliate Transactions Rules.

17. Complainants next argue that BellSouth violated section 621(b) of the Act[58] by constructing cable systems without a franchise.[59] Complainants further argue that, as a result of this alleged violation, BellSouth's cable affiliate received several intangible, but highly valuable, benefits from BellSouth: BIMS was allegedly able (1) to avoid extensive and costly local franchising processes; (2) to plan and schedule construction of the system without the normal permitting and make-ready delays often facing non-affiliates; (3) to generate market signals that a competing video system will soon be available, both to discourage subscribers from taking another video service and wait for BellSouth's offering and to discourage new competition from entering the market; and (4) to receive subsidization of its development and build-out costs. Complainants maintain that BellSouth's failure to account for the conveyance of these benefits violated the Commission's affiliate transactions rules provided in 47 C.F.R. §

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[57] *See Accounting Safeguards Order*, 11 FCC Rcd at 17662, ¶ 275 (stating that the Commission's current accounting safeguards "prevent subsidization of competitive nonregulated services . . . by subscribers to an incumbent local exchange carrier's regulated telecommunications service," and finding that section 254(k) does not require additional safeguards for the particular services discussed therein.)

[58] 47 U.S.C. § 541(b) ("[A] cable operator may not provide cable service without a franchise.").

[59] Complaint at ¶ 12. *See also* Complainants' Opening Brief at 11-14; Complainants' Reply Brief at 13; *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.,* Complainants' Supplemental Brief, File No. E-97-10 (filed Aug. 27, 1999) at 5-6 (Complainants' Supplemental Brief). In support of this allegation, Complainants cite sections 602(9), 621(a)(3), and 621(a)(4)(A) of the Act. 47 U.S.C. §§ 522(9), 541(a)(3), 541(a)(4)(A). Section 602(9) defines the term "franchise" as "an initial authorization . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9). Section 621(a)(3) permits local franchising authorities to require that a cable system be constructed so that "access to cable service is not denied to any group of potential residential cable subscribers because of . . . the local area in which such group resides." 47 U.S.C. § 541(a)(3). Section 621(a)(4)(A) states that franchising authorities "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." 47 U.S.C. § 541(a)(4)(A).

32.27.[60] Accordingly, Complainants conclude that BellSouth must account for these benefits retroactively by valuing the use of its intangible franchise asset for nonregulated purposes according to the principles set forth in section 32.27 of the Commission's rules. In Complainants' view, "BellSouth should be required to assess the market value of the benefit that has been conferred on its cable operator affiliate by aiding that affiliate in circumventing the franchising requirements of the Act and then (a) credit regulated operations with that market value and (b) charge the cable operator affiliate with it."[61]

18. Complainants' contention that BellSouth violated the Commission's affiliate transactions rules hinges on two predicate assertions: (1) that BellSouth violated the Act by constructing cable systems before obtaining cable franchises; and (2) that the affiliate transactions rules apply to transfers of intangible benefits. While we have serious doubts about the validity of both assertions, we find it unnecessary to reach these issues. For even assuming that both assertions are correct, we find that Complainants have failed to prove that BellSouth actually transferred anything of value to its cable affiliate.

19. First, contrary to Complainants' contention, BIMS has not "avoided extensive and costly local franchising process[es]."[62] As BellSouth recognizes, prior to actually offering cable service to consumers, BIMS will have to obtain the relevant local franchises.[63] At most, then, BIMS's involvement in local franchising processes has merely been delayed, not avoided. Moreover, the factual record is insufficient to support the claim that BIMS avoided the "normal" permitting and make-ready delays allegedly often facing non-affiliates. Complainant has not provided any evidence supporting this assertion, such as a credible analysis quantifying the "normal" delays faced by similar projects and the *actual* delays faced by BIMS. As a result, this allegation is merely speculation.

20. The record similarly lacks any factual evidence to support Complainants' assertion that BellSouth's cable construction has conveyed any market benefits to BIMS. In particular, Complainants have provided nothing other than the argument of counsel to substantiate their assertion that BellSouth's cable construction somehow discouraged consumers from selecting a competitor's service and discouraged market entry by potential new competitors. Such speculation falls far short of the proof necessary to

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[60] Complainants' Opening Brief at 17-18; Complainants' Reply Brief at 14-16; Complainants' Supplemental Brief at 6-9.

[61] Complainants' Supplemental Brief at 6.

[62] Complainants' Supplemental Brief at 7.

[63] 47 U.S.C. § 541(b)(1); Opposition Brief of BellSouth at 15.

demonstrate that BIMS received from BellSouth some intangible competitive advantage in the cable market. Finally, given that Complainants have failed to prove that BellSouth's cable construction conveyed a benefit to BIMS, Complainants' assertion that BellSouth's payment of the cable construction costs conveyed a benefit to BIMS must similarly fail for lack of proof. Payments made by BellSouth to develop and build a network that has not yet benefited BIMS cannot constitute a transfer or provision of an asset or service to BIMS until BIMS indisputably receives a benefit by actually using the network for which the payments were made.[64]

21. In sum, although Complainants have proffered theories of how BellSouth *may* have conferred intangible benefits to BIMS, Complainants have provided no concrete factual proof that BellSouth did actually confer such benefits. In the absence of such proof (in the form of affidavits, business records, etc.), Complainants' claim that BellSouth violated the Commission's affiliate transactions rules must fail.

C. Complainants Settled or Abandoned All Remaining Claims.

22. In their Complaint, Complainants assert that BellSouth violated sections 202(a) and 224(g) of the Communications Act of 1934 by not charging or imputing to "itself, or any BellSouth cable television/video distribution affiliate, the pole or conduit rate it charges [Complainants] or other telecommunications carriers in its service area."[65] Prior to this Order, the parties reached a settlement on the claims pertaining to the conduit rates charged by BellSouth.[66] However, Complainants allege that the "imputation and discrimination claims" were not settled and remain at issue.[67] We disagree that these claims are currently before the Commission. Complainants failed to provide support for these claims at any time during this proceeding. Accordingly, we consider these claims abandoned.[68]

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[64] Of course, if Complainants had provided proof that merely the construction of the network itself had transferred or provided an asset or service to BIMS, even before BIMS begins to use the network, then Complainants could perhaps have persuasively argued that the development/build-out payments should be included in the value of the conveyance. As described above, however, the record contains no such proof.

[65] Complaint at 7-8, ¶¶ 30-31.

[66] *See* Complainants' Supplemental Brief at 2.

[67] *Id.*

[68] *See generally IT&E Overseas, Inc. v. Micronesian Telecommunications Corporation*, Memorandum Opinion and Order, 13 FCC Rcd 16058, 16073 (1998) (complainant in section 208 proceeding is required to develop and validate its claim with relevant statements of fact and supporting evidence).

IV. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 202, 208, 224, and 254(k) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 202, 208, 224, 254(k), and sections 32.27 and 64.901 of the Commission's rules, 47 C.F.R. §§ 32.27, 64.901, and under the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the complaint filed by the Tennessee Cable Telecommunications Association, *et al.* and the Cable Television Association of Georgia, *et al.*, IS DENIED in its entirety.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau