

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

In the Matter of)	
)	
SBC Communications Inc.)	File No. EB-00-IH-0326a
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. 200132080015

ORDER OF FORFEITURE

Adopted: May 23, 2001

Released: May 24, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we find that SBC Communications, Inc. (SBC) willfully and repeatedly violated section 51.321(h) of the Commission's rules, requiring incumbent local exchange carriers (ILECs) promptly to post notice of premises that have run out of collocation space.¹ These violations were discovered through an independent audit of SBC's compliance with the Commission's collocation rules, in which Ernst & Young found material instances of noncompliance with the posting rule. Based on the facts and circumstances before us and after considering SBC's responses to our Notice of Apparent Liability (NAL) in this matter, we conclude that SBC is liable for a forfeiture of ninety-four thousand, five hundred dollars (\$94,500.00), the amount proposed in the NAL.

II. BACKGROUND

2. In the NAL, we found that SBC apparently violated section 51.321(h) of the Commission's rules, which states: "The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's public[ly] available Internet site, indicating all [collocation] premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space."² We found that SBC was apparently liable for a forfeiture of \$94,500.00.³

3. In its February 20, 2001 Response to the NAL, SBC contested the Bureau's

¹ 47 C.F.R. § 51.321(h).

² See SBC Communications, Inc., *Notice of Apparent Liability for Forfeiture*, DA 01-128 (Jan. 18, 2001) (NAL). 47 C.F.R. § 51.321(h).

³ NAL at ¶¶ 1, 9.

finding of apparent liability on the bases that: (1) the NAL failed to specify the alleged violations and, therefore, deprived SBC of a meaningful opportunity to respond; (2) SBC's few admitted posting lapses were not willful; and (3) the NAL failed to explain the forfeiture amount assessed.⁴

In response to SBC's first claim, on March 9, 2001, the Bureau issued a confidential letter to SBC's outside counsel explaining that the NAL omitted the details of the alleged violations because SBC had requested confidential treatment of its submissions to the Bureau detailing the nature and scope of its violations.⁵ The Bureau's letter detailed the number and locations of the apparent violations, and provided SBC with an additional 30 days in which it could file a supplemental response to the NAL.⁶

4. On April 9, 2001, SBC filed its Supplemental Response to the NAL claiming that the Bureau's NAL is "badly flawed" on the bases that: (1) the Bureau failed to explain the rationale behind its proposed forfeiture; (2) SBC's office-closing and Internet-posting policy is pro-competitive and fully consistent with Commission policy and rules; (3) SBC has not "willfully" disregarded its office-closing and Internet-posting legal obligations; (4) three of the apparent violations are barred from forfeiture by the statute of limitations; and (5) the Bureau's proposed forfeiture assessment is unexplained, unjustified, and arbitrary. As explained below, we are not persuaded by SBC's arguments.

III. DISCUSSION

A. Specificity of Allegations

5. The initial issue raised by SBC in its Response was that the NAL failed to specify the alleged violations and therefore deprived SBC of a meaningful opportunity to respond.⁷ As noted above, the Bureau issued a confidential letter to SBC's outside counsel detailing both the number of apparent violations, and the central offices where each apparent violation occurred.⁸ We believe that this letter fully responded to SBC's concern and note that SBC did not raise this issue again in its Supplemental Response.

B. Appropriateness of SBC's Collocation Posting Policy

6. SBC's policy is to post notice of exhausted collocation space only when it determines exhaustion has occurred, "[a]s a general matter . . . pursuant to the denial or partial

⁴ See February 20, 2001 Response of SBC Communications Inc. to Notice of Apparent Liability for Forfeiture (Response).

⁵ See March 9, 2001 Letter from David H. Solomon, Chief, Federal Communications Commission Enforcement Bureau, to Michael K. Kellogg, Counsel for SBC Communications, Inc. (March 9, 2001 Solomon Letter).

⁶ *Id.*

⁷ Response at 12 - 14.

⁸ See March 9, 2001 Solomon Letter.

denial of a collocation application, though it sometimes is made in the course of approving such an application or conducting an internal floor space assessment.”⁹ SBC asserts that, to its knowledge, all other ILECs determine the appropriate time at which they must post collocation space exhaustion using roughly the same criteria as SBC.¹⁰ SBC’s policy of posting only once it has denied a collocation application conflicts with the plain language of the collocation posting rule. Section 51.321(h) requires posting “within ten days of the date at which a premises runs out of physical collocation space.”¹¹ SBC’s denial of a collocation application is not the event that causes a premise to run out of space. Indeed, the denial makes clear that the premise already had run out of space. Moreover, SBC’s approach conflicts with the stated purposes of the rule, to “allow competitors to avoid expending significant resources in applying for collocation space in an incumbent LEC’s premises where no such space exists.”¹² By waiting until it denies an application, SBC in each instance causes at least one competitive local exchange carrier (CLEC) to waste time and resources on an application.

7. In arguing against the plain language of the rule, SBC asserts that in adopting the posting rule, the Commission “expressly stated that it was ‘adopt[ing] the proposal of Sprint’” and that “Sprint . . . suggested the Internet-posting requirement as an additional reporting requirement *that would also be triggered by the denial of a collocation application.*”¹³ We find nothing in Sprint’s comments to support this statement. Sprint merely urged that “ILECs be required simply to maintain a *current*, publicly available list of offices where no space is available.”¹⁴ The fact that Sprint specifies that the Internet document should be “current” suggests, contrary to SBC’s argument, that ILECs would have to keep track of current space availability, which would obviously be affected by each use or reservation of space.

8. SBC also asserts that the Commission’s Regulatory Flexibility Analysis in the *Advanced Services Order* “casts further doubt on the existence of” a requirement that ILECs monitor their collocation floor space after each space reservation and equipment installation.¹⁵ SBC quotes the Commission’s statement that the burden of the Internet-posting requirement on ILECs “is minimal, because an Internet site is easy and cheap to maintain, and all [the ILECs] are

⁹ Response at 3; *see also* April 9, 2001 Supplemental Response of SBC Communications Inc. to Notice of Apparent Liability for Forfeiture at 4 (Supplemental Response); *see also* August 7, 2000 Report of Management on Compliance with the FCC’s Collocation Rules at 3, 4.

¹⁰ Supplemental Response at 13.

¹¹ 47 C.F.R. § 51.321(h).

¹² *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4793 (*Advanced Services Order*).

¹³ Supplemental Response at 13 (emphasis added).

¹⁴ *See* Sprint comments at 18 (emphasis added).

¹⁵ Supplemental Response at 14.

doing is making available information that they already know themselves.”¹⁶ SBC argues that keeping track of space availability in every office cannot be considered “minimal.”¹⁷ We disagree. The Internet-posting requirement simply requires that ILECs make publicly accessible information about the availability of collocation space in offices that they occupy on a daily basis. Accordingly, we reject SBC’s assertion that the Bureau’s interpretation of the collocation space exhaustion posting requirement conflicts with the Commission’s Regulatory Flexibility Analysis of its *Advanced Services Order*.

9. Similarly, we reject SBC’s argument that the Commission must obtain additional approval from the U.S. Office of Management and Budget under the Paperwork Reduction Act before imposing the collocation space exhaustion posting requirement on ILECs.¹⁸ The Commission has already obtained such approval.¹⁹ The fact that SBC claims not to have realized the rule meant what it said is not a basis for requiring re-approval.

10. In its Supplemental Response, SBC alleges that the Bureau failed to explain the rationale behind its finding of apparent violations.²⁰ We disagree. As explained above and in the NAL, SBC failed to post notices of space exhaustion within 10 days of the event that actually caused the space to become unavailable for collocation. We note that in SBC’s pending application to the Commission to provide long distance service in Missouri, SBC proposed to modify its posting policy so as to post notice of a central office closing within 10 days of a collocation request or space assignment that would exhaust the collocation space at that central office.²¹ This approach would bring SBC into compliance with the rule.

C. Willfulness Standard

11. In both its initial and supplemental responses to the NAL, SBC contends that any violations of section 51.321(h) were not “willful.”²² Pointing to the Commission’s statement in *Midwest Radio-Television* that “the policy factor which has been the main key to our actions” in the forfeiture area is “a demonstrated lack of concern or indifference on the part of the licensee

¹⁶ Supplemental Response at 14 (citing the *Advanced Services Order* at App. C, ¶ 18).

¹⁷ Supplemental Response at 14.

¹⁸ Supplemental Response at 15.

¹⁹ OMB No. 3060-0848.

²⁰ Supplemental Response at 3.

²¹ See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri*, CC Docket No. 01-88 (filed April 4, 2001), Appendix A, Volume 1, Tab 5 at p. 10.

²² Response at 15 - 18; Supplemental Response at 16, 17.

for compliance with the Act or our Rules,”²³ SBC asserts that the NAL has failed to establish that any noncompliance was willful because the Bureau has not demonstrated a lack of concern or indifference for compliance on SBC’s part.²⁴ Even assuming the continuing validity of *Midwest Radio-Television*, in light of decades of subsequent Commission case law, SBC’s argument has no merit. The violations upon which the Bureau relied in issuing its NAL are not consistent with SBC’s description of its compliance with the Commission’s collocation requirements as “characterized by extreme care and meticulousness.”²⁵ Rather, SBC violated these rules in numerous instances during the audit period.²⁶ It has long been established that the word “willfully,” as employed in section 503(b) of the Act, does not require a demonstration that a party knew it was acting unlawfully. Section 503(b) requires only a finding that SBC knew it was doing the acts in question and that the acts were not accidental.²⁷

12. SBC further contends in its Supplemental Response that a “willful” violation must be predicated on a standard “sufficient to put [the licensee] on notice.”²⁸ In this regard, SBC states that (1) the Bureau’s standard is unclear; and (2) it is “SBC’s collocation [space exhaustion posting] policy – not the Bureau’s – that is followed by the entire ILEC industry,” and that the practice of the ILECs must by definition be legal if they all act the same way.²⁹ We reject both of these assertions.

13. First, as explained above, the collocation space exhaustion posting requirement is clear on its face. Second, we find SBC’s assertions about the practices of other ILECs to be irrelevant. Because, as stated above, we find that SBC’s policy clearly does not satisfy the posting requirement, the purported behavior of other companies cannot legitimize SBC’s noncompliance. In light of SBC’s statement regarding apparent non-compliance by other ILECs, we will, however, consider undertaking appropriate investigations and taking appropriate enforcement action.

D. Forfeiture Amount

²³ See *Midwest Radio-Television Inc.*, Memorandum Opinion and Order, 45 FCC 1137, 1141 (1963).

²⁴ Response at 15 - 17.

²⁵ Response at 15.

²⁶ See January 9, 2001 Letter from Sandra L. Wagner, Vice-President, SBC Telecommunications, Inc., to Brad Berry, Deputy Chief, Federal Communications Commission Enforcement Bureau, Exhibit A (January 9, 2001 Wagner Letter).

²⁷ E.g., *ConQuest Operator Services Corp.*, Order of Forfeiture, FCC 99-194, at ¶ 15 n.41 (rel. July 26, 1999); *Target Telecom, Inc.*, Order of Forfeiture, 13 FCC Rcd 4456, 4458 (1998); *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991).

²⁸ Supplemental Response at 16 (citing *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C. Cir. 1978)).

²⁹ Supplemental Response at 17.

14. SBC contends that the proposed forfeiture is unexplained, unjustified and arbitrary.³⁰ SBC argues that the Bureau (1) failed to explain its proposed forfeiture amount of \$94,500;³¹ (2) failed to identify the number of violations at issue;³² and (3) failed to provide the base forfeiture amount it used in determining the total forfeiture amount.³³ Further, SBC argues that the Bureau is required to examine downward adjustment factors in determining a forfeiture amount.³⁴ To that end, SBC argues that its performance in providing collocation arrangements to CLECs has been “outstanding”; that its overall record of compliance with the Commission’s collocation and other rules is “outstanding”; that no competitor or consumer was harmed by SBC’s posting policy; and that SBC has “operated in good faith” in dealing with the Bureau on this matter and has made “voluntary disclosure” of the information relied upon by the Bureau in its determination of a proposed forfeiture.³⁵ SBC further argues that its willingness to modify its “office-closing and Internet-posting policy” should be taken into account by the Bureau in considering a downward adjustment.³⁶

15. We believe the Bureau’s March 9, 2001 letter to SBC’s outside counsel sufficiently explains the proposed forfeiture amount, identifies the number of violations at issue, and provides the base forfeiture amount.³⁷ Because of SBC’s request for confidential treatment, these matters were not described in as much detail in the NAL as is typically the case. We reject all of SBC’s arguments for adjusting downward the proposed forfeiture amount. SBC’s argument that its collocation performance in general is “outstanding” does not mitigate SBC’s failure to comply specifically with the Commission’s collocation space exhaustion posting rule. Moreover, we note that this is not the only recent instance in which SBC has been found in violation of FCC rules.³⁸ Further, SBC’s assertion that no competitor or consumer was harmed by its posting

³⁰ See Response at 19, 20; see also Supplemental Response at 17, 18.

³¹ Response at 19.

³² *Id.*

³³ Response at 19; Supplemental Response at 17, 18.

³⁴ Response at 19, 20; Supplemental Response at 18.

³⁵ *Id.*

³⁶ Supplemental Response at 18.

³⁷ See March 9, 2001 Solomon Letter.

³⁸ See, e.g., *SBC Communications, Inc.*, Order of Forfeiture, DA 01-680, (March 15, 2001); *C.F. Communications Corp., et al. v. Century Telephone of Wisconsin, Inc., et al.*, Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759 (2000), *appeal pending*, *Bell Atlantic, et al. v. FCC*, No. 00-1207 (D.C. Cir. filed May 15, 2000); *AT&T Corp., MCI Telecommunications Corp., et al. v. Bell Atlantic-Pennsylvania, et al.*, Memorandum Opinion and Order, 14 FCC Rcd 556 (1998); *recon. denied* 15 FCC Rcd 7467 (2000); *review denied* 15 FCC Rcd 16,124 (2000); *Southwestern Bell Telephone Co.*, Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 6964 (1998); *AT&T Corp. International Telecharge v. Southwestern Bell Telephone Co.*, Memorandum Opinion and Order, 11 FCC Rcd 10061 (1996).

policy likely is false. Information submitted to the Bureau by SBC strongly suggests that several CLECs applied for collocation space from SBC where no such space remained, and were accordingly denied collocation by SBC.³⁹ Had SBC complied with the Commission's collocation space exhaustion posting rule, such denials likely would not have occurred as the CLECs would have been on notice as to the space exhaustion and would not have applied for space or had to incur the related costs of such applications.

16. The Bureau is not persuaded to reduce the forfeiture amount by SBC's arguments that it "voluntarily" disclosed to the Bureau information that the Bureau relied upon in determining its proposed forfeiture, and that it is willing to revise its posting policy. First, the Bureau first learned of SBC's violations from an audit report that SBC was *required* to file.⁴⁰ Moreover, SBC was legally bound to respond to the Bureau's subsequent inquiries.⁴¹ Thus, there was no voluntary disclosure. Second, SBC's willingness to revise its policy *after* an NAL has been issued provides no basis to adjust downward the proposed forfeiture amount. We give no weight to SBC's promise to comply with its existing obligation.

17. Furthermore, we disagree with SBC's contention that the Bureau failed to comply with the Commission's forfeiture guidelines by not explaining in its NAL whether it used a base forfeiture amount, and how, if at all, it adjusted such a base amount.⁴² In its March 9, 2001 letter to SBC's outside counsel, the Bureau provided the number of violations at issue, and the amount it proposed to assess per violation.⁴³ As explained in the NAL, the Bureau considered "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" in determining the forfeiture amount.⁴⁴ This forfeiture amount is justified here in light of the number of SBC's violations and the possible competitive harm caused by the violations.⁴⁵

³⁹ See January 9, 2001 Wagner Letter, Exhibit A.

⁴⁰ See *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶ 387, Appendix C at ¶ 40 (1999).

⁴¹ Sections 4(i), 218, and 403 of the Communications Act of 1934, as amended, provide the Commission with broad authority to make reasonable inquires of the carriers it regulates. 47 U.S.C. §§ 4(i), 218, 403.

⁴² Response at 19; Supplemental Response at 17, 18.

⁴³ See March 9, 2001 Solomon Letter.

⁴⁴ NAL at ¶ 9. 47 U.S.C. § 503(b)(2)(D); see also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

⁴⁵ NAL at ¶ 6.

E. Statute of Limitations

18. In its supplemental response, SBC contends that posting violations at three of the central offices the Bureau relied upon in determining apparent violations for its NAL are barred by the Commission's one-year statute of limitations.⁴⁶ SBC argues that because the NAL did not specify the central offices upon which the Bureau relied in determining its proposed forfeiture, the NAL was "insufficient to place SBC on notice" with respect to the apparent violations at issue – other than the three instances SBC had identified in prior submissions.⁴⁷ SBC states that it first was put on proper notice of the apparent violations on March 9, 2001, the date on which the Bureau issued a confidential letter to SBC's outside counsel setting forth the number and location of the violations upon which the Bureau relied in determining its proposed forfeiture.⁴⁸ As explained above, the NAL did not specify the apparent violations because SBC itself had requested confidential treatment of all information it submitted to the Bureau in conjunction with this proceeding.

19. We reject SBC's statute of limitations argument on two grounds: (1) the very reason the NAL did not specify the violations at issue was that SBC itself had requested confidential treatment of that information; and (2) SBC's Supplemental Response – filed thirty days after SBC's receipt of the Bureau's March 9, 2001 letter detailing the violations – does not defend substantively any specific instances of apparent violations, thereby indicating that the specific details provided in the Bureau letter were not needed by SBC to respond effectively to the NAL.

IV. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED that, pursuant to section 503(b) of the Act,⁴⁹ and section 1.80 of the Commission's Rules,⁵⁰ SBC Communications SHALL FORFEIT to the United States Government the sum of ninety-four thousand, five hundred dollars (\$94,500.00) for willfully and repeatedly violating the Commission's rule requiring ILECs promptly to post notice of premises that have run out of collocation space.

21. IT IS FURTHER ORDERED that payment shall be made in the manner provided for in section 1.80 of the Commission's rules within 30 days of release of this order. If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.

22. IT IS FURTHER ORDERED that a copy of this Order of Forfeiture shall be sent

⁴⁶ Supplemental Response at 17 (citing 47 U.S.C. § 503(b)(6)).

⁴⁷ Supplemental Response at 17.

⁴⁸ *Id.*

⁴⁹ 47 U.S.C. § 503(b).

⁵⁰ 47 C.F.R. § 1.80.

by Certified Mail/Return Receipt Requested to SBC Communications, c/o Sandra L. Wagner, Vice President-Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau