

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

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

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 17, 2001

Released: January 18, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that SBC Communications, Inc. (SBC) has apparently violated the Commission's rule requiring incumbent local exchange carriers (ILECs) promptly to post notices of premises that have run out of collocation space. These violations were discovered through an independent audit of SBC's compliance with the Commission's collocation rules. That audit was required by the Commission's order approving the merger application of Ameritech Corp. (Ameritech) and SBC.¹ It appears that, in numerous instances during the audit period,² SBC failed to timely update the document on its Internet site, required by the Commission's collocation rules, identifying those SBC premises that have run out of physical collocation space.³ These violations also constitute violations of the SBC/Ameritech Merger Order, which requires that SBC/Ameritech provide collocation consistent with the Commission's rules.⁴ Based upon our review of the facts and circumstances surrounding this matter, we find that SBC is apparently liable for a forfeiture in the amount of ninety-four thousand, five hundred dollars (\$94,500).

¹ 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 (1999) ("SBC/Ameritech Merger Order"); *SBC/Ameritech Merger Order*, Appendix C at ¶ 40. See also *Association of Communications Enterprises v. FCC*, No. 99-1441 (D.C. Cir. Jan. 9, 2001).

² 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. SBC has requested confidential treatment of its submissions to the Bureau detailing the nature and scope of its apparent violations, and that request is pending. Accordingly, we do not here disclose the number of apparent violations or the premises with respect to which they occurred.

³ 47 C.F.R. § 51.321(h).

⁴ See *SBC/Ameritech Merger Order*, Appendix C at ¶ 37.

II. BACKGROUND

2. SBC is an ILEC that provides local telephone service in 13 states, including Arkansas, Kansas, Missouri, Oklahoma, Texas, California, Nevada, Illinois, Michigan, Indiana, Ohio, Wisconsin, and Connecticut. At the end of 1999, SBC served nearly 60 million local exchange access lines in its 13-state region, and served customers in 23 countries.⁵ SBC also provides in-region interLATA, wireless, Internet access, out-of-region interLATA, cable and wireless television, security monitoring, and directory publishing services.⁶ In 1999, SBC had total operating revenues of more than \$49 billion dollars.⁷

3. In the *SBC/Ameritech Merger Order*, the Commission concluded that the merger of SBC and Ameritech posed significant public interest harms that were not mitigated by the proposed transaction's potential public interest benefits.⁸ The Commission therefore approved the merger only subject to certain conditions designed to mitigate the potential public interest harms. One of those conditions was that SBC retain an independent auditor to develop and implement a comprehensive audit of the merged company's compliance with the Commission's collocation rules for the first eight months after the merger closing.⁹

4. On August 8, 2000, SBC submitted its audit report to the Commission regarding SBC's compliance with the Commission's collocation rules from October 8, 1999 through June 8, 2000.¹⁰ Based on the Bureau's review of the audit report and of certain information submitted to the Bureau by SBC, we conclude that SBC apparently violated the requirement to timely post exhausted collocation space in numerous instances during the audit period.¹¹

III. DISCUSSION

A. Violations

⁵ SBC 1999 Annual Report at 6.

⁶ *Id.* at 4.

⁷ *Id.* at 76.

⁸ See *SBC/Ameritech Merger Order* at ¶ 348.

⁹ See *SBC/Ameritech Merger Order* at ¶ 387; see also *SBC/Ameritech Merger Order* Appendix C at ¶ 40. The audit covered the period from October 8, 1999 through June 8, 2000.

¹⁰ See August 8, 2000 Letter from Marian Dyer, Vice-President, SBC Telecommunications, Inc., to Magalie Salas, Secretary, Federal Communications Commission; see also August 7, 2000 Report of Management on Compliance with the FCC's Collocation Rules ("Management's Assertion on Compliance"); see also August 7, 2000 Report of Independent Accountants, Ernst & Young LLP ("Auditor's Report on Compliance").

¹¹ 47 C.F.R. § 51.321(h). See also *SBC/Ameritech Merger Order*, Appendix C at ¶ 37. See Auditor's Report on Compliance at pp. 1, 2; see also Management's Assertion on Compliance at p. 3.

5. SBC does not dispute that, in certain instances during the audit period, it violated the Commission's rule requiring timely posting of notice of exhausted collocation space.¹² Based on information submitted to the Bureau by SBC, we find that SBC apparently violated the timely posting requirement in numerous other instances.

6. The posting rule states that an ILEC must update its Internet website listing premises that have exhausted collocation space "within ten days of the date at which a premises runs out of physical collocation space."¹³ The Commission order adopting this rule makes clear that an ILEC's obligation to post notice of exhausted space is triggered when such exhaustion occurs.¹⁴ Specifically, the purpose of the rule is to ensure that competitors do not "expend[] significant resources in applying for collocation space in an incumbent ILEC's premises where no such space exists."¹⁵ Information provided by SBC indicates that there have been numerous instances in which the posting date was more than 10 days after the date that space actually became exhausted in those central offices.¹⁶ Moreover, in several of those instances, a competitive local exchange carrier (CLEC) may have been required to submit a collocation application, only to have the application denied on the ground that no space was available as of the time of the application. As noted above, this is the very result that section 51.321(h) of the Commission's rules was designed to avoid.¹⁷

7. Based on the facts set forth above, we find that SBC is apparently liable for a forfeiture for willful and repeated violation of the Commission's collocation rules and paragraph 37 of the merger conditions. SBC apparently violated the Commission rule requiring ILECs to timely update the document on its Internet site identifying those premises that have run out of physical collocation space in numerous instances during the audit period, and all during the past 12 months. We find that SBC's failure to timely post notice of exhausted collocation space was willful and repeated. The term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules, and repeated means more than once.¹⁸ Furthermore, a continuing violation is "repeated" if it lasts more than one day.¹⁹

¹² See Auditor's Report on Compliance at pp. 1, 2; see also Management's Assertion on Compliance at p. 3.

¹³ 47 C.F.R. § 51.321(h).

¹⁴ See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761, 4793 (1999) ("Advanced Services Order").

¹⁵ See Advanced Services Order at 4793.

¹⁶ In a November 28, 2000 meeting, SBC told representatives of the Enforcement Bureau that SBC notified the California Public Utilities Commission of its intention to delay the postings for many of its California central offices cited above. At no point, however, did SBC seek a waiver from the FCC of the requirements of section 51.321(h).

¹⁷ See 47 C.F.R. § 51.321(h); see also Advanced Services Order at 4793.

¹⁸ See *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("Southern California Broadcasting Co."); see also *Liability of Hale Broadcasting Corp.*, Memorandum Opinion and Order, 79 FCC 2d 169, 171 (1980).

¹⁹ See *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388.

8. Consistent with the Commission’s determination in the *SBC/Ameritech Merger Order* that its collocation rules are an integral component to opening local markets to competition, we find SBC’s failure to comply with these rules to be significant.²⁰ Given the importance of the Commission’s collocation rules, we cannot excuse SBC’s failure to comply with them.

B. Forfeiture Amount

9. Section 503(b)(1) of the Act states that any person that willfully or repeatedly fails 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.²¹ For the time period relevant to this proceeding, section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$110,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,100,000 for a single act or failure to act.²² In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including “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.”²³ Considering all of the circumstances described above, we find SBC apparently liable for a forfeiture in the amount of \$94,500.

IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,²⁴ and section 1.80 of the Commission’s Rules,²⁵ SBC Communications is HEREBY NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of ninety-four thousand, five hundred dollars (\$94,500) for willfully or repeatedly violating the Commission’s collocation rules.

11. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission’s Rules, within thirty (30) days of the release date of this NOTICE OF APPARENT LIABILITY, SBC Communications SHALL PAY to the United States the full amount of the proposed forfeiture OR SHALL FILE a written statement showing why the proposed forfeiture should not be imposed or should be reduced.

²⁰ See *SBC/Ameritech Merger Order* at ¶¶ 355, 386.

²¹ 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(2).

²² 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2).

²³ 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) (“Forfeiture Policy Statement”); recon. denied 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

²⁴ 47 U.S.C. § 503(b).

²⁵ 47 C.F.R. § 1.80.

12. Payment of the forfeiture amount may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the "NAL/Acct. No." referenced above.

13. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street S.W., Room 3-B443, Washington, D.C., 20554, and must include the "NAL/Acct. No." referenced above.

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

15. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability shall be sent 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