

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

In the Matter of	)	
	)	File No. EB-01-IH-0642
SBC Communications, Inc.	)	
	)	NAL/Acct. No. 200232080001
Apparent Liability for Forfeiture	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted:** November 1, 2001

**Released:** November 2, 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 an Enforcement Bureau order that SBC submit a sworn written response, not later than October 22, 2001, to a Bureau inquiry conducted pursuant to its authority provided by the Communications Act of 1934, as amended.<sup>1</sup> 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 one hundred thousand dollars (\$100,000).

**II. BACKGROUND**

2. On September 29, 2000, the Enforcement Bureau sent SBC a letter of inquiry (“LOI”) ordering SBC to provide digital subscriber line (“DSL”) provisioning and maintenance data for its affiliated Internet service provider (“ISP”) and for unaffiliated ISPs.<sup>2</sup> The Bureau sent this LOI pursuant to its investigation into whether SBC was discriminating in its provisioning and maintenance of DSL. SBC indicated in its response to that LOI,<sup>3</sup> and in affidavits provided on December 5, 2000,<sup>4</sup> that it was unable to supply the information. The major impediment identified by SBC was that it “has no method to identify or separate ISPs from

<sup>1</sup> 47 U.S.C. §§ 4(i), 4(j), 218, 403.

<sup>2</sup> See Sept. 29, 2000 Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Christine Jines, Executive Director – Federal Regulatory, SBC Telecommunications, Inc.

<sup>3</sup> See Oct. 19, 2000 Letter from Christine Jines, Executive Director – Federal Regulatory, SBC Telecommunications, Inc. to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission.

<sup>4</sup> See Dec. 5, 2000 Letter from Priscilla Hill-Ardoin, Senior Vice President, SBC Telecommunications, Inc. to Brad Berry, Deputy Chief, Enforcement Bureau, Federal Communications Commission (“SBC’s Dec. 5, 2000 Affidavits”).

any other [DSL] customer[s],”<sup>5</sup> and that “[t]herefore, a comparison of SBC’s ISPs to all other ISPs is not possible.”<sup>6</sup>

3. On April 30, 2001, SBC filed comments with the Commission in an unrelated rulemaking proceeding, in which it stated that “SBC has generated data that shows that SBC’s affiliated Internet ISPs and unaffiliated Internet ISPs received comparable treatment with respect to [DSL] provisioning and maintenance.”<sup>7</sup> SBC attached the referenced data to its comments.<sup>8</sup>

4. On October 1, 2001, the Bureau issued a supplemental LOI to SBC ordering the company to describe, among other things, the facts and circumstances surrounding the discrepancy between SBC’s statements in October and December 2000 that it could not provide the requested DSL data, and SBC’s statement in its April 2001 filing that it had such data available.<sup>9</sup> The Bureau, in two separate paragraphs of its supplemental LOI, directed SBC to submit a “sworn written response” to the LOI.<sup>10</sup>

5. On October 22, 2001, SBC submitted its response to the Bureau,<sup>11</sup> which failed to include a sworn statement, as ordered by the Bureau in its October 1, 2001 LOI.<sup>12</sup>

6. On October 29, 2001, Enforcement Bureau staff contacted SBC regarding the company’s omission of a sworn statement in its October 22, 2001 response. SBC orally stated to the staff that the company’s failure to submit a sworn statement was not an oversight; rather, it was intentional.

### III. DISCUSSION

7. Under section 503(b) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any of the provisions of the Act, or any rule or order issued by the Commission under the Act, shall be liable for a forfeiture

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<sup>5</sup> See SBC’s Dec. 5, 2000 Affidavits, Hill-Ardoin Affidavit at para. 9.

<sup>6</sup> *Id.* at para. 10; *see also* SBC’s Dec. 5, 2000 Affidavits, Taylor Affidavit at para. 4 (“SBC is unable to identify the universe of ISP customers”).

<sup>7</sup> See *Computer III Further Remand Proceedings, Bell Operating Company Provision of Enhanced Services*, CC Dkt No. 95-20; *1998 Biennial Regulatory Review – Review of Computer III ONA Safeguards and Requirements*, CC Dkt No. 98-10, Further Reply Comments of SBC Communications Inc., Apr. 30, 2001 at 15 (“SBC’s Further Reply Comments”).

<sup>8</sup> See SBC’s Further Reply Comments at Attachments A and B.

<sup>9</sup> See Oct. 1, 2001 Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Sandra L. Wagner, Vice-President – Federal Regulatory, SBC Telecommunications, Inc. (“Oct. 1, 2001 LOI”).

<sup>10</sup> *Id.* at pp. 2, 4.

<sup>11</sup> See October 22, 2001 Letter from William A. Brown, Senior Counsel, SBC Telecommunications, Inc. to Elizabeth H. Valinoti, Attorney, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission.

<sup>12</sup> See Oct. 1, 2001 LOI.

penalty.<sup>13</sup> In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>14</sup> 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.<sup>15</sup> Based on the facts set forth above, we find that SBC is apparently liable for a forfeiture for willful violation of the Bureau's order that SBC submit a sworn written response to the Bureau's October 1, 2001 LOI. 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.<sup>16</sup>

8. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$120,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,200,000 for a single act or failure to act.<sup>17</sup> 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."<sup>18</sup>

9. Section 1.80 of the Commission's rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture amount of \$3,000 for failure to file required forms or information.<sup>19</sup> The circumstances of this case, however, appear to justify a substantial increase to this base amount pursuant to upward adjustment criteria contained in the rules and the *Forfeiture Policy Statement*. Specifically, three factors warrant the adjustment. First, the misconduct appears egregious. Second, the violation was apparently intentional. Third, the forfeiture amount must be high enough to serve a deterrent effect in view of SBC's ability to pay.<sup>20</sup>

10. We consider SBC's conduct in this case to be egregious because its failure to submit a sworn written response to the Bureau hinders the Bureau's investigation into SBC's possible discrimination in provisioning and maintenance of DSL – a technology vital to

<sup>13</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

<sup>14</sup> 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

<sup>15</sup> See, e.g., *Tuscola Broadcasting Co.*, Memorandum Opinion and Order, 76 FCC 2d 367, 371 (1980) (applying preponderance of the evidence standard in reviewing Bureau level forfeiture order). Cf. 47 U.S.C. § 312(d) (assigning burden of proof in hearings to Commission).

<sup>16</sup> See *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>17</sup> 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2); see also *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000).

<sup>18</sup> 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).

<sup>19</sup> 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd at 17114, Appendix A, Section I.

<sup>20</sup> 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd at 17100.

competition in the ISP marketplace. Moreover, SBC's decision not to provide the requisite sworn statement here obstructs the Bureau's investigation into discrepancies in SBC's various representations to the Commission. SBC's conduct strikes at the core of the Bureau's ability to perform its function, and rises above the level of a mere omission or failure to file. Therefore, substantial upward adjustment of the proposed forfeiture amount is warranted. The fact that SBC apparently intentionally violated the order provides an additional basis for a substantial upward adjustment.

11. Finally, SBC's ability to pay warrants an upward-adjusted forfeiture amount to serve as a deterrent to future misconduct. In the *Forfeiture Policy Statement*, the Commission made it clear that companies with higher revenues, such as SBC,<sup>21</sup> could expect higher forfeitures than those reflected in the base amounts:

[O]n the other end of the spectrum of potential violations, we recognize that for large or highly profitable communication entities, the base forfeiture amounts . . . are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level . . . For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts . . ., we intend to take into account the subsequent violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.<sup>22</sup>

12. Based on these factors and the particular circumstances of this case, we find that SBC is apparently liable for a forfeiture in the amount of \$100,000. The egregiousness and intentional nature of SBC's misconduct, as well as SBC's ability to pay, considered in conjunction with the deterrent effect of the forfeiture, dictate that SBC be held apparently liable for an amount significantly higher than the base forfeiture amount set for the relevant misconduct.

#### IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,<sup>23</sup> and section 1.80 of the Commission's Rules,<sup>24</sup> SBC Communications is HEREBY NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of one hundred

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<sup>21</sup> In 2000, SBC had operating revenues of \$51.4 billion and operating income of \$10.7 billion. See SBC Telecomm., Inc., 2000 Annual Report at 4 (2001).

<sup>22</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17099, 17100.

<sup>23</sup> 47 U.S.C. § 503(b).

<sup>24</sup> 47 C.F.R. § 1.80.

thousand dollars (\$100,000) for willfully violating an Enforcement Bureau directive to submit timely a sworn written response to a Bureau letter of inquiry.<sup>25</sup>

14. 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.

15. IT IS AGAIN ORDERED THAT SBC SHALL SUBMIT, not later than November 7, 2001, a sworn written response to the Bureau's LOI dated October 1, 2001, in accordance with the delivery instructions set forth therein.

16. 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.

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

18. 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 Caryn D. Moir, Vice-President -- Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

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<sup>25</sup> We note that as of October 31, 2001, SBC still had not submitted the required attestation. SBC's intentional violation of the Bureau's directive thus has continued from at least October 22, 2001 through October 31, 2001.