

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

In the Matter of)	
)	File No. EB-03-IH-0616
)	NAL Account No. 200432080025
BellSouth Telecommunications, Inc.)	EB Docket No. 03-197
)	
Apparent Liability for Forfeiture)	FRN No. 0001-8579-52

**NOTICE OF APPARENT LIABILITY
FOR FORFEITURE**

Adopted: March 24, 2004

Released: March 25, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that BellSouth Telecommunications, Inc. (“BellSouth”),¹ apparently violated section 53.203(a)(3) of the Commission’s rules² during the period May 24, 2002 through at least March 17, 2004 by allowing a BellSouth affiliate, BellSouth Carrier Professional Service (“BCPS”), to perform operations, installation, and maintenance (“OI&M”) functions for BellSouth’s section 272 affiliate, BellSouth Long Distance, Inc. (“BSLD”).³ Based on our review of the facts and circumstances of this case, and for the reasons discussed below, we find that BellSouth is apparently liable for a monetary forfeiture in the amount of \$75,000.

II. BACKGROUND

2. Section 271 of the Communications Act of 1934, as amended (“the Act”), prohibits Bell Operating Companies (“BOCs”) from providing in-region interLATA services without Commission authorization. To receive such authorization, a BOC must demonstrate to the Commission that it satisfies the conditions of a fourteen-point competitive checklist; that authorization is in the public interest, convenience, and necessity; and that the BOC will carry out its in-region interLATA operations through a separate affiliate in accordance with section 272.⁴ Section 272 establishes certain structural, transactional, and nondiscrimination safeguards that govern the relationship between the BOC and its section 272 affiliate.⁵ These statutory safeguards were designed to prevent BOCs from giving an anti-competitive advantage to their own long distance affiliates to the detriment of unaffiliated carriers.⁶ One such

¹ BellSouth Telecommunications, Inc., the Bell Operating Company of BellSouth Corporation, provides local exchange service in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

² 47 C.F.R. § 53.203(a)(3).

³ BellSouth and BSLD are direct and wholly-owned subsidiaries of BellSouth Corporation.

⁴ 47 U.S.C. § 271.

⁵ 47 U.S.C. § 272.

safeguard requires that the section 272 affiliate “operate independently” from the BOC.⁷ To help the Commission determine if a BOC is complying with section 272 and the Commission’s implementing rules after the BOC receives section 271 authority, the Act requires the BOC to obtain a biennial joint federal/state audit conducted by an independent auditor.⁸

3. In a series of orders, the Commission implemented the section 272 separate affiliate safeguards, designing rules to deter BOCs from unfairly favoring their in-region interLATA operations by discriminating in favor of their long distance operations against unaffiliated competitors.⁹ In support of the “operate independently” requirement, the Commission articulated a clear rule prohibiting the section 272 affiliate from receiving OI&M services from the BOC or any BOC affiliate other than the section 272 affiliate itself.¹⁰ In the *Non-Accounting Safeguards Order*, the Commission explained that section 272(b)(1) “bar[s] a section 272 affiliate from contracting with a BOC or another entity affiliated with the BOC to obtain operating, installation, and maintenance functions associated with the section 272 affiliate’s facilities.”¹¹ In its Second Report and Order in that docket, the Commission reiterated that “operational independence . . . bars a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that the section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated.”¹²

4. After the *Second Report and Order*, BellSouth petitioned the Commission to reconsider its position with respect to OI&M.¹³ BellSouth contended that “the Commission improperly determined that section 272(b)(1) prohibits a BOC affiliate, other than the section 272 affiliate, from providing installation and maintenance services to both the BOC and its section 272 affiliate.”¹⁴ The Commission specifically

⁶ See *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Companies To Provide Nonregulated Activities and To Provide for Transactions Between Telephone Companies and Their Affiliates*, Report and Order, 2 FCC Rcd 1298 (1987), modified on recon., 2 FCC Rcd 6283 (1987), modified on further recon., 3 FCC Rcd 6701 (1988), *aff’d sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir. 1990).

⁷ 47 U.S.C. § 272(b)(1) (“The separate affiliate . . . shall operate independently from the Bell operating company.”)

⁸ 47 U.S.C. § 272(d). The Commission adopted requirements governing the section 272(d) biennial audit. See *Accounting Safeguards under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539, 17628-632, ¶¶ 197-205 (1996) (“*Accounting Safeguards Order*”), Second Order on Reconsideration, 15 FCC Rcd 1161 (2000); 47 C.F.R. §§ 53.209-53.213.

⁹ See *Accounting Safeguards Order; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff’d sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C.Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) (“*Third Reconsideration Order*”); see also 47 C.F.R. §§ 32.27, 53.1-53.213, 64.901-64.904.

¹⁰ 47 C.F.R. § 53.203(a)(3) provides that a “BOC or BOC affiliate, other than the section 272 affiliate itself, shall not perform any operating, installation, or maintenance functions associated with the facilities that the BOC’s section 272 affiliate owns or leases from a provider other than the BOC.”

¹¹ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21984, ¶ 163.

¹² See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15816, ¶ 104 (1997) (“*Second Report and Order*”).

¹³ *BellSouth Corporation, Petition for Reconsideration*, CC Docket No. 96-149 (filed Feb. 20, 1997).

¹⁴ *Third Reconsideration Order*, 14 FCC Rcd at 16314-15, ¶ 20.

considered and rejected BellSouth's position, concluding that "allowing a third affiliate to provide such installation and maintenance services would, in essence, create a loophole around the separate affiliate requirement."¹⁵

5. During 2002, the Commission authorized BellSouth to provide in-region interLATA service through a section 272 separate affiliate in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.¹⁶ The planning stage of the first section 272 biennial audit began in 2002 to ascertain BellSouth's compliance with section 272 and Commission rules during the period May 24, 2002 through May 23, 2003. At that time, BellSouth requested inclusion of audit procedures involving BCPS.¹⁷ BellSouth argued that procedures for this affiliate should be included because BCPS was "272 compliant" although it was not in fact the section 272 affiliate company. In order to obtain more information about BCPS, the federal/state joint oversight team agreed to include selected audit procedures for BCPS.¹⁸

6. BellSouth's first biennial audit was performed by independent auditor PricewaterhouseCoopers, LLP ("PWC") and filed with the Commission by PWC on December 23, 2003.¹⁹ The Audit Report disclosed that during the audit period BCPS performed approximately \$44 million in services for BSLD, including both services that qualified as OI&M and other management and vendor supervision tasks.²⁰ The Audit Report noted that BellSouth management confirmed that BCPS

¹⁵ *Id.*

¹⁶ See *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, 17 FCC Rcd 25828 (2002); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, Memorandum Opinion and Order, 17 FCC Rcd 17595 (2002); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, 17 FCC Rcd 9018 (2002). The section 272 requirements, other than section 272(e), expire three years after section 271 authorization, unless the Commission extends the three-year period. 47 U.S.C. § 272(f)(1). Sunset of these requirements is on a state-by-state basis. See *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Memorandum Opinion and Order, 17 FCC Rcd 26869 (2002). BellSouth agreed in a consent decree with the Commission that it will comply with the separate affiliate requirements set forth in 47 U.S.C. § 271, including section 272(d), until such time as each of the nine states in BellSouth's region is relieved of the requirements. *BellSouth Corporation*, Order and Consent Decree, 18 FCC Rcd 15135, 15143, ¶ 11(a)(i).

¹⁷ See Letter from Stephen L. Earnest, Regulatory Counsel, BellSouth Corporation to Maureen F. Del Duca, Division Chief, Investigations and Hearings Division, Enforcement Bureau, FCC (Feb. 27, 2003).

¹⁸ See Letter from Maureen F. Del Duca, Division Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to Stephen L. Earnest, Regulatory Counsel, BellSouth Corporation (Feb. 28, 2003) (granting BellSouth's request to expand the scope of the section 272(d) audit to include another BellSouth affiliate and reminding BellSouth that expansion of the audit did not constitute a waiver or modification of any Commission rule, order, or requirement that applied to BellSouth or its affiliates).

¹⁹ BellSouth initially requested confidential treatment for portions of the audit report and a redacted version of the document was filed by PWC with the Commission. See Letter from Stephen L. Earnest, BellSouth Corporation to Terry Bowling, Partner, PWC, EB Docket No. 03-197 (Nov. 7, 2003); *BellSouth Telecommunications, Inc., Section 272 Biennial Agreed-Upon Procedures Engagement, Public Version - Redacted*, EB Docket No. 03-197 (Nov. 10, 2003). That request was later withdrawn and a complete copy of the audit report was then filed with the Commission by PWC. *BellSouth Telecommunications, Inc., Section 272 Biennial Agreed-Upon Procedures Engagement*, EB Docket No. 03-197 (Dec. 23, 2003) ("Audit Report")

²⁰ Audit Report, Appendix A at 13, Appendix B at 64-79, Attachment C at 1-2. No break down was provided detailing the dollar value of services attributable to OI&M functions.

“perform[s] OI&M functions on BSLD network facilities.”²¹ The Audit Report noted that the services provided by BCPS to BSLD were encompassed by section 53.203(a)(2)-(3) of the Commission’s rules,²² and that Commission orders “prohibit a BOC or BOC affiliate from performing OI&M functions on facilities either owned by the section 272 Affiliate, or leased from a third party by the Section 272 Affiliate.”²³

7. BellSouth’s response was included in the Audit Report.²⁴ BellSouth disclosed that BCPS was established by BellSouth because BSLD management “determined that the type of professional services provided by the engineering group . . . was a potentially profitable line of business to be offered to third parties” and that “BellSouth determined that corporate governance would be better served by establishing and placing these operations in a new corporate entity.” BellSouth asserted that BCPS was “compliant with Section 272 rules” because it “remained completely separate from” the BOC. BellSouth emphasized that BCPS was never intended to and never did provide any services to the BOC. Further, BellSouth claimed that BCPS never provided services to any non-affiliated company.²⁵ As such, BellSouth argued that “BCPS’s provision of OI&M services to BSLD is the equivalent of one Section 272 Affiliate providing OI&M services to another Section 272 Affiliate.”²⁶

8. Upon request, BellSouth provided the Enforcement Bureau with additional information concerning BCPS.²⁷ According to BellSouth, BCPS was incorporated on July 15, 1999. Despite the purpose for the affiliate’s formation, the company has not provided services to any entity outside of BellSouth.²⁸ BellSouth reported that approximately \$4.4 million of the total value of services provided by BCPS to BSLD during the audit period was attributable to OI&M functions. BellSouth concedes that since the close of the audit period, there has been no alteration in the way BCPS and BSLD interact.

9. After a public notice,²⁹ on March 9, 2004, AT&T filed comments on the Audit Report, recommending enforcement action for, *inter alia*, BellSouth’s violation of the “operate independently” requirements.³⁰

10. On November 4, 2003, the Commission issued a Notice of Proposed Rulemaking to re-examine its rules implementing the “operate independently” requirements of section 272(b)(1) of the

²¹ Audit Report, Attachment C at 1.

²² 47 C.F.R. § 53.203(a)(2)-(3).

²³ *Id.*

²⁴ Audit Report, Attachment C at 1-2.

²⁵ During the audit period, BCPS provided some services to two non-BOC BellSouth affiliates, BellSouth.net and BellSouth Technology Group. *See* Letter from Mary L. Henze, BellSouth Corporation, to Hillary DeNigro, Enforcement Bureau (Jan. 16, 2004) at 3 (“BellSouth Jan. 16 Letter”).

²⁶ *Id.*

²⁷ *See id.* at 3-4. On Jan. 9, 2004, BellSouth met with staff from the Investigations and Hearing Division of the Enforcement Bureau to provide information concerning certain items in the Audit Report. At the Bureau’s request, the additional information contained in the BellSouth Jan. 16 Letter was thereafter provided to the Bureau.

²⁸ *See* BellSouth Jan. 16 Letter at n.25.

²⁹ “Enforcement Bureau Seeks Comment on BellSouth Telecommunications, Inc. Section 272 Biennial Audit Report in EB Docket No. 03-197,” Public Notice, DA 04-33 (rel. Jan. 9, 2004).

³⁰ *See* Section 272(d) Biennial Audit of BellSouth Telecommunications, Inc., EB Docket No. 03-197, Comments of AT&T Corp. on BellSouth’s Section 272 Compliance Biennial Audit Report (“AT&T Comments”).

Act.³¹ On March 17, 2004, the Commission released an order eliminating on a prospective basis the prohibition against sharing of OI&M functions by BOCs and their section 272 affiliates, finding that the prohibition is not a necessary component of the statutory requirement to “operate independently” and that the prohibition is no longer necessary to prevent cost misallocation or discrimination by BOCs against unaffiliated rivals.³² The *Operate Independently Order* made clear that prior to its release the Commission’s rules were unambiguous and there was an absolute prohibition against a BOC affiliate provisioning OI&M services to a 272 affiliate, “includ[ing] the prohibition against a non-section 272 affiliate providing OI&M services to a section 272 affiliate.”³³ The *Operate Independently Order* in no way excused any BOC for violations of the Commission’s OI&M prohibitions prior to release of the order. In fact, the order acknowledged potential enforcement action relating to certain OI&M violations.³⁴

III. DISCUSSION

11. Under section 503(b)(1) of the Act, 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 monetary forfeiture penalty.³⁵ 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.³⁶ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully or repeatedly violated the Act or a Commission rule.³⁷

12. The fundamental issue in this case is whether BellSouth violated the “operate independently” provisions of section 53.203(a)(3)³⁸ of the Commission’s rules, as they existed during the period May 24,

³¹ See Section 272(b)(1)’s “Operate Independently” Requirement for Section 272 Affiliates, Notice of Proposed Rulemaking, 18 FCC Rcd 23538 (2003). Comments were filed on December 10, 2003.

³² Section 272(b)(1)’s “Operate Independently” Requirement for Section 272 Affiliates, Report and Order in WC Docket No. 03-228 Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337, FCC 04-54 (rel. Mar. 17, 2004) (“Operate Independently Order”). The elimination of the rule becomes effective upon publication of the *Operate Independently Order* in the Federal Register.

³³ *Operate Independently Order* at n.51.

³⁴ See *id* at n.68.

³⁵ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). 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 to section 312(f)(1) of the Act indicates that this definition of willful 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 term in the section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (“*Callais Cablevision*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage). “Repeated” means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision*, 16 FCC Rcd at 1362, ¶ 9.

³⁶ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

³⁷ See, e.g., *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002).

³⁸ 47 C.F.R. § 53.203(a)(3).

2002 to the effective date of their elimination, when BCPS, a BellSouth affiliate, provided OI&M services to BSLD, the section 272 affiliate. As discussed below, we answer this question affirmatively. Based on a preponderance of the evidence, we therefore conclude that BellSouth is apparently liable for a forfeiture of \$75,000 for apparently willfully and repeatedly violating section 53.203(a)(3) of the Commission's rules.

A. BellSouth Apparently Willfully and Repeatedly Violated the "Operate Independently" Requirement

13. According to the Audit Report, "BSLD Management" confirmed that BCPS "employees performed OI&M functions on BSLD network facilities and also managed and supervised vendors that performed OI&M functions for BSLD network facilities."³⁹ The Audit Report also observed that "[T]he amount that BCPS bills BSLD each month is the total cost incurred by BCPS, plus a rate of return calculated on BCPS's total salaries and wages for the month, *less the cost of providing services to other BellSouth companies.*"⁴⁰ BellSouth concedes that BCPS is a BOC affiliate and not the 272 affiliate.⁴¹ During the audit period, BellSouth admits that BCPS provided approximately \$4.4 million worth of OI&M services to BSLD. BellSouth admits that BCPS did not alter its operations after the close of the audit period.⁴² The record indicates that BellSouth created BCPS in 1999, after determining that certain activities, including the provision of certain OI&M functions, could provide a profitable line of business.⁴³ In that same year the Commission rejected BellSouth's petition for reconsideration of its OI&M prohibition.⁴⁴

14. We disagree with BellSouth's position⁴⁵ that the provision of OI&M by BCPS to BSLD is not a violation of Commission rules because BellSouth satisfied the "spirit" of the "operate independently" requirement by maintaining BCPS as wholly separate from the BOC. The Commission's rules and its statements in repeated orders demonstrate that during the relevant period there was a clear rule prohibiting a BOC's section 272 affiliate, such as BSLD, from receiving OI&M from another BOC affiliate, such as BCPS. Although language in the *Third Reconsideration Order* demonstrates that the Commission's principal concern in creating this rule was to prevent the integration of essential functions between the BOC and its 272 affiliate, the rule patently does not, as BellSouth suggests, contemplate an exception permitting a 272 affiliate to receive OI&M from a BOC affiliate if that affiliate does not also serve the BOC. Indeed, the Commission specifically noted in denying BellSouth's petition for reconsideration of the OI&M rule that a clear prohibition was established for the purpose of avoiding the burdensome regulatory involvement that would result from the Commission's need to police subtle

³⁹ Audit Report, Objective I, Appendix A at 1.

⁴⁰ Audit Report, Objective I, Appendix A at 2 (emphasis added). We agree with AT&T's argument that under such a billing arrangement (which is not on a per service basis), there could be an undisclosed indirect subsidy from the BOC to BSLD. See AT&T Comments at 9-10.

⁴¹ Audit Report, Attachment C at 1.

⁴² Audit Report, Objective I, Appendix A at 1-3. According to the audit report, BCPS performs the following OI&M functions on BSLD network facilities: network planning, engineering, installation, operations, maintenance, fraud management, provisioning, service assurance, and customer care. *Id.* at 2.

⁴³ See Audit Report, Attachment C at 1. BCPS never provided such services to BellSouth or to a non-affiliated company. BCPS provided some services, however, to two non-BOC BellSouth affiliates, BellSouth.net and BellSouth Technology Group.

⁴⁴ *Third Reconsideration Order*, 14 FCC Rcd at 16314-15, ¶ 20.

⁴⁵ Audit Report, Attachment C at 1-2.

distinctions and procedures in the absence of a clear rule.⁴⁶ With full knowledge of the Commission's clear pronouncements concerning OI&M and the Commission's denial of BellSouth's petition for reconsideration, BellSouth established the corporate structure of BCPS for the purpose of providing OI&M to the section 272 affiliate and allowed BCPS to continue to provide OI&M services to BSLD throughout the audit period and thereafter.

15. Based on the information in the audit report, and BellSouth's admissions, we conclude that during the period May 24, 2002 through at least March 17, 2004, BellSouth authorized an affiliate other than the section 272 affiliate itself to provide OI&M services to the 272 affiliate.⁴⁷ Accordingly, we conclude that BellSouth apparently willfully and repeatedly violated section 53.203(a)(3) of the Commission's rules.

B. Proposed Forfeiture Amount

16. 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.⁴⁸ 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."

17. The record is undisputed that BellSouth provided OI&M to BSLD through BCPS, another BellSouth affiliate. Based on the facts described above, it appears that BellSouth deliberately chose to implement a corporate structure that violated Commission rules despite the Commission's clear rejection of this proposed structure in its petition for reconsideration. Due to BellSouth's apparently willful and repeated violation of section 53.203(a) of the Commission's rules, we find that a proposed forfeiture is warranted. The Commission has not established a base forfeiture amount for a violation of the section 272(b)(1) "operate independently" requirement or the section 53.203(a)(3) OI&M prohibition. We note, however, that section 503(b)(2)(D)⁴⁹ of the Act and the Forfeiture Policy Statement⁵⁰ allow the Commission considerable flexibility in determining the appropriate forfeiture.⁵¹ In determining the appropriate amount of the proposed forfeiture, we take into account the fact that the Commission recently eliminated the OI&M prohibitions in section 53.203(a) of the Commission's rules, finding that the prohibition was an overbroad means of preventing cost misallocation or discrimination by BOCs against unaffiliated rivals.⁵² While we do not believe the Commission's prospective rulemaking insulates BellSouth from the imposition of a proposed forfeiture for its apparent violation of a clear rule during the relevant period, we will consider the Commission's holding in assessing an appropriate penalty.⁵³

⁴⁶ *Third Reconsideration Order*, 14 FCC Rcd at 16314-15, ¶ 20.

⁴⁷ 47 C.F.R. § 53.203(a)(3).

⁴⁸ 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).

⁴⁹ 47 U.S.C. § 503(b)(2)(D).

⁵⁰ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁵¹ 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27; 47 C.F.R. § 1.80(b)(4).

⁵² *Operate Independently Order* at ¶ 1.

Balancing the clear rule violation against the prospective elimination of the rule yields a proposed forfeiture of \$75,000.

18. For the reasons discussed above, we find that BellSouth is in apparent willful and repeated violation of section 53.203(a)(3) of the Commission's rules. These violations pertain to the nondiscrimination safeguards established by the Act and the Commission's rules to promote efficient competition. Based on our review of the facts and circumstances of this case, we find that a forfeiture of \$75,000 is appropriate, pursuant to section 503(b) of the Act and section 1.80 of the Commission's rules.

V. ORDERING CLAUSES

19. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and sections 0.111, 0.311, and 1.80 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, and 1.80, BellSouth Telecommunications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seventy-five thousand dollars (\$75,000) for willfully and repeatedly violating section 53.203(a)(3) of the Commission's rules.

20. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE, BellSouth Telecommunications, Inc. SHALL PAY the full amount of the proposed forfeiture currently outstanding on that date or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

21. Payment of the forfeiture may be made by check or similar instrument, payable to the order of the Federal Communications Commission. Such remittance should be made to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the NAL/Acct. No. and FRN No. referenced above.

22. The response, if any, to this NOTICE OF APPARENT LIABILITY FOR FORFEITURE must be mailed to William H. Davenport, 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.

23. 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 ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial

⁵³ The Commission has previously proposed to penalize a company for intentionally violating a rule even while the Commission amended the rule prospectively and authorized a prospective waiver for the conduct at issue. See *Ameritech Corporation*, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd 10559 (1995) (finding Ameritech apparently liable for a \$200,000 forfeiture for violation of section 214 of the Communications Act and the Commission's implementing rule, 47 C.F.R. § 63.01, for constructing cable facilities without first obtaining authorization from the Commission and delegating authority to grant a prospective temporary waiver to the Chief, Common Carrier Bureau, issued contemporaneously with a Commission order amending the authorization process required by 47 C.F.R. § 63.01); *Telephone Company-Cable Television Cross-Ownership Rules*, Fourth Report and Order, 11 FCC Rcd 818 (1995) (streamlining the section 214 authorization process and implementing 47 C.F.R. § 63.16 for authorization disclosures in lieu of 47 C.F.R. § 63.01); *Application of Ameritech New Media Enterprises, Inc.*, Order and Authorization, 10 FCC Rcd 10873 (1995) (granting temporary authority to construct cable facilities).

status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

24. Requests for payment of the full amount of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE under an installment plan should be sent to Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁵⁴

25. Under the Small Business Paperwork Relief Act of 2002, Pub.L.No. 107-198, 116 Stat. 729 (June 28, 2002), the Commission is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within 30 days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division, Enforcement Bureau, 445 12th Street, S.W., Washington, D.C. 20054. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list in Attachment A of this NAL. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to section 503(b) of the Communications Act. If you have any questions regarding any of the information contained in Attachment A, please contact the Commission's Office of Communications Business Opportunities at (202) 418-0990.

26. IT IS FURTHER ORDERED that the Secretary shall send, by certified mail/return receipt requested, a copy of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE to Stephen L. Earnest, Regulatory Counsel, BellSouth Corporation Legal Department, 675 West Peachtree Street, Suite 4300, Atlanta, GA 30375-0001.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁵⁴ See 47 C.F.R. § 1.1914.

ATTACHMENT A

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

<i>International Services</i>	
International Broadcast Stations	

International Public Fixed Radio (Public and Control Stations)	\$12.5 Million in Annual Receipts or Less
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - Small Business is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	

	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years
39 GHz Service	Very Small Business is average gross revenues of \$15M or less for the preceding three years
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	
Instructional Television Fixed Service	\$12.5 Million in Annual Receipts or Less
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	
	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	
Audio and Video Equipment Manufacturers	750 Employees or Fewer
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)