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.	)	

ORDER ON REVIEW

Adopted: August 18, 2000 Released: August 22, 2000

By the Commission:

I. INTRODUCTION

1. In this Order, we deny an Application for Review of the Enforcement Bureau's (Bureau) order[1] denying a complaint filed by the Tennessee Cable Telecommunications Association and the Cable Television Association of Georgia (collectively, Complainants) against BellSouth Telecommunications, Inc. (BellSouth) pursuant to section 208 of the Communications Act of 1934, as amended (Act).[2] In particular, we affirm the Bureau's denial of Complainants' claim that

[1] *Tennessee Cable Telecommunications Association, et al., and Cable Television Association of Georgia, et al., v. BellSouth Telecommunications, Inc*., Memorandum Opinion and Order, 15 FCC Rcd 7513 (Enf. Bur. 2000) (*Bureau Order).*

[2] 47 U.S.C. § 208. *See* 47 C.F.R. § 1.115.

BellSouth is allocating joint and common costs between its telephony and cable services in a manner that violates our cost allocation rules.[3] In addition, we affirm the Bureau's denial of Complainants' claim that BellSouth is attributing benefits to its cable affiliate in a manner that violates our affiliate transactions rules.[4]

II. BACKGROUND

2. We briefly restate here the most relevant facts.[5] Complainants are cable television industry trade associations representing cable television operators in Tennessee and Georgia. Defendant BellSouth provides local exchange service and, at the time the complaint was filed, was constructing network facilities capable of providing both telephony service and cable service in Tennessee and Georgia, both directly and through an affiliate.

3. *The Cost Allocation Rules*. When a common carrier subject to the Act uses the same facilities to provide both telephony service and an unregulated service such as cable, the common carrier must allocate the costs of such facilities between these services in accordance with Part 64 of our rules. The pertinent provision for purposes of this decision 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.[6]

4. *The Affiliate Transactions Rules*. When a common carrier does business with a nonregulated affiliate, it must record the transaction pursuant to Part 32 of our rules.[7] Specifically, section 32.27 of the Commission's rules requires "transactions with affiliates involving asset transfers

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[3] 47 C.F.R. Part 64.

[4] 47 C.F.R. § 32.27.

[5] A more detailed recitation of the facts underlying this dispute, which we incorporate by reference here, is found in the *Bureau Order*.

[6] 47 C.F.R. § 64.901(b)(4) (emphasis added).

[7] 47 C.F.R. § 32.27.

into or out of the regulated accounts [to be] recorded" according to a hierarchy of rules.[8] Similar rules apply to certain non-tariffed services provided between a carrier and its affiliate.[9]

5. *The Cost Allocation Methodology Adopted by BellSouth*. BellSouth's methodology for allocating its joint and common costs incurred for the provision of regulated telephone service and nonregulated cable service does so based on the relative number of subscriber circuits for each service. That is, 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. To use the example related by the Bureau, if certain 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, and 20% (250 divided by 1,250) to cable.[10]

6. *BellSouth's Affiliate Transactions Methodology*. As of the date of the filing of the Complaint, neither BellSouth nor its cable affiliate had begun to provide cable service via the facilities at issue. Therefore, for reporting purposes, BellSouth did not record that it had transferred any benefit to its cable affiliate.

7. *The Complaint*. Complainants alleged that BellSouth: (1) violated section 254(k) of the Act[11] and our cost allocation rules by employing the subscriber circuit methodology to allocate joint and common costs between its telephone and cable services; (2) violated our affiliate transactions rules 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;[12] and (3) violated sections 202(a) and 224(g) of the Act[13] by not charging its cable affiliate the same pole and conduit rates as it charges other carriers.

8. *The Bureau Order*. The *Bureau Order* denied Complainants' complaint in its entirety. Specifically, the Bureau held that Complainants had failed to demonstrate that BellSouth's cost allocation methodology violates section 254(k) of the Act and section 64.901(b)(4) of our

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[8] 47 C.F.R. § 32.27(a).

[9] 47 C.F.R. § 32.27(c).

[10] We will use the parties' reference to this methodology as the "subscriber circuit" cost allocation methodology.

[11] 47 U.S.C. § 254(k).

[12] 47 U.S.C. § 541(b).

[13] 47 U.S.C. §§ 202(a), 224(g).

rules.[14] In so holding, the Bureau concluded that (i) section 64.901(b)(4) allows for the allocation of costs on any "reasonable" basis that measures relative usage, and (ii) BellSouth's "subscriber circuit" cost allocation methodology was not an unreasonable manner of allocating joint and common costs between telephony and cable, because it "roughly reflects the relative extent to which the shared facilities are being used by customers of each service."[15] Based on Commission precedent, the Bureau held that because BellSouth complied with the cost allocation rules, it also complied with section 254(k).[16] The Bureau also held that Complainants had failed to meet their burden of proving that BellSouth violated the Commission's affiliate transactions rules.[17] In so holding, the Bureau observed that Complainants had not provided for the record any factual basis for their assertion that BellSouth's construction of a network capable of providing cable service at some point in the future had already conveyed a reportable benefit to BellSouth's cable affiliate.[18]

III. DISCUSSION

9. Cost Allocation Rules. Complainants argue that section 64.901(b)(4) requires BellSouth to use the "best available" methodology to allocate joint and common costs shared between regulated and nonregulated services. Complainants maintain, therefore, that "the Bureau should have scrutinized BellSouth's 'subscriber circuit' methodology . . . to assess whether that methodology was the best available."[19] Instead, argue Complainants, the Bureau erroneously analyzed BellSouth's methodology according to a "new" standard of review, namely whether the methodology used was merely "reasonable."[20]

10. We disagree and affirm the Bureau's findings. The Bureau correctly

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[14] Bureau Order, ¶¶ 15-16.

[15] *Id.* ¶ 15.

[16] *Id.* ¶ 16.

[17] *Id.* ¶ 21.

[18] *Id.* ¶¶ 18-21. The Bureau also concluded that Complainants had abandoned their claims under sections 202(a) and 224(g). *Id.* ¶ 22. The Application for Review does not challenge these conclusions, so these conclusions are final and non-appealable. *See* 47 C.F.R. § 1.115(k).

[19] *Tennessee Cable Telecommunications Association, et al., and Cable Television Association of Georgia, et al., v. BellSouth Telecommunications, Inc*., Application For Review, File No. E-97-10 (filed May 19, 2000) at 2 (*Application For Review*); *Tennessee Cable Telecommunications Association, et al., and Cable Television Association of Georgia, et al., v. BellSouth Telecommunications, Inc*., Reply, File No. E-97-10 (filed June 15, 2000) at 2-3 (*Application Reply*).

[20] *Application For Review* at 2-3; *Application Reply* at 3.

interpreted our cost allocation rules, and section 64.901(b)(4) specifically, when it ruled that a carrier may use any reasonable method of allocating costs. Neither the language nor the policy of section 64.901(b)(4) requires carriers to utilize a single, "best available" method for allocating joint and common costs between regulated and nonregulated services. Rather, the rule establishes a general standard that must be satisfied, but leaves to the company's discretion how to meet that standard. Therefore, we agree with the Bureau that "[t]he rules primarily provide frameworks within which carriers can craft unique practices that are reasonable, rather than rigid directives that allow carriers no discretion."[21] Similarly, section 64.901(b)(4) does not require the Commission to determine and impose the "best available" method of allocating joint and common costs when the methodology used by a carrier is challenged in a section 208 complaint proceeding. For this reason, the Bureau was not obligated to address the relative merits of the allocation methodology suggested by Complainants.[22] Finally, Complainants do not directly challenge the Bureau's conclusion that BellSouth's cost allocation methodology is reasonable, arguing only that the methodology propounded by Complainants somehow yields more accurate results. Accordingly, we affirm the *Bureau Order* and deny Complainants' claim that BellSouth violated our cost allocation rules.

11. Affiliate Transactions Rules. We also affirm the Bureau's holding that Complainants failed to meet their burden of proving that BellSouth violated our Part 32 affiliate transactions rules. Complainants primarily argue that the Bureau's view of the record was mistakenly skewed by the failure to apply a "policy presumption" that an incumbent LECs' standing network conveys recordable benefits to an incumbent LEC's affiliate even before the network is used for the affiliate's business.[23] As a result, Complainants appear to argue that the Bureau should have

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[21] *Bureau Order*, ¶ 15.

[22] Even if we were to adopt the "best method" standard, we note that Complainants might have difficulty presenting convincing evidence that their suggested methodology produces better results than that used by BellSouth. *See generally Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 17211, 17220, ¶ 20 (1996) (*Video Cost Allocation NPRM*) (observing that a cost allocation methodology akin to the methodology proposed by Complainants in this proceeding "could dissuade companies from entering nonregulated competitive markets, thus depriving regulated ratepayers of any benefit from the economies of scope using facilities to provide both services might have created.").

[23] Complainants cite the *Video Cost Allocation NPRM* and *Implementation of Section 254(k) of the Communications Act of 1934, as amended*, Order, 12 FCC Rcd 6415 (1997) (*Section 254(k) Order)* for this proposition. *Application For Review* at 9-10. Specifically, the Complainants refer to our remark that "[o]ur rules will intentionally allocate a significant part of common costs to nonregulated services. This is appropriate because we believe that telephone ratepayers are entitled to at least some of the benefit of the economy of scope between telephony and competitive services." *Video Cost Allocation NPRM*, 11 FCC Rcd at 17222, ¶ 23. Complainants also reference our observation that our rules are "designed to discourage carriers from misallocating the costs of nonregulated activities and to ensure that ratepayers share in any efficiencies generated from the joint use of the network by nonregulated activities." *Section 254(k) Order*, 12 FCC Rcd at 6416-17, ¶ 3.

shifted the burden to BellSouth to prove that the construction of a network capable of providing cable services in the future does not presently convey recordable benefits to its cable affiliate.[24] Complainants also point out that BellSouth assigns a zero cost to the intangible assets assigned to nonregulated service accounts.[25]

12. Again, we disagree with Complainants and affirm the Bureau's findings. First, except in certain unique circumstances not present here,[26] in a section 208 complaint proceeding, the complainant bears the burden of proving a violation of the Act or our rules.[27] Second, we reject Complainants' argument that a "policy presumption" has been created by previous Commission orders. In the orders cited by Complainants, the Commission merely stated that, *once an incumbent LEC's network is used to provide unregulated as well as regulated services,* ratepayers should reap some benefit from the resultant economies of scope.[28] The Commission said nothing about whether the construction of a dual-capacity network by an incumbent LEC, without more, immediately conveys recordable benefits to an incumbent LEC's affiliate. Therefore, we agree with the Bureau that Complainants' failure to proffer for the record any evidence on this issue requires rejection of Complainants' claim that the mere construction of BellSouth's network conveyed recordable benefits to BellSouth's cable affiliate. Accordingly, we affirm the *Bureau Order* and deny Complainants' claim that BellSouth violated our affiliate transactions rules.

13. We have carefully reviewed the *Bureau Order* and the entire record herein and conclude that the *Bureau Order* correctly decided the issues raised by the parties. Therefore, we affirm the *Bureau Order* in its entirety.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 208, and

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[24] Complainants confuse the concepts of *cost allocation* and *affiliate transactions,* and, as a result, their argument is somewhat difficult to follow. *See Application For Review* at 10 (discussing section 64.901(b)(4) in the context of the affiliate transactions rules).

[25] *Application For Review* at 10-11; *Application Reply* at 5.

[26] *See, e.g., PanAmSat Corp. v. COMSAT Corp.,* Memorandum Opinion and Order, 12 FCC Rcd 6952, 6965, ¶ 34 (1997) (stating that in a section 208 complaint proceeding involving a violation of section 202(a) of the Act, once the complainant establishes discrimination, the burden shifts to the defendant to show that the discrimination was reasonable).

[27] *See, e.g., New Valley Corporation v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5134, ¶ 14 (2000).

[28] *See Video Cost Allocation NPRM*, 11 FCC Rcd at 17222, ¶¶ 22-23; *Section 254(k) Order*, 12 FCC Rcd at 6416-17, ¶ 3.

254(k) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 254(k), and sections 32.27, 64.901, and 1.115(g) of the Commission's rules, 47 C.F.R. §§ 32.27, 64.901, 1.115(g), that the Application for Review filed by the Tennessee Cable Telecommunications Association, *et al*. and the Cable Television Association of Georgia, *et al*., IS DENIED in its entirety, and this proceeding is TERMINATED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary