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
	)	
	)	FRN Numbers 0004-3051-24
	)	0004-3335-71
	)	0005-1937-01

ORDER ON REVIEW

Adopted: February 21, 2002 **Released: February 25, 2002**

By the Commission:

I. INTRODUCTION

1. In this Order, we affirm the May 24, 2001 Order of Forfeiture[1] issued by the Enforcement Bureau ("Bureau") finding that SBC Communications Inc. ("SBC") willfully and repeatedly violated section 51.321(h) of the Commission's rules,[2] which requires incumbent local exchange carriers ("ILECs") promptly to post on their Internet site notice of premises that have run out of collocation space. We reduce the amount of the forfeiture from ninety-four thousand, five hundred dollars ($94,500) to eighty-four thousand dollars ($84,000). Therefore, we grant SBC's June 25, 2001 Application for Review in so far as it requests a modification of the forfeiture amount and deny SBC's Application for Review in all other respects.

II. BACKGROUND

2. SBC is an ILEC that provides local telephone service in 13 states: Arkansas, Kansas, Missouri, Oklahoma, Texas, California, Nevada, Illinois, Michigan, Indiana, Ohio, Wisconsin, and Connecticut.[3] At the end of 2000, SBC served more than 61 million local exchange access lines in its 13-state regions.[4] SBC also provides intraLATA toll service, long distance, wireless, Internet access, international, cable, security monitoring, and directory

[1] *SBC Communications Inc*., Order of Forfeiture, DA 01-1273, 16 FCC Rcd 10963 (2001) ("*Forfeiture Order*").

[2] 47 C.F.R. § 51.321(h).

[3] SBC 2000 Annual Report at 15.

[4] *Id.* at 4.

publishing services.[5] In 2000, SBC had total operating revenues of more than $51 billion.[6] On October 8, 1999, SBC completed a merger with Ameritech Corp. ("Ameritech").[7]

3. The Commission's order approving the merger application of Ameritech and SBC required SBC to submit an audit report to the Commission regarding its compliance with the Commission's collocation rules for the period October 8, 1999 through June 8, 2000.[8] SBC submitted that report on August 8, 2000.[9] It included an assessment of SBC's compliance with 47 C.F.R. § 51.321(h), which provides that "[t]he 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."[10] The audit report revealed potential violations of this requirement.[11]

4. In response to a letter from the Bureau, SBC submitted further information concerning collocation posting.[12] The documents revealed additional potential violations of section 51.321(h). On January 18, 2001, the Bureau issued a Notice of Apparent Liability ("NAL")[13] finding that SBC apparently had violated the Commission's collocation rules[14] and the *SBC/Ameritech Merger Order*,[15] and finding SBC apparently liable for a forfeiture in the amount of ninety-four thousand, five hundred dollars ($94,500). Because SBC had requested confidential treatment of *all* its submissions to the Bureau, the Bureau omitted from the NAL details of the nature and scope of SBC's violations. Following SBC's complaints about these

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[5] *Id.* at 6-7.

[6] *Id.* at 4.

[7] *See Id.* at 12.

[8] *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, 14872, ¶ 387 (1999) ("*SBC/Ameritech Merger Order*"); *SBC/Ameritech Merger Order,* Appendix C at ¶ 40.

[9] *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").

[10] 47 C.F.R. § 51.321(h).

[11] Management's Assertion on Compliance at ¶ 7; Auditor's Report on Compliance at 2.

[12] *See* November 7, 2000 Letter from Marian Dyer, Vice President-Federal Regulatory, SBC Telecommunications, Inc. to David Solomon, Chief, Federal Communications Commission, Enforcement Bureau ("SBC's November 7, 2000 Response"); December 18, 2000 Letter from Sandra L. Wagner, Vice President-Federal Regulatory, SBC Telecommunications, Inc. to Elizabeth H. Valinoti, Federal Communications Commission, Enforcement Bureau ("SBC's December 18, 2000 Response"); January 9, 2001 Letter from Sandra L. Wagner, Vice-President, SBC Telecommunications, Inc. to Brad Berry, Deputy Chief, Federal Communications Commission, Enforcement Bureau ("SBC's January 9, 2001 Response").

[13] *SBC Communications Inc.*, Notice of Apparent Liability for Forfeiture, DA 01-128 (January 18, 2001).

[14] *See* 47 C.F.R. § 51.321(h).

[15] *See SBC/Ameritech Merger Order*, Appendix C at ¶ 37 (requiring SBC/Ameritech provide collocation consistent with the Commission's rules).

omissions in its response to the NAL,[16] the Bureau sent a confidential letter to counsel for SBC on March 9, 2001, providing details concerning the central offices at issue in the NAL and the calculation of the forfeiture amount.[17] At the Bureau's invitation, SBC submitted a supplemental response to the NAL on April 10, 2001.[18] The Bureau issued the *Forfeiture Order* on May 24, 2001.

5. On November 14, 2001, SBC agreed to waive confidential treatment for some information, including the number and name/location of the offices that were the subject of the *Forfeiture Order* and SBC's Application for Review.[19] Throughout this proceeding, SBC has conceded that it violated Internet posting requirements for three central offices, including Satellite Hills, Nevada; Chesterfield, Missouri; and Indianapolis, Indiana.[20] The Bureau determined in the *Forfeiture Order* that SBC violated section 51.321(h) with respect to the following additional SBC central offices:

Anaheim, California
Brentwood, California
Calabasas, California
Carlsbad, California
Clayton, California
Fallbrook, California
Fremont, California
Half Moon Bay, California
Modesto, California
Milpitas, California
Orange, California
Pedley, California
Riverside, California
Rocklin, California
San Juan Capistrano, California
San Jose, California
Tehacapi, California
Valley Center, California
Yorba Linda, California
Elk Grove, Illinois
Kildare, Illinois
Lake Zurich, Illinois

[16] *See* Response of SBC Communications Inc. to Notice of Apparent Liability for Forfeiture (February 20, 2001) ("SBC's Response to NAL").

[17] *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 Letter").

[18] *See* Supplemental Response of SBC Communications Inc. to Collocation-Posting Notice of Apparent Liability (April 10, 2001) ("SBC's Supplemental Response to NAL").

[19] *See* November 16, 2001 Letter from Caryn D. Moir, Vice President, Federal Regulatory, SBC Telecommunications, Inc. to Suzanne Tetrault, Deputy Chief, Enforcement Bureau, Federal Communications Commission ("November 16, 2001 Moir Letter").

[20] SBC's November 7, 2000 Response, attaching Sworn Statement of Ross K. Ireland at Exhibit B.

Orland Park, Illinois
Round Rock, Texas.

III. DISCUSSION

6. Under section 503(b) of the Act, any person who is determined by the Commission to have failed willfully or repeatedly to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission, shall be liable for a forfeiture penalty.[21] 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.[22] 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.[23] As set forth in detail below, we conclude that, based on this standard, the Bureau properly imposed a forfeiture on SBC for violations of the Commission's rules.

7. The issue presented by our review of the Bureau's *Forfeiture Order* is whether the Bureau properly determined that SBC violated the Commission's collocation posting rule that requires SBC to post on its publicly available Internet site the name of each premises that has no collocation space available within ten days of when the premises "runs out" of space.[24] Based upon our review of SBC's Application for Review and the record in this matter,[25] we affirm the Bureau's decision in this case as to liability and as to the methodology for calculating the forfeiture amount. We find that, based on the untimely postings of the offices identified in paragraph 5 above, SBC willfully and repeatedly[26] violated the Commission's collocation rules.[27] However, we modify the forfeiture amount because we credit SBC's assertion that it did not fully understand the basis of its liability until more than one year after SBC cured three of the 27 posting violations.

[21] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

[22] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[23] *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).

[24] 47 C.F.R. § 51.321(h).

[25] The record includes the following documents and any attachments thereto: SBC's November 7, 2000 Response, SBC's December 18, 2000 Response, SBC's January 9, 2001 Response, SBC's Response to NAL, SBC's Supplemental Response to NAL, the NAL, the March 9, 2001 Letter, and the *Forfeiture Order*.

[26] A party "willfully" violates the Commission's rules when it knows it is taking the action in question, irrespective of any intent to violate the Commission's rules, and repeated means more than once. *See Southern California Broadcasting Co., Licensee, Radio Station KIEV(AM) Glendale, California,* Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88, ¶ 5 (1991); *see also Liability of Hale Broadcasting Corp. Licensee of Radio Station WMTS Murfreesboro, Tennessee,* Memorandum Opinion and Order, 79 FCC 2d 169, 171, ¶ 5 (1980).

[27] *See* 47 C.F.R. § 51.321(h).

A. The Collocation Posting Requirement

8. The timing requirement of our collocation posting rule is clear from the text of the regulation. An ILEC must post on its publicly available Internet site the name of each of its premises that has no physical collocation space available "within ten days of the date at which a *premises runs out* of physical collocation space."[28] This requirement is not ambiguous. A premises "runs out" of space when space is no longer available. The ILEC then has ten days to post that information on its Internet site. Based on this plain meaning, the Bureau properly rejected SBC's defense of its collocation posting practices.

9. SBC argues that the collocation posting rule can be read to allow an ILEC to post notice of an exhausted premises not within ten days of its space becoming unavailable, but at some subsequent and indeterminate time, within ten days of whenever the ILEC might deny a CLEC application for collocation on the basis of lack of space. Section 51.321(h) cannot be read to support SBC's interpretation. Contrary to SBC's assertions, the posting obligation is not even arguably triggered by any event other than the exhaustion of available space. We decline, therefore, to validate SBC's "policy . . . to treat as the triggering event the *determination* that an office had no additional space for collocation"[29] because that determination is made only "when an ILEC tries, but fails, to accommodate a collocation application."[30] As the Bureau stated in the *Forfeiture Order,* "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."[31]

10. Moreover, in this case and under these circumstances, the evidence of industry practice in this record cannot be used to create ambiguity where none otherwise exists.[32] SBC argues that the collocation posting rule is ambiguous because it conflicts with SBC's understanding of industry standards among the ILECs.[33] As an initial matter, we need not turn to industry standards where a rule is clear on its face. But, in any event, we cannot rely on ILEC industry practice to inform our enforcement of collocation obligations because the Commission

[28] 47 C.F.R. § 51.321(h) (emphasis added); *see also 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, ¶ 58 (1999) ("*Advanced Services Order*") ("incumbent LECs must maintain a publicly available document, posted for viewing on the Internet, indicating all 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.").

[29] Application for Review at 3 (emphasis in the original).

[30] Application for Review at i.

[31] *Forfeiture Order* at 10964-65, ¶ 6. SBC argues that the Bureau's letter of inquiry ("LOI") reveals a latent ambiguity in the rule because the Bureau sought information on the *completion* of prior collocations, rather than seeking information on *requests* for prior collocations. Application for Review at 9. But nothing in the language of the LOI indicates that the Bureau ever interpreted the posting requirement to be triggered by anything other than exhaustion of available space, and nothing in SBC's argument on this point blurs the distinct conflict of SBC's policy and practices with our rule.

[32] *See* Application for Review at 7.

[33] *Id.*

has previously determined that "incumbent LECs have the incentive and capability to impede competition by reducing the amount of space available for collocation by competitors."[34]

11. The lack of weight we attribute to industry practice in this case is not in tension with the cases that SBC cites in support of its argument.[35] *Spancrete Northeast Inc. v. OSHRC*[36] and other federal cases like it have interpreted provisions of the Occupational Safety and Health Act and its implementing regulations. In assessing whether an employer complied with a duty that it provide a workplace "free from *recognized* hazards" and a duty that it ensure employees wear "*appropriate*" protective equipment,[37] federal courts have indeed adopted an objective standard "based on what a reasonable man familiar with industry practices would have done."[38] But such a standard is appropriate in that context only because those rules are "so general that due process requires some reference to reasonableness and industry custom before liability is imposed."[39] The clarity and precision of our collocation posting rule stands in stark contrast to the rules at issue in those cases. Therefore, SBC's citation to them does not influence our determination that the Bureau properly determined industry practice to be "irrelevant" in this case.[40]

12. In addition to the plain language of our collocation posting rule, the purpose underlying the rule further belies SBC's asserted interpretation. As stated in the order adopting the rule, the purpose is to ensure that competitors do not "expend[] significant resources in applying for collocation space in an incumbent LEC's premises where no such space exists."[41] Any posting that is triggered by a denial of an application necessarily follows the applicant's expenditure of resources to file the application. Specifically, the evidence in this record suggests that CLECs were injured as a result of SBC's conduct: in most of the instances of untimely posting that the Bureau identified, a CLEC applied for collocation space only to have SBC deny collocation because the space was full before the CLEC even submitted its application.[42] This injury is precisely the one that the rule is intended to avoid.[43] This anomalous result further supports our conclusion, based on the plain language of the rule, that the practice is not in accord with the rule.

13. As to the goals of our broader collocation rules, we are unpersuaded by SBC's assertion that our interpretation conflicts with the "goal of keeping offices *open*,"[44] and that

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[34] *Advanced Services Order* at 4791-92, ¶ 56.

[35] Application for Review at 7 (citing *Spancrete Northeast Inc. v. OSHRC*, 905 F.2d 589, 593-94 (2d Cir. 1990)).

[36] 905 F.2d at 618.

[37] *Spancrete*, 905 F.2d at 593 (citing 29 U.S.C. § 654(a)(1) and 29 C.F.R. § 1926.28(a)) (emphasis added).

[38] *Spancrete*, 905 F.2d at 593.

[39] *Id.* at 594.

[40] *Forfeiture Order* at 10967, ¶ 13.

[41] *See Advanced Services Order* at 4793, ¶ 56.

[42] SBC's January 9, 2001 Response, Exhibit A.

[43] *See Advanced Services Order* at 4793, ¶ 56.

[44] Application for Review at 5 (emphasis in the original).

SBC's practice serves that goal by allowing additional CLECs to be "squeezed-in."[45] An office is not open when all space is consumed by space reservations and newly installed equipment. And, if there is room to accommodate an additional CLEC, an office is not exhausted. Our ruling here does not require that offices be listed as closed when there is room to collocate additional CLECs. It simply requires offices to be listed as closed when space becomes unavailable for any reason, including the reservation of space or installation or equipment. If such offices subsequently become open, they should be taken off the list of closed offices.

14. The *Advanced Services Order* does not support SBC's interpretation. SBC argues that our adoption in that proceeding of Sprint's collocation posting proposal establishes that we intended this obligation to be triggered only by an ILEC's denial of a CLEC collocation application.[46] But contrary to SBC's assertions, Sprint did not propose that collocation space reporting requirements be triggered only by an application denial, and we never suggested anything of the kind.[47] Rather, Sprint expressed discomfort with our tentative conclusion that ILECs would be required to submit detailed reports about the status of available collocation space to requesting CLECs.[48] As an alternative to that requirement, Sprint "urge[d] that instead, the ILECs be required simply to maintain a *current*, publicly available list of offices where no space is available."[49] Ultimately, we adopted Sprint's posting proposal *in addition to* our own tentative conclusion that ILECs are required to provide status reports to CLECs upon request.[50] Therefore, an ILEC must report the status of its available collocation space (1) in a report whenever a CLEC requests information about that status, *and* (2) on its publicly available Internet site when a location runs out of space. That we imposed the first reporting requirement, which is obviously triggered by an event other than an application denial, refutes SBC's assertion that we were wedded to the idea that ILECs would be overly burdened by obligations triggered by anything other than application denials.[51]

15. We are similarly unpersuaded by SBC's assertion that its position is supported by a sentence in a footnote in the *Advanced Services Order* that merely acknowledges that Bell Atlantic was generally making use of its Internet site to furnish carriers with information on collocation space availability.[52] SBC asserts that this reference "makes clear that an ILEC could restrict its posting to premises in which collocation had been requested . . ." because that was

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[45] *Id.* at 10.

[46] *See* Application for Review at 10-11.

[47] *Id*.

[48] Application for Review, Attachment 8 (*In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services,* CC Docket No. 98-147, Comments Sprint Corporation (September 25, 1998)) ("Sprint Comments") at 18 (citing *Notice of Proposed Rulemaking* at ¶147).

[49] Sprint Comments at 18 (emphasis added). As the Bureau stated in the *Forfeiture Order*, Sprint states that the Internet posting would be "current," indicating a need to track current space availability. *Forfeiture Order* at 10965, ¶ 7.

[50] *See* 47 C.F.R. § 51.323(h). *See also* Sprint Comments at 18 (citing *Notice of Proposed Rulemaking* at ¶147).

[51] SBC overlooks this first reporting requirement despite the fact that Sprint addresses it in the paragraph on which SBC relies for this argument, *see* Application for Review at 11 (citing Sprint Comments at 18), and despite its inclusion in the same subsection of the collocation rules as the posting requirement. *See* 47 C.F.R. § 51.323(h).

[52] *Advanced Services Order* at 4793, ¶ 58 n.143 ("We note that Bell Atlantic already makes information available on an Internet website concerning space availability in its offices in New York.").

Bell Atlantic's practice at that time.[53] In view of all of the discussion above about the clarity of the text of this rule and its purposes, this single sentence reference in a footnote to a carrier's use of the Internet to post space availability information cannot be read to control the interpretation of the rule, regardless of whether or not the carrier was posting the information only for offices in which collocation had been requested. We did not take note of that aspect of the Bell Atlantic's Internet posting, nor did we attribute to it any significance.

16. We also reject SBC's assertion that the Regulatory Flexibility Analysis in the *Advanced Services Order* "casts further doubt on the existence of" a requirement that ILECs monitor their collocation floor space.[54] As the Bureau stated in the *Forfeiture Order*, "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."[55] That SBC disagrees with our assessment of the cost of compliance with our rule has no bearing on the meaning of the rule.[56]

17. It is hornbook law that "where [a] regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability."[57] As we explain above, however, section 51.321(h)'s[58] requirement that offices be posted when they "run out" of space provides ample notice to carriers that they may not ignore space exhaustion resulting from the reservation of space or equipment installation.[59] Moreover, SBC's practice so distorts the rule as to undermine its purpose. We therefore reject SBC's contention that section 51.321(h)[60] is ambiguous and its contention that the rule cannot operate to support the imposition of a forfeiture on SBC for its past conduct.[61] SBC violated a clear rule, and the Bureau's *Forfeiture Order* was appropriate.[62]

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[53] Application for Review at 12.

[54] Application for Review at 12-13.

[55] *Forfeiture Order* at 10965, ¶ 8.

[56] We adopt the Bureau's rejection of SBC's position that the U.S. Office of Management and Budget has not approved the requirements of section 51.321(h) under the Paperwork Reduction Act. *See Forfeiture Order* at 10966, ¶ 9; Application for Review at 13-14. The Commission has already obtained such approval. OMB No. 3060-0848.

[57] *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 628 (DC Cir. 2000), cited in Application for Review at 14.

[58] 47 C.F.R. § 51.321(h).

[59] Specifically, under SBC's interpretation of the rule it was not required to consider the availability of collocation space "every time space was reserved, or equipment installed, at a central office," Application for Review at 4, but "only when it had a collocation application in hand, and when it appeared that the application might be denied or partially denied due to lack of space." Application for Review at 3-4.

[60] 47 C.F.R. § 51.321(h).

[61] SBC appears to confuse this issue with the issue of willfulness. *See* Application for Review at 15 ("This case is . . . about whether the obligations the bureau seeks to enforce is so clear . . . that SBC's failure to follow it can be considered a 'willful' violation of the Commission's rules."). A finding of willfulness merely requires a finding that the party had knowledge of its actions, without regard to any intention to violate the Commission's rules. *See supra* note 26. We agree with the Bureau's determination that SBC willfully and repeatedly failed to comply with the Commission's rules. *Forfeiture Order* at 10966-67, ¶¶ 11-13.

[62] Contrary to SBC's apparent assertions that the Commission's approval of its section 271 applications, including a footnote cross-referencing the Bureau's NAL, somehow precludes a finding of a violation, *see* Application for

(continued....)

B. Forfeiture Amount

18. 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.[63] Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*[64] allow the Commission considerable flexibility to determine the appropriate forfeiture.[65] SBC objects to the forfeiture amount on the basis that the Bureau (1) failed to explain how the amount was calculated; (2) failed to apply the *Forfeiture Policy Statement*; (3) relied on unpaid or unadjudicated findings of liability against SBC; and (4) failed to exclude violations prior to March 9, 2000. We hold that the Bureau's methodology in calculating the forfeiture amount was proper but we amend that forfeiture amount downward as described in paragraph 22 below.

19. First, we find that the Bureau used a reasonable and appropriate methodology in calculating the forfeiture penalty, and it explained that method sufficiently. 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.[66] In the NAL and the March 9, 2001 Letter to SBC's counsel, the Bureau described the nature and scope of the violations and its calculation of the forfeiture amount. Specifically, the Bureau explained that it had considered "the nature, circumstances, extent and gravity of the violations, 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,"[67] and it determined that each of the 27 violations described in paragraph 5 above warrants a forfeiture amount of three thousand, five hundred dollars ($3,500).[68] The NAL and the March 9, 2001 Letter, therefore, sufficiently explained the calculation and basis of the forfeiture amount to SBC, identified the number of violations, and disclosed the base forfeiture amount.

20. Second, the Bureau properly followed the Communications Act and the *Forfeiture Policy Statement* in calculating the forfeiture amount.[69] Although there is no base amount under the Commission's forfeiture guidelines for failure to post exhaustion of collocation space in a timely fashion, an analogous violation is the "[f]ailure to file required forms or

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Review at ii, 4-5, we do not believe it was incumbent on the Commission to deny or defer acting on SBC's applications pending the outcome of the investigation of this matter. In any event, at this point, having found SBC in violation of the rule, we see no need to initiate on our own motion any enforcement action under section 271.

[63] 47 U.S.C. §503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

[64] *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) ("*Forfeiture Policy Statement*"); *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement Reconsideration Order").*

[65] 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).

[66] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R § 1.80(b)(2).

[67] *See* NAL at ¶ 9 quoting 47 U.S.C. § 503(b)(2)(D).

[68] *See* March 9, 2001 Letter.

[69] Application for Review at 17-18.

information." The base amount for such a violation is three thousand dollars ($3,000).[70] Another analogous forfeiture amount in the Commission's guidelines is for "[v]iolation of public file rule." The base amount for such a violation is ten thousand dollars ($10,000).[71] Because the violations here involve important local competition requirements, the Bureau, in a perfectly appropriate exercise of its discretion, imposed a base amount not at the bottom of the range but between the two most analogous violations for each violation here. The *Forfeiture Policy Statement* permits an upward adjustment in the base forfeiture amounts for "large or highly profitable entities" in order "to guarantee that forfeitures . . . are not considered merely an affordable cost of doing business."[72] Accordingly, a large and highly profitable company like SBC[73] "should expect . . . that the forfeiture amount set out in an [NAL]. . . may . . . be above, or even well above, the relevant base amount."[74] We find that the Bureau properly applied the *Forfeiture Policy Statement,* and we find that a forfeiture of three thousand, five hundred dollars ($3,500) per violation on a company of SBC's resources for the types of violations at issue here is not unreasonably high.

21. Third, SBC argues that in calculating the forfeiture amount, the Bureau violated section 504(c) of the Act,[75] which prohibits reliance on notices of apparent liability that have not been either paid or adjudicated in court.[76] SBC points to a footnote in the *Forfeiture Order* citing cases in which the Commission found that SBC violated various FCC rules.[77] Although SBC is correct that some of the cases in that footnote involved notices of apparent liability that had not been either paid or adjudicated by a court as of the date of the *Forfeiture Order,*[78] the Bureau did not improperly rely on them in calculating this forfeiture. The Bureau's citation was for the limited purpose of refuting SBC's position that its "performance in general is outstanding" and "its overall record of compliance with the Commission's collocation and other rules is outstanding" thus justifying a downward adjustment of the forfeiture amount.[79] The Bureau's citation of these cases for the limited purpose of rejecting a downward adjustment does not violate section 504(c). Moreover, although reliance on the *issuance* of an NAL is prohibited until the forfeiture has been paid or the person is subject to a final court order to pay, reliance on

[70] *See Forfeiture Policy Statement* at Appendix A, 17114; 47 C.F.R. § 1.80(b)(4).

[71] *See Forfeiture Policy Statement* at Appendix A, 17113; 47 C.F.R. § 1.80(b)(4).

[72] *Forfeiture Policy Statement* at 17099-100, ¶ 24.

[73] *See supra* ¶ 2.

[74] *Forfeiture Policy Statement* at 17099-100, ¶ 24.

[75] 47 U.S.C. § 504(c).

[76] Application for Review at 18.

[77] *Forfeiture Order* at 10968 n. 38.

[78] *Forfeiture Order* at 10968 n. 38 (citing *SBC Communications Inc.,* Order of Forfeiture, DA 01-680 (March 15, 2001) ("March 15, 2001 Forfeiture Order") and *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)). The Commission notes that the March 15, 2001 Forfeiture Order was paid by SBC on June 29, 2001, four days after submission of the Application for Review on June 25, 2001.

[79] *Forfeiture Order* at 10968, ¶ 15 (internal quotation marks omitted).

the *facts underlying* prior NALs under similar circumstances is permissible.[80] In any event, we need not and do not rely on footnote 38 in the *Forfeiture Order* in rejecting SBC's argument that the forfeiture amount is unreasonably high.

22. Finally, we will decrease the total amount of the forfeiture. Because SBC had requested confidential treatment for *all* information submitted to the Bureau in conjunction with this proceeding, the NAL released on January 18, 2001 contained less detail concerning the violations than is typically the case. SBC did not agree until November 14, 2001, that the number and name/location of the offices that are the subject of this proceeding could be disclosed in publicly available documents.[81] SBC argues that "[t]he Bureau first provided SBC with notice of the bulk of the violations . . . on March 9, 2001" in the letter from the Bureau to SBC's counsel identifying the central offices that were not posted on SBC's Internet site in a timely fashion.[82] Consequently, SBC asserts, three posting violations should not factor into the forfeiture amount because the statute of limitations expired on those violations between the date of the NAL and the date of the March 9, 2001 Letter. Without deciding whether the statute of limitations was satisfied by the issuance of the NAL,[83] we credit SBC's assertion that it did not fully understand the basis of its liability until the March 9, 2001 Letter. Therefore, the violations resulting from the late posting of central offices in Round Rock, Texas; Riverside, California; and Lake Zurich, Illinois, will not factor into the forfeiture amount. Each violation had been assigned a forfeiture of three thousand, five hundred ($3,500) for a total of ten thousand, five hundred dollars ($10,500). The forfeiture amount is therefore reduced by that amount resulting in a forfeiture amount of eighty-four thousand dollars ($84,000).

IV. ORDERING CLAUSES

23. For the reasons discussed above, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), and 503(b) of the Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 503(b), the Application for Review filed by SBC Communications Inc. IS GRANTED as to its request for a modification of the forfeiture amount and IS DENIED in all other respects.

24. IT IS FURTHER ORDERED THAT, pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, SBC Communications Inc. SHALL FORFEIT to the United States Government the sum of eighty-four thousand dollars ($84,000) for willfully and repeatedly violating the Commission's rules and orders requiring ILECs promptly to post on the ILEC's Internet site notice of premises that have run out of collocation space.

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[80] *Forfeiture Policy Statement Reconsideration Order* at 304, ¶ 4 (internal citation omitted) (Section 504(c) "is not intended to mean that the facts upon which a notice of forfeiture liability against a licensee is based cannot be considered by the Commission . . . with respect to the imposition of other sanctions authorized by the Communications Act of 1934.").

[81] *See* November 16, 2001 Moir Letter.

[82] Application for Review at 16.

[83] 47 U.S.C. § 503(b)(6)(B) ("No forfeiture penalty shall be determined or imposed against any person . . . if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.").

25. IT IS FURTHER ORDERED that payment shall be made in the manner provided for in section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, within 30 days of release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act, 47 U.S.C. § 504(a). Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. 200132080015 referenced above and FRN Numbers 0004-3051-24, 0004-3335-71, and 0005-1937-01. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.[84]

26. IT IS FURTHER ORDERED that a copy of this Order on Review shall be sent by Certified Mail/Return Receipt Requested to SBC Communications Inc. c/o Caryn Moir, Vice President-Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[84] *See* 47 C.F.R. § 1.1914.