A

MARKET CONCENTRATION AND BROADBAND ACCESS

- For "a typical local broadband market, the HHI ranges between approximately 5,000 and 5,400. The above figures indicate that the typical broadband internet market is very highly concentrated."[1]

- "The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market."[2]

- According to FCC data, fixed wireless and satellite hold insufficient market share (just 1.3%) to be considered serious competition to the incumbent LEC or cable operator in any relevant market.[3]

- Broadband over power lines ("BPL") is not a significant entrant in either retail or wholesale markets.[4] In a May 2004 survey of alternative broadband services,

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[1] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd. 6722, ¶ 123 (2003). The Herfindahl-Hirschman Index, or HHI, a well-accepted measure of market concentration used by the U.S. Department of Justice and the Federal Trade Commission, is described at Section 1.5 of the *Merger Guidelines*. The index divides the spectrum of market concentration into three categories: "unconcentrated" for markets with an HHI of less than 1,000; "moderately concentrated" for markets with HHI between 1,000 and 1,800; and "highly concentrated" for markets with an HHI above 1,800. *Merger Guidelines*, § 1.5. We note that the FCC data does not include non-incumbent LEC ADSL on a state-by-state basis. However, if included, it would be unlikely to change the HHI analysis in any significant way since non-incumbent LEC ADSL comprises only 4.3% of ADSL nationally. High-Speed Services for Internet Access: Status as of December 31, 2004, Table 5 – High-Speed Lines by Type of Provider (rel. July 7, 2005) ("*FCC December 2004 High-Speed Report*").

[2] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, 18 FCC Rcd. 16978, ¶ 233 (2003), *partially vacated on other grounds*, USTA v. FCC, 359 F.3d 554 (2004) ("*TRO*").

[3] *FCC December 2004 High-Speed Report*, Chart 2 – High-Speed Lines by Technology ("*FCC December 2004 High-Speed Report*"); *see also, In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order, 18 FCC Rcd. 16978, ¶ 231 (2003) ("*TRO*"), *partially vacated and remanded*, USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004)("The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market.").

[4] *TRO*, ¶ 232 ("Finally, we note that other technologies that can substitute for loops in providing narrowband and broadband service are currently under development. For

Verizon was able to list only two commercial roll-outs of BPL, at least one of which was not in Verizon territory.[5]

- Commission statistics show that 12.5% of U.S. zip codes are served by (*i.e.*, receive at least a single high-speed line over any technology at any price and any quality level) just one provider and another 16.3% are served by just two providers.[6]

- According to FCC data, in four (4) SBC states (Arkansas, Missouri, Nevada, Oklahoma) and in three (3) Verizon states (Maine, Vermont, West Virginia), more than 30% of the zip code areas are served by just one or two providers.[7]

HHI ANALYSIS OF THE STATE-BY-STATE BROADBAND MARKET USING FCC DATA IN SBC REGION

State	ADSL (%)	Cable (%)	Other (%)	HHI
Arkansas	45.8	48.1	6.0	4,454.3
California	50.2	41.1	8.7	4,283.1
Illinois	46.1	45.0	8.8	4,233.8
Indiana	37.3	56.9	5.8	4,660.9
Kansas	28.9	63.6	7.5	4,933.9
Michigan	27.3	66.9	5.8	5,249.8
Missouri	47.8	44.8	7.4	4,350.6
Nevada	27.1	*	*	Not known
Ohio	33.8	59.7	6.5	4,753.1
Oklahoma	40.5	*	*	Not known
Texas	42.5	50.8	6.6	4,436.3
Wisconsin	31.2	62.9	5.9	4,964.4

* Data withheld by FCC to maintain firm confidentiality

example, some companies are experimenting with delivering narrowband voice service via power lines. Such technologies have not been deployed beyond an experimental basis (*e.g.*, technical trials) at this time.") (footnote omitted).

[5] "Competition in the Provision of Voice Over IP and Other IP-Enabled Services," CC Dkt. No. 04-36, at A-13 (filed May 28, 2004) (referencing BPL roll-outs in Virginia and Ohio).

[6] *FCC December 2004 High-Speed Report*, Table 12 – Percentage of Zip Codes with High-Speed Lines in Service.

[7] *FCC December 2004 High-Speed Report*, Table 13 – Percentage of Zip Codes with High-Speed Lines in Service.

HHI ANALYSIS OF THE STATE-BY-STATE BROADBAND MARKET USING FCC DATA IN VERIZON REGION

State	ADSL (%)	Cable (%)	Other (%)	HHI
Connecticut	40.5	56.5	2.9	4,848.8
Delaware	*	*	*	Not known
District of Columbia	44.4	*	*	Not known
Hawaii	*	*	*	Not known
Maine	28.7	*	*	Not known
Maryland	31.3	62.9	5.7	4,976.6
Massachusetts	26.4	68.1	5.5	5,360.4
New Hampshire	19.8	76.5	3.6	6,263.0
New Jersey	25.3	69.0	5.7	5,432.2
New York	22.8	70.4	6.8	5,520.8
Pennsylvania	31.1	63.0	5.9	4,973.7
Rhode Island	*	*	2.9	Not known
Vermont	39.4	*	*	Not known
Virginia	25.5	68.3	6.2	5,354.1
West Virginia	*	69.9	*	Not known

* Data withheld by FCC to maintain firm confidentiality

B1

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

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

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 17, 2001 **Released:** January 18, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

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

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1 *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶ 387 (1999) ("*SBC/Ameritech Merger Order*"); *SBC/Ameritech Merger Order,* Appendix C at ¶ 40. *See also Association of Communications Enterprises v. FCC,* No. 99-1441 (D.C. Cir. Jan. 9, 2001).

2 *See* January 9, 2001 Letter from Sandra L. Wagner, Vice-President, SBC Telecommunications, Inc., to Brad Berry, Deputy Chief, Federal Communications Commission Enforcement Bureau, Exhibit A. SBC has requested confidential treatment of its submissions to the Bureau detailing the nature and scope of its apparent violations, and that request is pending. Accordingly, we do not here disclose the number of apparent violations or the premises with respect to which they occurred.

3 47 C.F.R. § 51.321(h).

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

II. BACKGROUND

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

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

4. On August 8, 2000, SBC submitted its audit report to the Commission regarding SBC's compliance with the Commission's collocation rules from October 8, 1999 through June 8, 2000.[10] Based on the Bureau's review of the audit report and of certain information submitted to the Bureau by SBC, we conclude that SBC apparently violated the requirement to timely post exhausted collocation space in numerous instances during the audit period.[11]

III. DISCUSSION

A. Violations

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5 SBC 1999 Annual Report at 6.

6 *Id.* at 4.

7 *Id.* at 76.

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

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

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

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

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

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

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

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

[13] 47 C.F.R. § 51.321(h).

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

[15] *See Advanced Services Order* at 4793.

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

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

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

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

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

B. Forfeiture Amount

9. Section 503(b)(1) of the Act states that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.[21] For the time period relevant to this proceeding, section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $110,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,100,000 for a single act or failure to act.[22] In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[23] Considering all of the circumstances described above, we find SBC apparently liable for a forfeiture in the amount of $94,500.

IV. ORDERING CLAUSES

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

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

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

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

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

[23] 47 U.S.C. § 503(b)(2)(D); *see also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

[24] 47 U.S.C. § 503(b).

[25] 47 C.F.R. § 1.80.

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

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

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

15. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability shall be sent by Certified Mail/Return Receipt Requested to SBC Communications, c/o Sandra L.Wagner, Vice President-Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

B2

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

In the Matter of	)	File No. EB-01-IH-0030
	)	
SBC Communications, Inc.	)	NAL/Acct. No. 200232080004
	)	
Apparent Liability for Forfeiture	)	FRN 0004-3051-24, 0004-3335-71,
	)	0005-1937-01

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 16, 2002 **Released: January 18, 2002**

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that SBC Communications, Inc. ("SBC") has apparently willfully and repeatedly violated one of the conditions that the Commission imposed pursuant to its approval of the merger application of Ameritech Corp. ("Ameritech") and SBC.[1] In particular, it appears that SBC[2] failed to offer shared transport in the former Ameritech states[3] under terms and conditions substantially similar to those that it offered in Texas as of August 27, 1999, in violation of the *SBC/Ameritech Merger Order*. Based upon our review of the facts and circumstances surrounding this matter, we find that SBC is apparently liable for a forfeiture in the amount of six million dollars ($6,000,000.00).

II. BACKGROUND

2. SBC is an incumbent local exchange carrier (ILEC) that provides local telephone service in 13 states, including Arkansas, Kansas, Missouri, Oklahoma, Texas, California, Nevada, Illinois, Michigan, Indiana, Ohio, Wisconsin, and Connecticut. At the end of 1999,

[1] *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*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Merger Order*"), *reversed in part on other grounds,* Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C.Cir. 2001).

[2] SBC refers to SBC Communications, Inc. and all its affiliates, including its incumbent LECs.

[3] Throughout this NAL, we refer to the states located in Ameritech's territory prior to Ameritech's merger with SBC as "the former Ameritech states." These states are: Illinois, Indiana, Michigan, Ohio, and Wisconsin. *See SBC/Ameritech Merger Order,* 14 FCC Rcd at 14719, ¶ 6.

SBC served nearly 60 million local exchange access lines in its 13-state region, and served customers in 23 countries.[4] SBC also provides in-region interLATA, wireless, Internet access, out-of-region interLATA, cable and wireless television, and directory publishing services.[5] In 2000, SBC had total operating revenues of more than $51 billion.[6]

3. In the *SBC/Ameritech Merger Order*, the Commission approved license transfers to SBC subject to several conditions that were first proffered by the applicants and then incorporated into the Merger Order as an express condition of the grant of approval.[7] One condition related to SBC's provision of shared transport in the former Ameritech states. Paragraph 56 of the merger conditions states that:

> Within 12 months of the Merger Closing Date (but subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport), SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999.[8]

4. On April 12, 2001, the Enforcement Bureau directed SBC to submit a sworn written response to a series of questions relating to SBC's compliance with paragraph 56 of the merger conditions.[9] SBC filed its responses on May 2, May 14, and July 23, 2001.[10] Based on SBC's responses, we conclude below that SBC apparently violated this condition in each of the five former Ameritech states by refusing to offer shared transport to be used to provide intraLATA toll.

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4 *SBC Communications Inc. 1999 Annual Report* at 6 ("*SBC 1999 Annual Report*"). In its *2000 Annual Report*, SBC reported that its total access lines increased by approximately 1% from the previous year. *SBC Communications Inc. 2000 Annual Report* at 7 ("*SBC 2000 Annual Report*").

5 *SBC 1999 Annual Report* at 4. *See also SBC 2000 Annual Report* at 33-34.

6 *SBC 2000 Annual Report* at 4.

7 *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14954, ¶ 584.

8 *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

9 Letter from David H. Solomon, Chief, Enforcement Bureau, FCC, to Cassandra Carr and Sandra L. Wagner, SBC Telecommunications, Inc., dated April 12, 2001.

10 Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, dated May 2, 2001 ("*May 2 Response*"); Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, dated May 14, 2001 ("*May 14 Response*"); Letter from Christopher M. Heimann, SBC Telecommunications, Inc., to Suzanne Tetreault, Assistant Chief, Enforcement Bureau, FCC, dated July 23, 2001 ("*July 23 Response*"). *See also* Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to David H. Solomon, Chief, Enforcement Bureau, FCC, dated October 10, 2001 ("*October 10 Letter*"), which includes an attachment that "summarizes the evidence presented" in prior submissions and meetings.

III. DISCUSSION

5. Under section 503(b) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed 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.[11] 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.[12] 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.[13] As set forth in more detail below, we conclude under this standard that SBC is apparently liable for a forfeiture for its apparent violations of the Merger Order.

6. The fundamental issue in this investigation is whether SBC, as required by paragraph 56 of the merger conditions, has offered shared transport in the Ameritech states on terms "substantially similar to (or more favorable than)" the most favorable terms it offered in Texas as of August 27, 1999. Based on the facts set forth below, we find that it apparently has not. We find that in each of the five former Ameritech states, SBC has apparently violated its obligations under the paragraph 56 condition, and that this apparent failure to comply is apparently willful and repeated.[14] We propose a forfeiture in the amount of six million dollars.

A. Apparent Violations of the Merger Conditions

7. This investigation has focused on SBC's compliance with paragraph 56 of the merger conditions with respect to one particular aspect of SBC's shared transport offerings – the use of the shared transport UNE to route intraLATA toll calls. As described more fully below, subsequent to the effective date of the merger conditions, SBC apparently attempted to restrict or prohibit the use of shared transport for routing intraLATA toll calls in the Ameritech states. SBC asserts that the restrictions it sought to impose are not less favorable than its August 27, 1999 offering in Texas. We disagree. On August 27, 1999, SBC had at least two interconnection agreements in Texas pursuant to which it offered CLECs the option of using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC. In the Ameritech states, by contrast, SBC has opposed

[11] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

[12] 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

[13] *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).

[14] The term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules, and repeated means more than once. *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). Furthermore, a continuing violation is "repeated" if it lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5.

carriers' requests for agreements that would permit them to use shared transport for intraLATA toll traffic.[15] Thus, it appears that SBC has violated paragraph 56 of the merger conditions.

8. SBC disputes that it was offering shared transport for routing intraLATA calls pursuant to the agreements that were in place in Texas on August 27, 1999.[16] Thus, we review here the facts about SBC's Texas offering.

9. At the beginning of 1999, at least two CLECs in Texas, Sage Telecom, Inc. (Sage) and Birch Telecom of Texas, Ltd. (Birch), were using shared transport purchased from SBC to route intraLATA toll calls between their end user customers and customers served by SBC.[17] In April 1999, however, SBC notified CLECs that it intended to put an end to such use of shared transport once intraLATA dialing parity was implemented.[18] SBC informed CLECs that in the future, intraLATA toll calls would be routed off the SBC network to a non-SBC tandem switch, and then back again to the SBC network.[19] In other words, once dialing parity was implemented, shared transport could no longer be used to route intraLATA toll calls end-to-end between CLEC and SBC customers.

10. Sage and Birch objected to this new plan, and filed complaints with the Public Utility Commission of Texas alleging that SBC's plan would violate their interconnection agreements.[20] SBC asserted that, to the contrary, the interconnection agreements provided that shared transport could be used for end-to-end routing of intraLATA toll calls *only until the implementation of intraLATA dialing parity,* and that SBC's proposed routing change therefore

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15 *See May 2 Response*, Sworn Statement of Deborah A. Golden at 1 and Exhibit 1.

16 *See, e.g., May 2 Response*, Sworn Statement of Michael C. Auinbauh, response to question 4.

17 *See Complaint of Birch Telecom of Texas, LTD., L.L.P. and Alt Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal to Provide IntraLATA Equal Access Functionality, and Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions of the Interconnection Agreement*, Arbitration Award, Docket Nos. 20745 and 20755 (Pub. Util. Comm'n of Texas, Nov. 4, 1999) ("*Texas Arbitration Award*") at 9; *see also Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Complaint, Docket 20755 at 3 (Pub. Util. Comm'n of Texas, filed Apr. 16, 1999); and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Complaint, Docket No. 20745 at 3 (Pub. Util. Comm'n of Texas, filed Apr. 15, 1999). Those carriers used shared transport to provide all of the necessary transmission and routing between the two customers' end offices. We refer to this arrangement in this order as "end-to-end" routing of intraLATA toll calls.

18 *May 2 Response*, Sworn Statement of Michael C. Auinbauh at Exhibit A ("Accessible Letter," dated April 6, 1999).

19 *See Texas Arbitration Award* at 9. This would have resulted in intraLATA toll calls being routed in the same way as interLATA calls.

20 *Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Complaint, Docket No. 20755 (Pub. Util. Comm'n of Texas, filed Apr. 16, 1999); and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Complaint, Docket 20745 (Pub. Util. Comm'n of Texas, filed Apr. 15, 1999).

did not conflict with the agreements.[21] SBC's obligations under paragraph 56 of the merger conditions hinge on which of these parties is correct about the scope of SBC's Texas offering, as established by its interconnection agreements. In considering this issue, we have the benefit of the fact that the Texas PUC has already resolved this dispute between the parties.

11. In November 1999, an arbitration panel of the Texas PUC issued an order rejecting SBC's arguments and ruling that SBC's agreements with Sage and Birch require SBC to provide shared transport for routing intraLATA toll traffic regardless of whether dialing parity has been implemented.[22] The full PUC shortly thereafter approved the *Texas Arbitration Award*.[23] Thus, the Texas PUC has interpreted agreements that were in place on August 27, 1999 as offering CLECs the ability to use the shared transport UNE to route intraLATA toll calls end-to-end, without the restrictions that SBC sought to impose in the Ameritech states.[24]

12. While admitting that the *Texas Arbitration Award* has not been modified, reversed, or overruled,[25] SBC apparently disagrees with the Texas PUC's decision, as it raises arguments in its response to the Bureau's LOI that were already expressly considered and rejected by the Texas PUC.[26] Given the special expert position of the Texas Commission in interpreting Texas interconnection agreements, we accept the interpretation set forth in the *Texas Arbitration Award*, and reject SBC's attempt to persuade us to take a different view.[27]

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[21] *Texas Arbitration Award* at 5-6; *see also May 2 Response*, Sworn Statement of Michael C. Auinbauh, Response to Question 4.

[22] *Texas Arbitration Award*, *supra* n.19. We note that the *Texas Arbitration Order* phrased the issue in terms of whether the interconnection agreements allowed SBC, post-dialing parity, to route intraLATA toll calls in the same way as interLATA toll calls. This is equivalent, however, to the question of whether SBC could, as it proposed, stop providing shared transport end-to-end and instead route intraLATA toll calls off the SBC network to a non-SBC tandem switch, and then back again to the SBC network. *See* note 21, *supra*.

[23] *Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Docket No. 20755, and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Order, Docket 20745 (Pub. Util. Comm'n of Texas, Dec. 1, 1999).

[24] Notably, the Texas PUC found that the interconnection agreement "provides that the UNE common transport permits a CLEC to utilize [SBC's] common network between a [SBC] tandem and a [SBC] end office [and it] neither differentiates between the originating and terminating side of the routing scheme nor makes a distinction between pre- and post-dialing parity environments." *Texas Arbitration Award* at 31.

[25] *May 2, 2001 Response*, Sworn Statement of Michael C. Auinbauh at 4.

[26] SBC asserts that it need not allow the use of shared transport to route intraLATA toll calls in a post-dialing parity environment because its agreements with Sage and Birch say that "[a]fter implementation of intraLATA Dialing Parity, intraLATA toll calls from [CLEC][unbundled local switching ports] will be routed … [to] the end user intraLATA Primary Interexchange Carrier (PIC) choice." *May 2 Response*, Sworn Statement of Michael C. Auinbauh, Response to Question 4, *citing* Interconnection Agreement Between Southwestern Bell Tel. Co. and Sage Telecom, Inc., App. Pricing-UNE § 5.2.2.2.1.2; Interconnection Agreement Between Southwestern Bell Tel. Co. and Birch Telecom of Texas, Ltd., App. Pricing-UNE § 5.2.2.2.1.2. The *Texas Arbitration Award* explains, however, that SBC based its argument in Texas on this same language, and concludes that "[t]he Arbitrators reject SWBT's position." *Texas Arbitration Award* at 12-13.

[27] We note that SBC's responses indicate that, in all five of the Ameritech states, it has affirmatively opposed requests for such service before the state commissions. *See, e.g.*, *Investigation Into Tariff Providing*

13. SBC also argues that it has not violated the merger conditions because (1) the *Texas Arbitration Award* imposed a new obligation that was not in place on August 27, 1999, and thus is not relevant to SBC's obligations under the merger conditions,[28] and (2) SBC was not "offering" shared transport for intraLATA toll on August 27, 1999, because it allowed Birch and Sage to use shared transport on that date only because the PUC had temporarily enjoined it from implementing the routing changes it proposed in April. We find no merit in either of these contentions. It is quite clear that the *Texas Arbitration Award* constitutes a review of SBC's obligations under its *existing* agreements, and not a policy decision to impose new requirements. The arbitrators set forth the issues in terms of what the interconnection agreements require, and engaged in an analysis of specific language from the agreements to determine what SBC's obligations were.[29] Moreover, SBC seems to have understood contemporaneously that the Texas proceeding was interpreting an existing agreement, as it apparently made arguments about the

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Unbundled Local Switching With Shared Transport, Order, Case No. 00-0700 (Ill. Commerce Comm., Nov. 1, 2000), Exhibit 1(v) to Sworn Statement of Deborah A. Golden (Golden Exhibit), submitted with SBC May 2 response (investigating an Illinois Bell Telephone Company tariff on the issue of whether Ameritech's restrictions on the shared transport offering are appropriate, and specifically whether shared transport should be available for use by CLECs in transporting their intraLATA toll traffic); *AT&T Communications of Indiana, Inc. TCG Indianapolis Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Ameritech Indiana's Submission of Proposed Order, Cause No. 40571-INT-03 at 69-71 (Ind. Util. Reg. Comm'n, filed Oct. 10, 2000), Golden Exhibit 1(b) (proposed ruling that Ameritech should be permitted to prohibit AT&T's use of shared transport for intraLATA toll traffic); *AT&T Communications, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Ameritech Ohio's Response to AT&T's Petition for Arbitration, Case No. 00-1188-TP-ARB at 19 (Pub. Util. Comm'n of Ohio, filed July 25, 2000), Golden Exhibit 1(k) (arguing that AT&T should not be permitted to use shared transport for intraLATA toll traffic; *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Ameritech Michigan's Reply Brief, Case No. U-12622 (Mich. Pub. Serv. Comm'n, filed December 28, 2000) (defending a tariff filing that prohibited use of shared transport for intraLATA toll service); Ameritech Michigan's Exceptions to the Proposal for Decision at 4-8 (filed February 12, 2001), Golden Exhibit 1(h) (arguing that the Merger Order does not require Ameritech to allow the use of shared transport for intraLATA toll service); *Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin),* Ameritech Wisconsin's Initial Post-Hearing Brief, Docket No. 05-MA-120 at 74 (Pub. Serv. Comm'n of Wisconsin, filed September 22, 2000), Golden Exhibit 1(o) (arguing that Ameritech may prohibit AT&T's use of shared transport for intraLATA toll traffic).

[28] In essence, SBC argues that "[i]t was not until November 4, 1999—more than two months after the relevant date for purposes of the Merger Conditions—that the Texas PUC issued its arbitration order forcing Southwestern Bell to accept such a request." *See May 2 Response*, Exhibit C at 4. Thus (according to SBC), it was not until that later date that there were "terms [Southwestern Bell] offer[ed] to telecommunications carriers in Texas" that allowed them to use Southwestern Bell's interexchange network to complete intraLATA toll calls. *Id*. We note, however, that prior to August 27, 1999, the Texas PUC issued an interim order requiring SBC to offer shared transport to Birch and Sage for the routing of CLEC-originated intraLATA toll traffic. *See May 2 Response*, Sworn Statement of Michael C. Auinbauh, Response to Question 4, *citing Birch Telecom of Texas, Ltd., LLP v. Southwestern Bell Tel. Co*., Order Issuing Interim Ruling Pending Dispute Resolution, Docket Nos. 20745 & 20755 at 3 (Pub. Util. Comm'n of Texas, Apr. 26, 1999).

[29] For instance, as discussed above, the arbitrators specifically considered the significance of section 5.2.2.2.1.2 of the pricing appendix.

proper interpretation of that agreement.[30] Thus, although the *Texas Arbitration Award* was not issued until November 1999, it describes obligations that were in effect in August. Moreover, SBC's argument that the arbitrators' injunction demonstrates that it did not "offer" shared transport for routing intraLATA toll calls has no persuasive force in light of the Texas PUC's ultimate conclusion that SBC's agreements already obligated it to do so.[31]

14. SBC also argues that the way in which CLECs have requested to route intraLATA traffic does not constitute "shared transport" within the meaning of paragraph 56 of the Merger Conditions. First, SBC asserts that:

> the facilities that SBC's ILECs use to complete intraLATA toll calls are distinct from the 'shared transport' that SBC is required to unbundle under the Commission's rules. Paragraph 56 of the Merger Conditions, which by its terms has to do with the terms and conditions on which Ameritech would offer the shared transport UNE, therefore has nothing whatsoever to do [with the issue under investigation].[32]

We disagree. The Merger Conditions define "shared transport" as that term is defined in the Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460 (1997). That order defines shared transport as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, *between end office switches and tandem switches*, and between tandem switches, in the incumbent LEC's network."[33] The intraLATA toll arrangements that CLECs in the Ameritech states have requested (and that the Texas Commission found to be required in Texas) consist of routing *between end office switches and tandem*

[30] *See Texas Arbitration Award* at 9 ("according to [SBC], in a post-dialing parity environment, the interconnection agreement requires CLECs to route their intraLATA traffic in a different manner."). In another context, SBC also seems to recognize that the *Texas Arbitration Award* did not create new obligations, but interpreted an existing agreement. *See* Ex Parte Presentation from Edwardo Rodriguez Jr., Director - Federal Regulatory, SBC, filed December 22, 2000 in CC Docket No. 00-217, Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to provide in-region interLATA service in the States of Kansas and Oklahoma (committing to "interpret ... sections of [Kansas and Oklahoma interconnection agreements] in exactly the same fashion that it was ordered to" interpret identical provisions in Texas agreement in the *Texas Arbitration Award*).

[31] Moreover, we note that the language of paragraph 56 of the merger conditions made no exception for this issue, even though the issue was being litigated in Texas at the same time that the Commission was reviewing and finalizing the text of the conditions.

[32] *May 2 Response* at Exhibit C, page 4.

[33] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 at Appendix A, rule 51.319 (1997) (emphasis added). *See* 47 C.F.R. § 51.319.

switches.[34] Therefore, we reject SBC's contention that the facilities that would be used to route intraLATA traffic do not fit within the definition of shared transport.

15. In addition, SBC argues that the Merger Order's shared transport obligation is restricted to the use of shared transport for purely *local* service, and does not extend to intraLATA toll routing.[35] We disagree with SBC's assertion that the definition of shared transport encompasses such a use restriction. The definition contained in the *Local Competition Third Order on Reconsideration* does not distinguish between purely local services and long distance services. Moreover, we note that when both the Merger Order and the *Local Competition Third Order on Reconsideration* were adopted, the Commission had in place a rule prohibiting use restrictions on UNEs.[36] Thus, we are unpersuaded by SBC's attempt to read such a use restriction into its obligations under the merger conditions.

16. SBC's responses indicate that in all five of the Ameritech states, it has refused to offer shared transport for end-to-end routing of intraLATA toll calls, and indeed has affirmatively opposed requests for such service before the state commissions. It continued to do so even after the *Texas Arbitration Award* made undeniably clear its obligations in Texas. Thus, we find that SBC has apparently violated paragraph 56 of the merger conditions, in each of the Ameritech states.

17. In addition to arguing that it has complied with the merger conditions, SBC argues that the paragraph 56 condition is no longer applicable. In its more recent responses to the Bureau's inquiry letter, SBC argues that the requirement that it provide shared transport in the former Ameritech states on "terms and conditions … substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offer[ed] to telecommunications carriers in Texas as of August 27, 1999" was terminated by the Commission's *UNE Remand Order*.[37] By its terms, paragraph 56 was "[s]ubject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport."[38] SBC asserts that because the *UNE Remand Order* addressed the obligation of an incumbent LEC to make shared transport available to CLECs,[39] any obligation to provide

[34] The *Texas Arbitration Award* makes clear that the routing being requested there by CLECs does in fact meet this definition. *See Texas Arbitration Award* at 7-9 and Appendix A, which contains diagrams showing explaining that intraLATA calls would be routed using "option 2" as set forth at those pages, which consists of routing between end offices and tandems.

[35] *October 10 Letter* at 5-9.

[36] *See* 47 C.F.R. § 51.309(a), which provides that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."

[37] *July 23 Response* at 7-12. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[38] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[39] *UNE Remand Order*, 15 FCC Rcd at 3862-66, ¶¶ 369-79.

shared transport pursuant to paragraph 56 of the Merger Conditions terminated upon release of the *UNE Remand Order*.[40] We disagree. The *UNE Remand Order* was adopted on September 15, 1999, three weeks *before* the *SBC/Ameritech Merger Order* was adopted on October 6, 1999.[41] Thus, the *UNE Remand Order* cannot plausibly be considered a "future Commission order" under paragraph 56 of the Merger Conditions. We reject the suggestion that the Commission would have imposed a merger condition that had already been superseded by other events that were obviously well-known to the Commission at the time the *SBC/Ameritech Merger Order* was adopted.

18. Even if it were a "future Commission order," nothing in the UNE Remand Order appears to supersede the requirements imposed by paragraph 56. Here, again, SBC argues that the obligation to provide shared transport extends only to the use of that UNE in connection with purely local service, not intraLATA toll.[42] As noted above, however, the definition of shared transport in the UNE Remand Order (*i.e.*, the *Local Competition Third Order on Reconsideration*) contains no such express restriction, and the Commission's rules generally prohibit ILECs from imposing use restrictions on UNEs. Moreover, we note that in a decision that post-dates the UNE Remand Order, the Commission treated an allegation that SBC had unlawfully precluded competitors from using UNEs to provide intraLATA toll service as a section 271 checklist compliance issue. Thus, by implication, the Commission treated the matter as an issue of compliance with the Commission's UNE unbundling rules.[43]

19. Finally, SBC argues that the Bureau (and presumably, the Commission) lacks authority to adjudicate this matter based on the merger conditions.[44] SBC notes that paragraph 56 states that its requirements are "subject to state commission approval." Thus, SBC asserts that enforcement of that paragraph "requires resort to state commission arbitration procedures." We find SBC's interpretation to be unsupported by the *SBC/Ameritech Merger Order*, and reject SBC's attempt to persuade us not to enforce our own order. The cited clause merely refers to the requirement that the interconnection agreements be approved by the state regulatory body.

B. Forfeiture Amount

20. In light of SBC's apparent willful and repeated failure to comply with the *SBC/Ameritech Merger Order*, we find that a substantial proposed forfeiture is warranted.

[40] *July 23 Response* at 7-12.

[41] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14712; *UNE Remand Order*, 15 FCC Rcd at 3696.

[42] *October 10 Letter* at 10.

[43] *See Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6322-23, ¶ 174 (2001), *remanded on other grounds*, Sprint Communications Co. v. FCC, __ F.3d __ (D.C.Cir. 2001), 2001 WL 1657297 (D.C.Cir).

[44] SBC also argues that the Commission lacks enforcement jurisdiction under section 251 of the Act. *May 2 Response*, Exhibit C at 5-6. Because we base this violation on the merger conditions, and not section 251, we need not address this issue.

Section 503(b)(1) of the Act states that any person that willfully or repeatedly fails to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission, shall be liable to the United States for a forfeiture penalty.[45] 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.[46] 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."[47]

21. In response to the Bureau's letter, SBC has stated that the issue of SBC's obligation to allow intraLATA toll traffic to be routed over shared transport facilities was currently before the state commissions or state arbitrators in proceedings in each of the five Ameritech states. In each of those states, SBC failed to offer shared transport on the required terms and conditions, and affirmatively objected to requests for such service.[48] Thus, SBC has apparently violated the requirements of the Merger Order in at least five instances, one in each state. Each of these is a continuing violation, beginning on October 8, 2000 (12 months after the close of the merger), and continuing at least until the date of SBC's May 14, 2001 response to the Bureau's letter of inquiry in four of the five Ameritech states (*i.e.*, Ohio, Indiana, Illinois, and Wisconsin), and until March 2001 in Michigan.[49] Each continuing violation is potentially subject to the statutory maximum forfeiture of $1,200,000.

22. Considering all the circumstances before us, we find SBC apparently liable for a forfeiture in the amount of $6,000,000, the statutory maximum for five continuing violations lasting at least ten (10) days each during the one-year period prior to this Notice of Apparent Liability. First, the Commission emphasized in the Merger Order that it would hold SBC to a high standard of compliance, stating that "[w]e expect that SBC/Ameritech will implement each

[45] 47 U.S.C. §503(b)(1)(A); *see also* 47 C.F.R. § 1.80(a)(1).

[46] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R § 1.80(b)(2). In September 2000, the Commission increased the maximum forfeiture amount from $1,100,000 to $1,200,000 per violation to account for inflation. *See Amendment of Section 1.80(B) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000). That change became effective November 13, 2000. *See* 65 FR 60868 (October 13, 2000).

[47] 47 U.S.C. § 503(b)(2)(D); *see also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, Report and Order, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

[48] *See* note 27, *supra*.

[49] The Michigan Public Service Commission has required Ameritech to file tariffs in Michigan that would permit CLECs to use Ameritech's shared transport to provide intraLATA toll. *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Opinion and Order, Case No. U-12622 at 6-16 (Mich. Pub. Serv. Comm'n, March 19, 2001). Ameritech filed a tariff offering this capability, which became effective March 30, 2001. *See CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al.*, Joint Statement, File No. EB-01-MD-017 (filed Oct. 23, 2001).

of these conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions."[50] Second, we find it particularly egregious that SBC refused to make shared transport available on the same terms available in Texas, even after the *Texas Arbitration Award* made not only "ascertainably certain,"[51] but abundantly clear, what SBC's obligations under its interconnection agreements were. Instead, SBC has continued to argue to state commissions, and to this Commission, that the *Texas Arbitration Award* imposed only new obligations, despite the fact that the order states clearly that it was interpreting existing obligations. SBC's apparent violations have forced other carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to provide. Third, the Commission has made clear that it will take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against "large or highly profitable entities are not considered merely an affordable cost of doing business."[52] These factors together persuade us that we should propose the statutory maximum forfeiture.

IV. ORDERING CLAUSES

23. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,[53] and section 1.80 of the Commission's Rules,[54] SBC Communications is HEREBY NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of six million dollars ($6,000,000.00) for willfully and repeatedly violating the Commission's merger conditions in the *SBC/Ameritech Merger Order*.

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

25. Payment of the forfeiture amount may be made by mailing a check or similar instrument payable to the order of the Federal Communications Commission, to the Forfeiture

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[50] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14858, ¶ 360 (citations omitted).

[51] Due process requires that parties receive fair notice before being deprived of property. In the absence of notice, the courts ask whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform." *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir.2000), *quoting General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir.1995).

[52] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17099-100, ¶ 24 (1997). With revenues of more than $51 billion in the year 2000, SBC plainly falls into the category of companies to which the Commission was referring.

[53] 47 U.S.C. § 503(b).

[54] 47 C.F.R. § 1.80.

Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the "NAL/ Acct. No." referenced above.

26. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearing Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street S.W., Room 5-C814, Washington, D.C., 20554, and must include the "NAL/Acct. No." referenced above.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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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.

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[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

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[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

[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

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[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.

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

In the Matter of	)	File No. EB-01-IH-0030
	)	
SBC Communications, Inc.	)	NAL/Acct. No. 200232080004
	)	
Apparent Liability for Forfeiture	)	FRN 0004-3051-24, 0004-3335-71,
	)	0005-1937-01

FORFEITURE ORDER

Adopted: October 8, 2002 **Released: October 9, 2002**

By the Commission:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we find that SBC Communications, Inc. ("SBC") willfully and repeatedly violated one of the conditions that the Commission imposed in its order approving the merger application of Ameritech Corp. ("Ameritech") and SBC.[1] Specifically, SBC[2] failed to offer shared transport in the former Ameritech states[3] under terms and conditions substantially similar to those that it offered in Texas as of August 27, 1999, in violation of the *SBC/Ameritech Merger Order*. Based upon our review of the facts and circumstances before us and after considering SBC's response to the Commission's Notice of Apparent Liability ("NAL")[4] in this matter, we conclude that SBC is liable for a forfeiture of six million dollars ($6,000,000.00), the amount we proposed in the NAL.[5]

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[1] *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*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*"SBC/Ameritech Merger Order"*), *reversed in part on other grounds*, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[2] SBC refers to SBC Communications, Inc. and all its affiliates, including its incumbent LECs.

[3] Throughout this Order, we refer to the states located in Ameritech's territory prior to Ameritech's merger with SBC as "the former Ameritech states." These states are: Illinois, Indiana, Michigan, Ohio, and Wisconsin. *See SBC/Ameritech Merger Order*, 14 FCC Rcd at 14719, ¶ 6.

[4] *SBC Communications, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1397 (2002) ("*NAL*").

[5] As we explain below, *see infra* ¶ 23, we find that SBC has committed a separate and distinct violation of this requirement in each of the five former Ameritech states. Each violation is subject to the statutory maximum forfeiture of $1,200,000, resulting in an overall forfeiture of $6,000,000.

II. BACKGROUND

2. In its order approving the merger between SBC and Ameritech, the Commission imposed a condition requiring that, within 12 months of the date of the SBC/Ameritech merger, SBC offer shared transport within the former Ameritech states under terms and conditions substantially similar to, or more favorable than those that SBC was offering to telecommunications carriers in Texas as of August 27, 1999.[6] In the NAL, we found that SBC had apparently repeatedly refused to provide shared transport for intraLATA toll calls, despite the existence as of August 27, 1999 of "at least two interconnection agreements in Texas pursuant to which it offered CLECs the option of using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC."[7] Consequently, we found that SBC had apparently violated the requirements of paragraph 56, and that it was apparently liable for a forfeiture of $6,000,000.[8]

III. DISCUSSION

3. Under section 503(b) of the Act, any person who the Commission determines has willfully or repeatedly failed 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.[9] 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 the Commission should not impose such a forfeiture penalty.[10] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has failed to comply with

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[6] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56 ("paragraph 56 merger condition" or simply "paragraph 56"). In its entirety, paragraph 56 states:

> Within 12 months of the Merger Closing Date (but subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport), SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999. Subject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport, SBC/Ameritech shall continue to make this offer, at a minimum, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that shared transport is not required to be provided by SBC/Ameritech in the relevant geographic area.

SBC/Ameritech Merger Order, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[7] *NAL*, 17 FCC Rcd at 1399, ¶ 7.

[8] *NAL*, 17 FCC Rcd at 1406, ¶ 22.

[9] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a).

[10] 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

the relevant requirement.[11] As set forth in more detail below, we conclude under this standard that SBC is liable for a forfeiture for its willful and repeated violations of the *SBC/Ameritech Merger Order*.

4. The issue in this case is whether SBC's refusal to offer shared transport to CLECs in its Ameritech service area for intraLATA toll service violated the conditions of the Commission's approval of SBC's merger with Ameritech. SBC does not deny that it refused to offer shared transport for intraLATA toll calls in the Ameritech states, but instead argues that the paragraph 56 merger condition did not contain a clear requirement that it do so.[12] We find, however, that paragraph 56 is unambiguous and that SBC's arguments to the contrary are unpersuasive. SBC violated the paragraph 56 merger condition at least five times, once in each of the five former Ameritech states, by refusing to offer shared transport to route intraLATA toll calls. Therefore, we affirm the NAL, both as to the violations of paragraph 56 and as to the forfeiture amount.

A. Paragraph 56 of the Merger Conditions Imposed on SBC a Clear Obligation to Provide to CLECs in its Ameritech Region Shared Transport for IntraLATA Toll Service.

5. 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."[13] The paragraph 56 merger condition's shared transport requirements are abundantly clear, and "a regulated party acting in good faith would [have been] able to identify, with ascertainable certainty,"[14] its obligation to offer to CLECs in the Ameritech region shared transport for intraLATA toll service. As of October 8, 2000, twelve months after the effective date of the SBC/Ameritech Merger Order, SBC had a legal obligation to offer shared transport in the Ameritech states on terms "substantially similar to (or more favorable than)" the most favorable terms it offered in Texas as of August 27, 1999.[15] On that day in August in Texas, SBC was actually offering shared transport to CLECs who were using that shared transport to provide intraLATA toll service.[16] The plain language of paragraph 56 required SBC to offer that same shared transport for intraLATA toll to CLECs in the Ameritech region as of

[11] *See, e.g., SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002); *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 certain types of hearings to Commission).

[12] *SBC Communications, Inc., Apparent Liability for Forfeiture*, Response of SBC Communications, Inc. to Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030 (filed Mar. 5, 2002) ("SBC Response").

[13] *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

[14] *Id*. at 628.

[15] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[16] SBC does not dispute that it was providing shared transport to CLECs for intraLATA toll calls as of August 27, 1999. In earlier filings, however, SBC argued that it was not "offering" shared transport for intraLATA toll, because it only allowed CLEC use of shared transport on that date because the Texas Public Utility Commission had temporarily enjoined it from refusing to provide this service. *See NAL*, 17 FCC Rcd at 1402-03, ¶ 13. We rejected this contention in the NAL, and we adhere to that ruling now. *Id*.

October 8, 2000.[17] That requirement is clear and simple, and SBC's *post hoc* efforts to muddy the waters cannot justify its failure to comply with the law.[18]

6. SBC argued both prior to the NAL and in response to it that various circumstances and matters of interpretation render paragraph 56 inapplicable, invalid, or insufficiently clear to support the imposition of a forfeiture. As much of SBC's response to the NAL consists of restatement of the arguments that it made previously and that we resolved in the NAL, we will not repeat our analysis of each argument. Rather, we incorporate and adopt here the reasoning and conclusions we set forth in the NAL.[19] We address below SBC's new or newly expanded-upon arguments.

[17] *NAL*, 17 FCC Rcd at 1402, ¶ 13 n.28. In the NAL, we noted that (1) SBC's interconnection agreements in Texas memorialized its obligation to offer shared transport for intraLATA toll; (2) that obligation existed before, during, and after August 1999; (3) SBC was in fact offering shared transport for intraLATA toll before, during, and after August 1999 pursuant to its interconnection agreements and a Texas PUC Interim Order; and (4) the Texas PUC confirmed in a November 1999 ruling resolving a dispute between SBC and two CLECs that SBC's interconnection agreements obliged it to offer shared transport for intraLATA toll before, during, and after August 1999. *Id*. ¶¶ 7, 9, 11 (citing *Birch Telecom of Texas, Ltd., LLP v. Southwestern Bell Tel. Co*., Order Issuing Interim Ruling Pending Dispute Resolution, Docket Nos. 20745 & 20755 at 3 (Pub. Util. Comm'n of Texas, Apr. 26, 1999); *Complaint of Birch Telecom of Texas, LTD., L.L.P. and Alt Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal to Provide IntraLATA Equal Access Functionality, and Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions of the Interconnection Agreement,* Arbitration Award, Docket Nos. 20745 and 20755 (Pub. Util. Comm'n of Texas, Nov. 4, 1999) ("*Texas Arbitration Award*"); *Complaint Of Sage Telecom, Inc. Against Southwestern Bell Telephone Company For Violating Unbundled Network Elements Provisions Of The Interconnection Agreement*, Docket No. 20755, and *Complaint Of Birch Telecom Of Texas, Ltd., L.L.P. And ALT Communications, L.L.C. Against Southwestern Bell Telephone Company For Refusal To Provide IntraLATA Equal Access Functionality*, Order, Docket 20745 (Pub. Util. Comm'n of Texas, Dec. 1, 1999) (approving the arbitration award)).

[18] This case is wholly different from the cases to which SBC cites and from other similar cases assessing the constitutionality of agency actions involving deprivation of property based on civil liability. Courts have found administrative rules to be so unclear as to preclude forfeiture or other similar action in a variety of circumstances, but not in circumstances similar to those present in this case, where a rule or order establishes clearly the obligations of the regulated entity. *See, e.g., Trinity Broadcasting of Florida v. FCC*, 211 F.3d at 618 (where the FCC failed to provide a relevant definition for a key regulatory term, regulated entity's reliance on the FCC's prior interpretation of that term as it appeared in a different but similar regulation was reasonable); *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) (scope of regulation was not clear when, among other things, the agency's interpretation of a key term in the regulation was contrary to its ordinary meaning; the regulation was ambiguous on its face as to whether the conduct was prohibited; and different divisions of the enforcing agency disagreed about the meaning of the regulation); *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991) (although the EPA's interpretation of the regulation was permissible, forfeiture was improper where the regulation was ambiguous and significant disagreement existed among EPA's various offices regarding the proper interpretation of the language); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976) (citations improper where, *inter alia*, there was disagreement among OSHA compliance officers as to whether the regulation applied to conduct at issue).

[19] *NAL*, 17 FCC Rcd 1397 (2002).

1. The *Texas Arbitration Award* supports the conclusion that SBC offered shared transport for intraLATA toll service as of August 27, 1999.

7. In the NAL, we relied in part on a November 4, 1999 ruling by an arbitration panel of the Texas PUC concerning SBC's shared transport obligations to support our conclusion that SBC was offering shared transport for intraLATA toll service in Texas as of August 27, 1999.[20] SBC contends that we misinterpreted the Texas PUC's ruling, and that our interpretation of the company's paragraph 56 federal obligation is therefore flawed.[21] SBC argues that the *Texas Arbitration Award* addressed SBC's obligation to provide access to combinations of unbundled network elements ("UNEs"), not shared transport, and thus is not relevant in interpreting the scope of SBC's shared transport offering in Texas. Specifically, SBC asserts that:

> insofar as it relied upon agreement language at all, the Texas PUC focused primarily on the language mandating access to UNE combinations – in particular, section 2.4.1. in Attachment 6 of the agreement, which "requires SWBT to provide the CLEC with all the functionality of a combination of UNEs." In the Texas PUC's view, because that language required Southwestern Bell to provide UNE functionality equivalent to what "SWBT [wa]s providing to itself . . . without restriction," it followed that Southwestern Bell had to permit CLECs to route intraLATA toll calls in the same manner that Southwestern Bell did [i.e., using shared transport].[22]

We find SBC's argument to be unpersuasive for a number of reasons, and we reaffirm our conclusion that the *Texas Arbitration Award* clearly stated SBC's obligation to provide shared transport for intraLATA toll calls.

8. In the Texas arbitration, two CLECs, Sage and Birch, were asserting their right to use a combination of local switching and shared transport, plus unbundled local loops and tandem switching, to transport intraLATA toll calls.[23] That the Texas Commission ordered SBC to provide this particular combination of UNEs necessarily means that SBC was obligated to provide each of the individual UNEs.[24] Thus, the *Texas Arbitration Award's* discussion of UNE combinations does nothing to undermine our conclusion that the Texas PUC found that SBC was obligated to continue offering shared transport for intraLATA toll calls.[25]

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[20] *NAL*, 17 FCC Rcd at 1402-03, ¶¶ 11-13. The Arbitration Award subsequently was approved by the Texas Commission on December 1, 1999. *See id.* at 1402, ¶ 11.

[21] SBC Response at 26-27.

[22] SBC Response at 26 (citation omitted).

[23] *Texas Arbitration Award* at 2-3, 5-7.

[24] *Texas Arbitration Award* at 12-13.

[25] *See NAL*, 17 FCC Rcd at 1403-04, ¶ 14 & n.34. SBC's argument about how other state commissions might interpret the language in its Texas interconnection agreements is irrelevant to our analysis. *See* SBC Response at 27. The Texas PUC's ruling confirmed that SBC was obliged to and did offer shared transport for

9. Moreover, we note that the *Texas Arbitration Award* specifically states that "[t]he use of the common transport UNE, or any other UNE, for that matter, cannot be limited in any way by the type of traffic that passes through it."[26] This ruling further undermines SBC's argument that its Texas offering allowed it to restrict the use of shared transport for intraLATA toll calls.

10. Regardless, the *Texas Arbitration Award* makes clear that SBC had been offering shared transport for intraLATA toll for some time prior to August 1999 pursuant to its interconnection agreements, and that it sought to stop doing so in April 1999 on the grounds that the implementation of federal dialing parity rules somehow eliminated its obligation to do so.[27] The *Texas Arbitration Award* explicitly rejected SBC's dialing parity argument, which necessarily means that the earlier obligation remained in place on August 27, 1999.[28] In any event, on August 27, 1999, SBC was in fact offering shared transport for CLECs to use for intraLATA toll service.[29] Therefore, even if we assume *arguendo* that before the *Texas Arbitration Award* SBC held a good faith belief that paragraph 56 of the merger conditions did not encompass intraLATA toll traffic, that belief was unreasonable after the Texas PUC decision. Paragraph 56 expressly links SBC's obligations in the Ameritech states to its service offerings in Texas, and the *Texas Arbitration Award* confirmed with clarity that shared transport for intraLATA toll traffic was within the scope of those service offerings. That simple fact alone triggered SBC's paragraph 56 obligation to offer shared transport for intraLATA toll service to CLECs in the Ameritech region.

11. SBC's effort to inject a confused interpretation of the Texas PUC orders into an otherwise clear picture of the company's obligations is unpersuasive. It does not alter our conclusion that SBC was offering shared transport for intraLATA toll calls in Texas on August 27, 1999, and that it was therefore subsequently obliged to do the same in the Ameritech region.

2. The shared transport obligation contained in the paragraph 56 merger condition includes shared transport for intraLATA toll service.

12. Paragraph 56 of the merger conditions does not impose or permit any restriction on the type of services for which CLECs may use shared transport. SBC argues in its response to the NAL, as it did in previous pleadings, that the paragraph 56 merger condition does not

intraLATA toll in Texas during August, 1999. Paragraph 56 required SBC to do the same in the Ameritech region. SBC's focus on how other state commissions might interpret the language from the Texas interconnection agreements is entirely misplaced. Paragraph 56 does not bind SBC to offer that particular contract language in other states, but to fulfill the obligation embodied in that language pursuant to which it must offer shared transport in the former Ameritech states.

[26] *Texas Arbitration Award* at 39. The term "common" transport as the Texas PUC used it in the *Texas Arbitration Award* is synonymous with the term "shared" transport that we used in the Merger Order. SBC does not argue to the contrary.

[27] *Texas Arbitration Award* at 2-3.

[28] *Texas Arbitration Award* at 14.

[29] *NAL*, 17 FCC Rcd at 1400-01, ¶¶ 9-12.

apply to intraLATA toll traffic, because "SBC's understanding [is] that the Merger Conditions' shared-transport obligation is a purely local one."[30] Similarly, SBC asserts that the general shared transport obligation that we established in the *UNE Remand Order* applies only when the CLEC intends to provide a local service.[31] SBC seemingly cites to every use of the word "local" in Commission orders addressing shared transport to argue that the Commission's use of this word in various contexts indicates its intent to limit any shared transport obligation to "local" traffic, which, according to SBC, does not include intraLATA toll.[32] As we did in the NAL,[33] we find these arguments to be without merit. We incorporate our reasoning and conclusion there,[34] but also take this opportunity to address SBC's argument in more detail.

13. Paragraph 56 requires SBC to offer shared transport in the former Ameritech states under similar or more favorable conditions than those SBC offered in Texas. This language is inclusive and contains no exclusions. It does not in any way limit the purposes for which a CLEC may use shared transport.[35] SBC places great weight on the argument that the paragraph 56 shared transport obligation is limited by what SBC asserts is the view that we expressed elsewhere that CLECs may only use shared transport for local service. IntraLATA toll, SBC contends, is not a local service and does not affect local competition.[36] But neither the

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[30] SBC Response at 10. SBC submitted a series of declarations signed by various SBC personnel who assert that their understanding was that the purpose of the shared transport merger condition was "to permit CLECs in the Ameritech region to use shared transport for *local* exchange and exchange access, not for long-distance calling." SBC Response at 25 (emphasis in original). These self-interested declarations, however, cannot serve to contradict the plain language of the merger condition. Our interpretation of that condition, set forth at paragraph 5 above, is entirely straightforward, and the language of the condition admits no reasonable contrary interpretation.

[31] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[32] *See infra* n.45.

[33] 17 FCC Rcd at 1404-05, ¶¶ 17-18.

[34] *NAL*, 17 FCC Rcd 1397 (2002).

[35] SBC argues that the Commission must have intended to limit the shared transport requirement to local services, because otherwise there would be "no limitation at all on an incumbent LEC's obligation to unbundle common transmission facilities." SBC Response at 13. By way of example, SBC contends that under such a reading, Sprint would have to unbundle all of its long-distance facilities throughout any state in which it is an incumbent LEC. *Id*. SBC is mistaken, however; the unrestricted nature of the shared transport obligation does not lead to such a scenario. Although paragraph 56 does not restrict the use of the shared transport UNE to intra LATA services, as a practical matter shared transport is not generally available for interLATA, interexchange traffic. Incumbent LECs are not required to provide shared transport between incumbent LEC switches and serving wire centers, which is how an incumbent LEC typically routes interLATA, interexchange traffic in its network. *See 1997 Shared Transport Order*, 12 FCC Rcd at 12478, ¶ 29; *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14226-27, ¶¶ 8-10 (1999). In addition, Commission rules generally prohibit an incumbent LEC from jointly owning interexchange transmission facilities with its long distance affiliate. *See, e.g.*, 47 C.F.R. § 64.1903(a)(2) (stating that incumbent independent LECs may not jointly own transmission facilities with their in-region, interexchange services affiliates). An incumbent LEC's long distance network must be independent from its local networks, and, therefore, as a practical matter, competitive LECs cannot use the shared transport UNE to transit traffic beyond the LATA boundary.

[36] SBC Response at 10-16, 19-25.

text of paragraph 56 nor the Act and our rules provide for or permit SBC to limit CLECs' use of the shared transport UNE, and the references SBC cites elsewhere that use the word "local" in reference to traffic, switches, and markets are beside the point.

14. The broad swath of paragraph 56 comports with section 251(c)(3) of the Act, which requires incumbent LECs to provide nondiscriminatory access to network elements, "to any requesting carrier for the provision of *a telecommunications service*."[37] In implementing section 251(d)(2) and (c)(3), we identified the *network elements* — that is, the physical *facilities* and their "features, functions and capabilities" — that the incumbent LEC must provide to the requesting carrier, not the purposes for which a CLEC may use those facilities.[38] Specifically, rule 51.319(d) defines shared transport as "transmission *facilities* shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network."[39] This definition requires incumbent LECs to provide these shared transport facilities "to *any* requesting telecommunications carrier . . . for the provision of *a telecommunications service.*"[40] It contains no limitation on the type of telecommunications service that the requesting carrier may provide, and therefore it contains no limitation on use of these facilities to transport intraLATA toll traffic.[41] A "telecommunications carrier" includes a carrier who provides intraLATA toll service, and "telecommunications service" includes intraLATA toll service.[42] Thus, rule 51.319(d) makes clear that *any* requesting telecommunications carrier may use the shared transport UNE for *any* "telecommunications service" it chooses to provide — including intraLATA toll service.[43] Indeed, as we stated in the NAL, as a general matter, the Commission's rules explicitly prohibit use restrictions on UNEs.[44]

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[37] 47 U.S.C. § 251(c)(3). This provision was codified almost verbatim at section 51.307(a) of the Commission's rules, 47 C.F.R. § 51.307(a).

[38] *See* 47 U.S.C. § 153(29) (a "network element" is "a facility or equipment used in the provision of a telecommunications service . . . .").

[39] 47 C.F.R. § 51.319(d)(iii) (emphasis added). Rule 51.319 was promulgated in the *UNE Remand Order*, 15 FCC Rcd at 3936-51.

[40] 47 C.F.R. § 51.319(d) (emphasis added).

[41] *See UNE Remand Order*, 15 FCC Rcd at 3864, ¶ 374 (finding a requesting carrier's ability "to provide the services it seeks to offer" would be impaired without access to shared transport); *id.* at 3842, ¶ 321 (same).

[42] *See* 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing . . ."); 47 U.S.C. § 153(44) (defining "telecommunications carrier" as "any provider of telecommunications services"); and 47 U.S.C. § 153(46) (defining "telecommunications service" as "the offering of telecommunications . . .").

[43] *See also* 47 C.F.R. 51.307(a) ("An incumbent LEC shall provide [UNEs], to a requesting telecommunications carrier for the provision of a telecommunications service . . .").

[44] 47 C.F.R. 51.309(a) ("[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.") Where we impose or permit use restrictions on UNEs, we do so explicitly, as we did with our rules limiting the use of enhanced extended links ("EELs"). *See Implementation of the Local Competition*

15. Because of the clarity of the language of paragraph 56 and of the Act and rules, we need look no further to determine SBC's obligation. Because we find that there is no limitation on SBC's shared transport obligation, SBC's arguments about the nature of intraLATA toll traffic are irrelevant. It matters not whether intraLATA toll is properly characterized as being inherently local in nature or whether competition in intraLATA toll affects competition in local markets. However, we note that SBC overreaches in attempting to characterize various statements in our orders as being indicative of a view that shared transport cannot extend to intraLATA toll because the "local" nature of that obligation is necessarily exclusive of intraLATA toll service.[45] Nothing in the passages to which SBC cites supports that view.[46] Indeed, we have made statements in other circumstances that establish our view that

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Provisions of the Telecommunications Act of 1996, Supplemental Order, 15 FCC Rcd 1760 (1999); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000). The Commission has not adopted any restriction on the use of shared transport, and therefore under rule 51.309(a) the requesting carrier may use the shared transport UNE to provide intraLATA toll or any other telecommunications service it seeks to provide.

[45] SBC's overreaching in this regard extends to its reliance on a California state commission decision as well. SBC cites to a California state commission order that SBC says adopted the position that "[c]ompletion of end-user calls over [the incumbent LEC's] intraLATA toll network is not part of the shared transport UNE under the FCC's *UNE Remand Order*." SBC Response at 21, citing *Application of AT&T Communications of California, Inc. (U 5002 C) et al., for arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Final Arbitrator's Report, A.00-01-022, at 118-19 (Cal. P.U.C., June 13, 2000). SBC's characterization of the California PUC's holding in this proceeding is misleading and incorrect. Although the arbitrator did adopt the incumbent's position on the substantive issue in question, it was not on the grounds that SBC suggests. In fact, consistent with our conclusion that SBC is required to offer shared transport for routing intraLATA toll calls, the California PUC held that AT&T was entitled to use shared transport to route its intraLATA toll traffic over the incumbent LEC's network, as long as it is used in combination with unbundled switching. Specifically, the California PUC concluded that, when a competing carrier purchases unbundled switching from an incumbent LEC, "that function, in combination with shared transport, can be used to route . . . intraLATA toll traffic." Therefore, even this state decision that SBC uses in an effort to blur the clarity of paragraph 56 rejects SBC's position that shared transport excludes intraLATA toll traffic.

[46] SBC points to the Commission's statement that "access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12482, ¶ 35 (1997) ("*1997 Shared Transport Order*"). SBC also quotes the Commission's statement that "the only carrier that would need shared transport facilities would [be] one that was using an unbundled local switch," and maintains that this statement, too, was meant to limit the shared transport obligation to local traffic. SBC Response at 12, citing *1997 Shared Transport Order* at 12488, ¶ 47 n.127. According to SBC, these statements indicated the Commission's intent to "stimulate competition in the local market," and thus to exclude intraLATA traffic from the shared transport obligation. SBC Response at 12. The company also relies on paragraph 56 itself, which applies to the obligation "to provide unbundled local switching and shared transport." SBC Response at 11, quoting *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56. None of the statements SBC cites contradicts the plain meaning of our rules regarding the obligation to provide the shared transport UNE, or, for that matter, even addresses the nature or scope of the shared transport obligation. Moreover, SBC's repeated citation to the use of the term "local" in reference to the "switch" seems to imply a limitation on the Commission's rules providing for broad use of the switching UNE. To the contrary, when we use the word "local" in conjunction with the word "switch," the former is a term descriptive of the physical switching facility itself and not the services for which a carrier may use the switch. As we concluded in the NAL, and as we explain in the instant Order, neither paragraph 56 nor the Commission's rules limit the use of the shared transport UNE to a particular type of telecommunications service. In addition, despite SBC's assertions

intraLATA toll traffic does affect local competition.[47] For these reasons, we reject any implication that we have expressed differing views at different times about whether the shared transport obligation extends to use of the UNE for intraLATA toll. To the extent SBC relies on such a suggestion in support of its argument that paragraph 56 lacked sufficient clarity to provide adequate notice of its obligation, we reject that notion.[48] In any event, as we explained above, the plain and unambiguous language of paragraph 56 renders these other statements irrelevant.

16. For these reasons, and for the reasons we articulated in the NAL, SBC's overly restrictive interpretation of the paragraph 56 shared transport obligation as being exclusive of shared transport for intraLATA toll service is unreasonable.

3. The Merger Conditions' paragraph 56 shared transport obligation is unaffected by the Commission's *UNE Remand Order*.

17. The paragraph 56 merger condition is "subject to . . . the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport." SBC argues again, as it did before the NAL, that the Commission's *UNE Remand Order* is a "future Commission order," that it does not require SBC to provide shared transport for intraLATA toll, and that it therefore eliminated any merger condition requirement to offer shared transport for intraLATA toll. We reject this argument for several reasons, some of which we stated previously in the NAL, and incorporate here.[49]

18. As an initial matter, the shared transport rules that we adopted in the *UNE Remand Order* plainly require unbundling of shared transport for use with intraLATA toll traffic. As we explained above, the language of the Act and of the *UNE Remand Order* and our rules is clearly and unambiguously inclusive and does not permit SBC to make exclusions based on the services for which a requesting carrier might use a UNE.[50] Therefore, paragraph 56 is fully consistent with the *UNE Remand Order.*

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to the contrary, and as we note in the following footnote, we have previously stated that intraLATA toll service affects competition in the local market.

[47] In the order denying Ameritech's section 271 application for the state of Michigan, we addressed allegations that Ameritech was refusing to provide intraLATA toll service to CLEC customers, and we emphasized our "concerns that discontinuing or refusing to offer *intraLATA toll service* to customers that elect to switch to another local service offer may threaten a competing LEC's ability to compete effectively in *the local market* and thus may be inconsistent with the procompetitive goals of the 1996 Act." *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20738-40, ¶¶ 377-378 (1997). *See also id.* at 20738, ¶ 377 (expressing "concerns that Ameritech is effectively stifling competition in the *local exchange market* by refusing to provide *intraLATA toll service* to competing LEC customers") (emphasis added).

[48] SBC Response at 8-9, 33 (*citing Trinity Broadcasting of Florida v. FCC*, 211 F.3d at 618; *General Electric Co. v. EPA*, 53 F.3d at 1328).

[49] *NAL*, 17 FCC Rcd at 1405, ¶ 18.

[50] *See supra* ¶¶ 13-14.

19. Moreover, although we adhere to our view that the earlier adopted *UNE Remand Order* was not a "future" order,[51] that finding is not essential to our ruling here. Regardless of the relationship of that Order's release, adoption, and effective date to the effective date of the Merger Conditions,[52] it only supports and does not in any way undermine the enforceability of SBC's obligation pursuant to paragraph 56 to provide shared transport for intraLATA toll service. The paragraph 56 obligation is "subject to" the terms of a future Commission order, which can only mean that the shared transport obligation of paragraph 56 will remain in place until the merger condition sunset date, unless the terms of another order directly contravene it. We have issued no such order. Moreover, paragraph 56 expressly provides its own merger condition sunset date,[53] stating that this obligation shall remain in effect unless and until either the Commission were to find in the UNE Remand proceeding that SBC is not required to provide shared transport, or a court were to issue a final non-appealable order to that effect.[54] Neither of those events has occurred.[55] Therefore, SBC's arguments about the impact of the *UNE Remand Order* on the paragraph 56 obligation are unavailing.

B. SBC Did Not Substantially Comply with the Paragraph 56 Condition.

20. SBC argues that section 503(b) of the Act does not support a forfeiture here because any requirement that SBC offer shared transport for intraLATA toll calls was "tangential to the primary purpose of the condition," and thus, SBC did not fail *substantially* to comply with the paragraph 56 merger condition.[56] We recognize that in adopting paragraph 56 we focused on requiring SBC to reverse Ameritech's practice of refusing to offer any shared transport whatsoever, a practice that was contrary to our local competition rules. The fact that SBC instead chose to refuse to offer only a subset of shared transport does not render its violation insubstantial. For those CLECs seeking intraLATA toll shared transport, SBC's refusal to offer it was anti-competitive and thus significant. Accordingly, we find that SBC failed substantially to comply with paragraph 56.

C. SBC's Actions Were Willful and Repeated.

21. Pursuant to section 503(b)(1) of the Act, any person that willfully or repeatedly fails to comply substantially with the terms and conditions of any license, permit, certificate, or

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[51] *NAL*, 17 FCC Rcd at 1404-05, ¶ 17.

[52] SBC response at 16-17.

[53] The merger condition sunset provision of general applicability provides for independent sunsets for particular conditions. *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14858, ¶ 359. The paragraph 56 shared transport obligation sunset provision is conditioned on the events we describe in text, rather than on a particular date.

[54] *SBC/Ameritech Merger Order*, 14 FCC Rcd at 15023-24, Appendix C, ¶ 56.

[55] The recent D.C. Circuit Court decision in *United States Telecom Association, et al. v. FCC, et al.*, 290 F.3d 415 (2002), does not undermine our analysis. The court did not vacate the *UNE Remand Order*.

[56] 47 U.S.C. § 503(b)(1)(A). Specifically, section 503(b)(1) states, in pertinent part: "[a]ny person who [has] willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission . . . shall be liable to the United States for a forfeiture penalty." *Id*.

other instrument or authorization issued by the Commission, shall be liable to the United States for a forfeiture penalty.[57] It has long been established that the word "willfully," as employed in section 503(b) of the Act, does not require a demonstration that a party knew it was acting unlawfully,[58] but only that it knew it was committing the acts in question consciously and deliberately, and that the acts were not accidental. SBC does not contest the NAL's tentative conclusion that it intentionally and affirmatively refused to offer shared transport for intraLATA toll in the five former Ameritech states. We thus find that SBC's behavior was willful.[59]

D. Forfeiture Amount

22. SBC's willful and repeated failure to comply with the *SBC/Ameritech Merger Order* justifies a substantial forfeiture in this case.[60] 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.[61] In determining the appropriate forfeiture amount, we consider the factors set forth 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."[62]

23. We impose a forfeiture of $6,000,000, the amount initially proposed in the NAL. This figure represents the statutory maximum for five continuing violations lasting at least ten days each during the period prior to the NAL. We find that SBC's conduct represents five

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57 47 U.S.C. § 503(b)(1)(A); *see also* 47 C.F.R. § 1.80(a)(1).

58 *See, e.g.,* 47 U.S.C. § 312(f)(1) (defining willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission"); *Southern California Broadcasting* Company, 6 FCC Rcd 4387, 4388 (1991) (discussing legislative history of section 312(f)(1) and its applicability to section 503(b) forfeiture proceedings); *Liability of Chesapeake Broadcasting Corp., Licensee of AM Radio Station WASA, Havre de Grace, MD, for a Forfeiture*, Memorandum Opinion and Order, 2 FCC Rcd 252, 253, ¶¶ 9-10 (1987) (stating that, in the forfeiture context, willfulness is not "an intent to deceive the Commission or to violate the Act or the Rules.").

59 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 Montary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or if it lasts more than one day. *Southern California Broadcasting Co., Licensee, Radio Station KIEV(AM) Glendale, California*, 6 FCC Rcd 4387, 4388, ¶ 5 (1991); *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd at 1362, ¶ 9. In this case, SBC refused to comply with multiple requests for shared transport to route intraLATA calls in each of the former Ameritech states, and for more than one day on each occasion. Thus, the acts addressed here were repeated as well as willful, and support a forfeiture on those grounds as well.

60 *NAL*, 17 FCC Rcd at 1405-06, ¶ 20.

61 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).

62 47 U.S.C. § 503(b)(2)(D); *see also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

separate and distinct violations of the Merger Conditions, one for each state in which it refused to offer shared transport to requesting carriers for intraLATA toll traffic.

24. SBC argues that the amount of the forfeiture is excessive, but we find that it is fully justified. SBC has repeatedly violated the clear terms of the merger condition. In state after state, throughout the Ameritech region, SBC forced competing carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to offer, causing delays in the availability of shared transport. Thus, the potential competitive impact of SBC's violations is substantial, and warrants a significant penalty. In addition, the Commission has made clear that it will take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against "large or highly profitable entities are not considered merely an affordable cost of doing business."[63] In 2001, SBC had total operating revenues of nearly $46 billion.[64] For a company of this size, a $6,000,000 forfeiture is not excessive. Indeed, a smaller forfeiture would lack adequate deterrent effect.

25. SBC makes a variety of specific arguments about the forfeiture amount, none of which we find persuasive. SBC complains that the NAL did not apply a base forfeiture amount, and asserts that "[t]he NAL's failure to rely on [the forfeiture] guidelines, or at least to explain its deviation from them, is unlawful."[65] First, we note that the forfeiture guidelines contain no base amount for the violation at issue here; thus there was no base amount to apply. In any event, the Commission has discretion to depart from the guidelines where appropriate,[66] and we explained fully the basis for the proposed forfeiture in the NAL.

26. SBC also argues that the maximum forfeiture in this case is $1.2 million, *i.e.*, the statutory maximum for a single continuing violation.[67] SBC's reasoning is that paragraph 56 creates a single obligation,[68] that it complied with that obligation by the single act of deploying an AIN-based shared transport solution throughout its region, and that if it imposed any unwarranted limitation on its shared transport offering, it did so only once when it first made shared transport available in the Ameritech region.[69] We reject SBC's characterization of the facts. The merger conditions obligate SBC to "offer shared transport . . . within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (or more favorable than) the most favorable terms" offered in Texas on August 27,

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63 *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100.

64 *SBC 2001 Annual Report* at 4.

65 SBC Response at 31.

66 *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17101, ¶ 29 (1997).

67 SBC Response at 31-32.

68 SBC describes its obligation as simply "to provide AIN-based shared transport throughout the Ameritech region by October 8, 2000." SBC Response at 32. SBC substantially understates the extent of its obligation. Nothing in the *SBC/Ameritech Merger Order* indicates that SBC's only obligation was to implement an AIN-based system. SBC is obligated to provide shared transport under terms and conditions – *all* terms and conditions (except for pricing) substantially similar to or better than those it offered in Texas.

69 SBC Response at 32.

1999. The record shows that at least five times, once in each of the Ameritech states, a competing carrier requested the use of shared transport to route intraLATA toll traffic.[70] Each of those requests obligated SBC to offer shared transport in compliance with the merger condition. In each of those instances, SBC refused to offer the requested UNE. Thus, each of those instances constituted a separate, continuing violation of the merger conditions. By SBC's theory, having once refused to make available shared transport on the required terms, it could continue to refuse all requests with impunity and suffer no further consequences. We will not adopt such a skewed reading.

27. Finally, SBC asserts that the forfeiture amount is excessive because intraLATA toll is "far afield from the central purpose of paragraph 56," and because the amount fails to recognize that SBC complied with some portion of the shared transport merger conditions.[71] We find neither of these points persuasive. First, as indicated above, we believe that SBC's violations did relate to local competition. In addition, as discussed above in rejecting SBC's argument that it has "substantially" complied with the conditions, we do not find it reasonable to

[70] The records of proceedings in each of the five Ameritech states document these requests, as well as SBC's refusal to honor them. *See, e.g.*, *Investigation Into Tariff Providing Unbundled Local Switching With Shared Transport*, Order, Case No. 00-0700 (Ill. Commerce Comm., Nov. 1, 2000), Exhibit 1(v) to Sworn Statement of Deborah A. Golden ("Golden Exhibit"), submitted with Letter from Sandra L. Wagner, SBC Telecommunications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, dated May 2, 2001 ("SBC May 2 Response") (investigating an Illinois Bell Telephone Company tariff on the issue of whether Ameritech's restrictions on the shared transport offering are appropriate, and specifically whether shared transport should be available for use by CLECs in transporting their intraLATA toll traffic); *AT&T Communications of Indiana, Inc. TCG Indianapolis Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Ameritech Indiana's Submission of Proposed Order, Cause No. 40571-INT-03 at 69-71 (Ind. Util. Reg. Comm'n, filed Oct. 10, 2000), Golden Exhibit 1(b) of SBC May 2 Response (proposed ruling that Ameritech should be permitted to prohibit AT&T's use of shared transport for intraLATA toll traffic); *AT&T Communications, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Ameritech Ohio's Response to AT&T's Petition for Arbitration, Case No. 00-1188-TP-ARB at 19 (Pub. Util. Comm'n of Ohio, filed July 25, 2000), Golden Exhibit 1(k) of SBC May 2 Response (arguing that AT&T should not be permitted to use shared transport for intraLATA toll traffic; *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Ameritech Michigan's Reply Brief, Case No. U-12622 (Mich. Pub. Serv. Comm'n, filed December 28, 2000) (defending a tariff filing that prohibited use of shared transport for intraLATA toll service); Ameritech Michigan's Exceptions to the Proposal for Decision at 4-8 (filed February 12, 2001), Golden Exhibit 1(h) of SBC May 2 Response (arguing that the Merger Order does not require Ameritech to allow the use of shared transport for intraLATA toll service); *Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)*, Ameritech Wisconsin's Initial Post-Hearing Brief, Docket No. 05-MA-120 at 74 (Pub. Serv. Comm'n of Wisconsin, filed September 22, 2000), Golden Exhibit 1(o) of SBC May 2 Response (arguing that Ameritech may prohibit AT&T's use of shared transport for intraLATA toll traffic).

[71] SBC reminds us that it deployed an Advanced Intelligent Network-based shared transport product as required by the *SBC/Ameritech Merger Order*, and concludes that "[t]he Commission's resort to the statutory maximum is thus wholly out of proportion to what SBC is alleged to have done wrong, and fails entirely to acknowledge what it has done right." SBC Response at 32. However, the mere act of compliance with one portion of the law does not insulate SBC from the consequences of significant noncompliance with a different portion of the law. Regulated entities must comply with all requirements, and should expect significant enforcement action where, as here, there is significant noncompliance.

focus on the "proportion" of the condition that has been violated, but rather on the scope and potential impact of SBC's violations. The fact that SBC may have properly offered shared transport for local non-toll traffic does not mitigate its refusal to offer shared transport for intraLATA traffic.

28. For all of the reasons we have discussed above, we find that SBC's conduct justifies the forfeiture amount that we proposed in the NAL. We therefore affirm the $6,000,000 forfeiture amount originally proposed.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,[72] and section 1.80 of the Commission's rules,[73] SBC Communications SHALL FORFEIT to the United States Government the sum of six million dollars ($6,000,000.00) for willfully and repeatedly violating the Commission's merger conditions in the *SBC/Ameritech Merger Order*.

30. IT IS FURTHER ORDERED that payment shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) days of release of this order.[74] If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.[75]

31. IT IS FURTHER ORDERED that a copy of this Order of Forfeiture shall be sent by Certified Mail/Return Receipt Requested to SBC Communications, c/o Michelle Thomas, Executive Director – Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

Federal Communications Commission

Marlene H. Dortch
Secretary

[72] 47 U.S.C. § 503(b).

[73] 47 C.F.R. § 1.80.

[74] *Id*.

[75] 47 U.S.C. § 504(a).

[redacted]

David G Cartwright
Director-Federal Regulatory

SBC Telecommunications, Inc
1401 I Street, N W, Suite 1100
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DOCKET FILE COPY ORIGINAL

May 21, 2004

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MAY 2 1 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW,; Room TW-A325
Washington, D.C. 20554

Re: In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization from Ameritech Corporation, Transferor, to SBC Communications, Inc. Transferee (CC Docket No. 98-141)

Dear Ms Dortch:

In accordance with the voluntary commitments made in connection with the SBC/Ameritech Merger, SBC made a payment of $39,800 00 to the U. S. Treasury on May 20, 2004 for wholesale performance results for the three month period ending March 2004.

This is the final monthly voluntary payment as required by the SBC/Ameritech Merger Condition 7 – Carrier to Carrier Performance Plan.[1]

Sincerely,

CC· Diana Lee
Mika Savir
Pete Young

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[1] Voluntary payments are due 30 days after the performance measurement report is filed with the FCC Since SBC filed its last monthly performance measurement report with the FCC on April 20, 2004 (for March 2004 results) and the above payment relates to the performance measurement data as filed on April 20, 2004, no further voluntary payments are required

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Notice of SBC Voluntary Payments Pursuant to Merger Condition
CC Docket No. 98-141
June 3, 2004

In the *SBC/Ameritech Merger Order* the Commission adopted a carrier-to-carrier performance plan that requires SBC to make payments to the United States Treasury should it fail to meet certain performance standards.[1] Specifically, SBC makes payments if its performance on a given measurement is below the relevant standard for three consecutive months or six of twelve months in a calendar year.[2]

SBC has made the following payments:

Month of Payment	Performance Months	Amount of Payment
December 2000	August through October 2000	$6,128,600
January 2001	September through November 2000	$6,417,975
February 2001	October through December 2000	$6,085,950
March 2001	November 2000 through January 2001	$4,585,580
April 2001	December 2000 through February 2001	$4,356,365
May 2001	January 2001 through March 2001	$3,872,175
June 2001	February 2001 through April 2001	$3,789,170
July 2001	March 2001 through May 2001	$3,223,235
August 2001	April 2001 through June 2001	$3,849,350
September 2001	May 2001 through July 2001	$2,540,487
October 2001	June 2001 through August 2001	$2,976,873
November 2001	July 2001 through September 2001	$3,510,421
December 2001	August 2001 through October 2001	$1,946,024
January 2002	September 2001 through November 2001	$2,894,087
February 2002	October 2001 through December 2001	$3,412,702
March 2002	November 2001 through January 2002	$1,749,409
April 2002	December 2001 through February 2002	$1,950,427
May 2002	January 2002 through March 2002	$1,009,374
June 2002	February 2002 through April 2002	$1,162,462
July 2002	March 2002 through May 2002	$ 667,410
August 2002	April 2002 through June 2002	$ 787,048
September 2002	May 2002 through July 2002	$1,055,906
October 2002	June 2002 through August 2002	$1,472,781
November 2002	July 2002 through September 2002	$1,282,773
December 2002	August 2002 through October 2002	$2,602,897

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[1] 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 14,712, Appendix C, ¶¶ 23-24 (1999) ("*SBC/Ameritech Merger Order*"); *see id.* at Appendix C, Attachment A.

[2] *Id*. at Appendix C, Attachment A, para. 13.

Month of Payment	Performance Months	Amount of Payment
January 2003	September 2002 through November 2002	$6,075,481
February 2003	October 2002 through December 2002	$ 989,690
March 2003	November 2002 through January 2003	$ 857,650
April 2003	December 2002 through February 2003	$ 780,983
May 2003	January 2003 through March 2003	$ 711,440
June 2003	February 2003 through April 2003	$ 629,659
July 2003	March 2003 through May 2003	$ 586,246
August 2003	April 2003 through June 2003	$ 629,002
September 2003	May 2003 through July 2003	$ 724,475
October 2003	June 2003 through August 2003	$1,356,684
November 2003	July 2003 through September 2003	$ 750,229
December 2003	August 2003 through October 2003	$ 103,500
January 2004	September 2003 through November 2003	$ 123,000
February 2004	October 2003 through December 2003	$ 38,700
March 2004	November 2003 through January 2004	$ 41,100
April 2004	December 2004 through February 2004	$ 26,600
May 2004	January 2004 through March 2004	$ 39,800[3]

[3] SBC states that May 2004 is the company's final monthly voluntary payment. *See* Letter from David Cartwright, Director-Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed May 21, 2004).

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

In the Matter of	)	
	)	File No. EB-01-IH-0236
Verizon Communications, Inc.	)	Acct. No. 200132080058
	)	

ORDER

Adopted: September 10, 2001 Released: September 14, 2001

By the Chief, Enforcement Bureau:

1. In this Order, we adopt a Consent Decree terminating an investigation into possible violations by Verizon Communications, Inc. ("Verizon") of section 51.321(h) of the Commission's rules, in connection with Verizon's posting of notice of exhausted collocation space on its Internet website.

2. The Bureau and Verizon have negotiated the terms of a Consent Decree that would terminate the staff's investigation. A copy of the Consent Decree is attached hereto and is incorporated by reference.

3. We have reviewed the terms of the Consent Decree and evaluated the facts before us. In light of Verizon's commitment to be bound by various requirements to help ensure its compliance with section 51.321(h) of the Commission's rules, we believe that the public interest would be served by approving the Consent Decree and terminating the investigation.

4. Based on the record before us, and in the absence of material new evidence relating to this matter, we conclude that there are no substantial and material questions of fact as to whether Verizon possesses the basic qualifications, including its character qualifications, to hold or obtain any FCC licenses or authorizations.

5. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the attached Consent Decree IS ADOPTED.

6. IT IS FURTHER ORDERED that the Commission staff inquiry into the matter described here IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

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

In the Matter of	)	
	)	File No. EB-01-IH-0236
Verizon Communications, Inc.	)	Acct No. 200132080058
	)	

CONSENT DECREE

1. The Enforcement Bureau of the Federal Communications Commission ("FCC" or "Commission") and Verizon Communications, Inc. ("Verizon") hereby enter into a Consent Decree terminating an informal Bureau investigation into possible violations of section 51.321(h) of the Commission's rules. The investigation focused on whether Verizon had updated its Internet website listing premises that have exhausted collocation space "within ten days of the date at which a premises runs out of physical collocation space."[1]

Statement of Facts

2. In the *Bell Atlantic/GTE Merger Order*, the Commission approved the merger of Bell Atlantic and GTE subject to certain conditions designed to mitigate potential public interest harms from the merger.[2] One of those conditions was that Verizon retain an independent auditor to develop and implement a comprehensive audit of the merged company's compliance with the Commission's collocation rules.[3]

3. On January 29, 2001, Verizon submitted its audit report to the Commission regarding Verizon's compliance with the Commission's collocation rules from July 1, 2000 through October 31, 2000.[4] The auditor's report indicated that, in certain instances during the audit period, Verizon failed to post exhausted collocation space within 10 days of exhaustion.[5]

[1] 47 C.F.R. § 51.321(h).

[2] *See Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14143 (2000) ("*Bell Atlantic/GTE Merger Order*").

[3] *Id.* at 14170; *see also Bell Atlantic/GTE Merger Order,* Appendix D at ¶ 27. The audit covered the period from July 1, 2000 through October 31, 2000.

[4] *See* January 29, 2001 letter from Mark E. Gaumond, Arthur Anderson, LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission; *see also* January 29, 2001 Report of Independent Accountants ("Auditor's Report on Compliance"); *see also* January 29, 2001 Report of Management on Compliance with the FCC's Collocation Rules.

[5] *See* Auditor's Report on Compliance at 2.

Additionally, the auditor's report noted that, in certain instances during the audit period, Verizon denied collocation applications for certain premises due to lack of space, yet did not post such premises as being exhausted.[6] Rather, Verizon listed such premises as "Pending Office Reevaluation," a term the company defines internally to mean that "the premise cannot currently accommodate physical collocation but may be considered for reconfiguration to permit additional physical collocation space in the future."[7] Based on the Bureau's review of the audit report, the Bureau commenced an investigation into whether Verizon may have violated the Commission rule requiring the timely posting of exhausted collocation space.[8]

4. The posting rule states that an incumbent local exchange carrier ("ILEC") must update its Internet website listing of premises that have exhausted collocation space "within ten days of the date at which a premises runs out of physical collocation space."[9] The purpose of the posting rule is to ensure that competitors do not "expend[] significant resources in applying for collocation space in an incumbent ILEC's premises where no such space exists."[10] Information provided by the auditors and Verizon indicates that there may have been a number of instances in which Verizon updated its website information more than 10 days after the date that space for physical collocation became exhausted in those premises.[11] Information submitted to the Bureau by Verizon indicates that in some of these instances, competitive local exchange carriers may have submitted collocation applications for space at these premises, only to have the applications denied on the ground that no space was available.[12] Verizon does not agree that the information provided by the auditors and Verizon prove that it failed to meet the 10-day posting requirement.

Terms of Settlement

5. For the purposes of this Consent Decree the following definitions shall apply:

(a) "Commission" or "FCC" means the Federal Communications Commission;
(b) "Bureau" means the Enforcement Bureau of the Federal Communications Commission;
(c) "Verizon" means Verizon Communications, Inc. and any subsidiaries, including its incumbent LEC operating telephone companies, and any successors or assigns of Verizon Communications, Inc. or its incumbent LEC operating telephone companies;

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6 *Id.*

7 *Id.*

8 47 C.F.R. § 51.321(h); *see also Bell Atlantic/GTE Merger Order*, Appendix D at ¶ 27.

9 47 C.F.R. § 51.321(h).

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

11 *See* Auditor's Report on Compliance at 2; *see also* May 7, 2001 letter from Joseph DiBella, Regulatory Counsel, Verizon Communications, Inc., to Elizabeth H. Valinoti, Attorney, Federal Communications Commission, Enforcement Bureau, Attachments A, B ("May 7, 2001 DiBella Letter").

12 *See* May 7, 2001 DiBella Letter, Response to FCC Questions at 1, 3.

(d) "Parties" means Verizon Communications, Inc., and the Bureau;
(e) "Adopting Order" means an Order of the Bureau adopting the terms and conditions of this Consent Decree;
(f) "Effective Date" means the date on which the Bureau releases the Adopting Order; and,
(g) "Inquiry" means the investigation initiated by the Bureau's April 5, 2001 letter of inquiry regarding Verizon's compliance with 47 C.F.R. § 51.321(h).

6. The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in an Adopting Order of the Bureau.

7. The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Commission and any violation of the terms of this Consent Decree shall constitute a violation of a Commission Order entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission Order.

8. Verizon admits the jurisdiction of the Commission for purposes of this Consent Decree and the Adopting Order.

9. The parties agree and acknowledge that this Consent Decree shall constitute a final settlement between Verizon and the Bureau of the Inquiry. In consideration for the termination by the Bureau of its investigation into whether Verizon has violated section 51.321(h) of the Commission's rules, 47 C.F.R. § 51.321(h), and in accordance with the terms of this Consent Decree, Verizon agrees to the terms set forth herein.

10. Verizon agrees to initiate the following remedial actions, no later than 30 days from the effective date of this Consent Decree, to help ensure its compliance with section 51.321(h) of the Commission's rules: (1) adopt new methods and procedures to clearly indicate that a grant of an application for collocation space, or any other event that makes unavailable the last remaining usable physical collocation space, triggers the ten-day time period within which Verizon must post notice of exhaustion of space for physical collocation; (2) establish a centralized point of control to monitor and record Verizon's compliance with the posting requirements of section 51.321(h); and (3) eliminate the use of the phrase "Pending Office Reevaluation" on Verizon's Internet site that lists facilities with exhausted physical collocation space. Verizon agrees to continue to comply with each of these remedial actions for the entire time period in which the Internet posting requirement in section 51.321(h) of the Commission's rules remains in effect in its current form. Additionally, Verizon agrees to provide remedial refresher training on the posting requirements of section 51.321(h) to all personnel responsible for Internet posting regarding collocation space exhaustion, such training to take place within 12 months from the effective date of this Consent Decree.

11. Verizon shall make a voluntary contribution to the United States Treasury in the total amount of $77,000 (seventy-seven thousand dollars). This amount shall be paid within 30 days of the date on which the order adopting this Consent Decree becomes final. Such contribution shall be made, without further protest or recourse, by certified check, cashiers

check, or money order drawn to the order of the Federal Communications Commission, and shall be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Reference should be made on the check or money order to “Acct. No. 200132080058.”

12. While this Consent Decree is in effect, Verizon agrees to maintain and make available to the Bureau within 21 days of the receipt of a specific written request from the Bureau, business records demonstrating compliance with the terms and provisions of this Consent Decree. This requirement will begin forty-five 45 days after the effective date of this Consent Decree and will expire twenty-four (24) months later.

13. In express reliance on the covenants and representations in this Consent Decree, the Bureau agrees to terminate the inquiry without any finding of liability on the part of Verizon.

14. The Bureau agrees that, based on the facts developed in the Inquiry and in the absence of material new evidence related to this matter, it will not use the facts developed in this Inquiry through the date of the Consent Decree or the existence of this Consent Decree to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against Verizon concerning the matters that were the subject of the Inquiry. The Bureau also agrees that, based on the facts developed in the Inquiry, and in the absence of material new evidence related to this matter, it will not use the facts developed in this Inquiry through the date of this Consent Decree or the existence of this Consent Decree to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Verizon with respect to its basic qualifications, including its character qualifications, to be a Commission licensee or with respect to compliance with the Commission’s rules and policies.

15. Nothing in this Consent Decree shall prevent the Commission from adjudicating complaints filed pursuant to section 208 of the Communications Act, as amended, 47 U.S.C. § 208, against Verizon or its affiliates for alleged violations of section 51.321(h) of the Commission’s rules, or for any other type of alleged misconduct, regardless of when such misconduct took place. If any such complaint is made, the Commission's adjudication of that complaint will be based solely on the record developed in that proceeding. Nothing in this Consent Decree shall prevent the Commission from instituting new investigations or enforcement proceedings against Verizon pursuant to sections 4(i), 403 and 503 of the Communications Act in the event of any alleged future misconduct.

16. Verizon waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Order adopts the Consent Decree without change, addition, or modification.

17. Verizon waives any rights it may have under any provision of the Equal Access to Justice Act, 5 U.S.C. § 504.

18. In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, this Consent Decree shall become null and void and may not be used in any manner in any legal proceeding.

19. If either Party (or the United States on behalf of the Commission) brings a judicial

action to enforce the terms of the Order adopting this Consent Decree, neither Verizon nor the Commission shall contest the validity of the Consent Decree or Order, and Verizon and the Commission will waive any statutory right to a trial *de novo* with respect to any matter upon which the Order is based, and shall consent to a judgment incorporating the terms of this Consent Decree.

20. The Bureau and Verizon agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Communications Act, including section 251 thereof, and the Commission's implementing rules, including section 51.321(h). The parties agree that this Consent Decree is for settlement purposes only and that by agreeing to this Consent Decree, Verizon does not admit any liability for violating Commission rules in connection with the matters that are the subject of this Consent Decree. Indeed, Verizon expressly denies any such noncompliance, violation, or liability.

21. The Parties agree that any provision of the Consent Decree that would require Verizon to act in violation of a rule or order adopted by the Commission will be superseded by such Commission rule or order.

22. This Consent Decree may be signed in counterparts.

For the Enforcement Bureau,
Federal Communications Commission

____
David H. Solomon
Chief

____
Date

For Verizon Communications, Inc.

____
Virginia Ruesterholz
Senior Vice President, Wholesale Services

____
Date

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

Global NAPs, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-01-MD-010
	)	
Verizon Communications,	)	
Verizon New England, Inc., and	)	
Verizon Virginia, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 2002 **Released:** February 28, 2002

By the Commission:

I. INTRODUCTION

1. In this Order, we grant in part and deny in part a formal complaint that Global NAPs, Inc. ("Global NAPs"), filed against Verizon Communications, Verizon New England, Inc., and Verizon Virginia, Inc. (collectively, "Verizon"),[1] pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[2] We grant Global NAPs' claim that Verizon violated section 201(b) of the Act[3] by refusing to permit Global NAPs to opt into certain provisions of an interconnection agreement that are eligible for adoption across state lines in accordance with a condition of the Commission's approval of the merger application of Bell Atlantic Corp. and GTE Corp.[4] We deny Global NAPs' claim for damages, however, because such claim is premature.

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1 *See* Formal Complaint, File No. EB-01-MD-010 (filed Apr. 27, 2001) ("*Global NAPs Complaint*"). Although Global NAPs originally named Verizon Communications as a defendant, the parties jointly requested that we dismiss Verizon Communications as a defendant. Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-01-MD-010, at 2, ¶ 7 (filed June 11, 2001) ("*Joint Statement*"). We hereby grant this request.

2 47 U.S.C. § 208.

3 *Id.* § 201(b).

4 *See Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14171–75, ¶¶ 300–05, 14310–11, App. D at ¶ 32 (2000) ("*Merger Order*").

II. BACKGROUND

2. Global NAPs is a telecommunications carrier that offers interstate and intrastate telecommunications services.[5] Pursuant to sections 251 and 252 of the Act,[6] Global NAPs and its affiliates have interconnection agreements with Verizon concerning the provision of local telecommunications services in a number of states.[7] Verizon is an incumbent local exchange carrier ("LEC") that provides, among other services, local exchange and exchange access services in the states that are relevant to this complaint.[8]

3. In 1998, pursuant to section 252(a) of the Act,[9] Global NAPs and Bell Atlantic – Rhode Island signed a negotiated interconnection agreement governing the exchange of telecommunications traffic in the state of Rhode Island ("Rhode Island Agreement").[10] That agreement contains section 5.7.2.3, which provides, *inter alia*, that Verizon will pay Global NAPs reciprocal compensation (as defined in the agreement) for the delivery of traffic from Verizon's network to Global NAPs' internet service provider ("ISP") customers ("ISP-bound traffic") until such time as this Commission or a court determines that ISP-bound traffic is not "local traffic" or is otherwise not compensable.[11]

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5 *Global NAPs Complaint* at 2, ¶ 2; Verizon Answer, File No. EB-01-MD-010, at 13, ¶ 28 (filed May 18, 2001) ("*Verizon Answer*").

6 47 U.S.C. §§ 251, 252.

7 *Global NAPs Complaint* at 2, ¶ 3; *Verizon Answer* at 13, ¶ 29.

8 *Global NAPs Complaint* at 2, ¶ 3; *Verizon Answer* at 13, ¶ 29.

9 *See* 47 U.S.C. § 252(a)

10 *Joint Statement* at 1–2, ¶ 2. Bell Atlantic – Rhode Island is the predecessor company of Verizon – Rhode Island, Inc., which is now a subsidiary of Defendant Verizon New England, Inc.

11 *Id.* at 1–2, ¶ 2. The interconnection agreement reads as follows: "5.7.2.3 The Parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Service Provider ("ISP") connected to the other Party's network ("ISP Traffic") constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation must be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. The Parties agree that the decision of the FCC in that proceeding, or as such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue, BA agrees to pay GNAPS Reciprocal Compensation for ISP Traffic (without conceding that ISP Traffic constitutes Local Traffic or precluding BA's ability to seek appropriate court review of this issue) pursuant to the [Rhode Island] commission's Order in Case 97-C-1275, dated March 19, 1998, as such Order may be modified, changed or reversed." *Global NAPs Complaint* at Exhibit 2, at 22 (quoting Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 Between Bell Atlantic-Rhode Island and Global NAPs, Inc. (Oct. 1, 1998).).

4. On February 26, 1999, the Commission ruled that ISP-bound traffic is largely interstate traffic that is not subject to the reciprocal compensation scheme of section 251(b)(5) of the Act.[12] Nevertheless, the Commission stated that state commission findings as to whether reciprocal compensation provisions of interconnection agreements applied to ISP-bound traffic would remain in place pending adoption of a Commission rule establishing an appropriate interstate compensation mechanism.[13] On November 16, 1999, the Rhode Island Public Utilities Commission ("PUC") issued an order finding that the requirements of section 5.7.2.3 remain in effect, notwithstanding the Commission's *Declaratory Ruling*.[14] The Rhode Island PUC held that the Commission's *Declaratory Ruling* did not fulfill the Rhode Island Agreement's requirement of fully resolving the issue of whether ISP-bound traffic would remain in the reciprocal compensation scheme as local traffic. Thus, the Rhode Island PUC continued to require Bell Atlantic-Rhode Island to pay reciprocal compensation to Global NAPs for this traffic.[15]

5. On March 24, 2000, the Court of Appeals for the District of Columbia Circuit vacated the *Declaratory Ruling*.[16] The court stated, *inter alia*, that the Commission had not adequately explained why ISP-bound traffic falls outside the rubric of section 251(b)(5) of the Act.[17] Thus, the court remanded the matter to the Commission for further explanation.

6. On June 16, 2000, while the D.C. Circuit's remand of the *Declaratory Ruling* remained pending at the Commission, the Commission released the *Merger Order* approving the transfer of licenses from GTE to Bell Atlantic.[18] The Commission concluded, *inter alia*, that, because of the conditions to which the parties had voluntarily committed, the proposed transfer of licenses would serve the public interest.[19] One such condition set forth in the *Merger Order* is the subject of the instant complaint. In brief, that condition requires Verizon, under certain specified circumstances, to permit requesting carriers to adopt in one state an interconnection agreement that was voluntarily negotiated in another state. The condition states, in pertinent part:

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12 *See Implementation of the Local Competition Provision in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*"); *see also* 47 U.S.C. § 251(b)(5).

13 *Declaratory Ruling* at 3703, ¶ 21.

14 *See* Complaint of Global NAPs, Inc., Against Bell Atlantic-Rhode Island Regarding Reciprocal Compensation, Docket No. 2967, *Report and Order*, R.I. P.U.C. (Nov. 16, 1999) ("*RIPUC Order*"); *Joint Statement* at 2, ¶ 3.

15 *See RIPUC Order* at 4–5.

16 *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

17 *Bell Atlantic*, 206 F.3d at 8.

18 *See supra* note 4.

19 *See Merger Order*, 15 FCC Rcd at 14036, ¶ 3–5.

> 32. In-Region Pre-Merger Agreements. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provision of an interconnection subject to 47 U.S.C. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior to the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa.[20]

7. On April 27, 2001, in response to the D.C. Circuit's remand, the Commission released an order determining, *inter alia*, that ISP-bound traffic constitutes "information access" under section 251(g) of the Act and is, therefore, excluded from the reciprocal compensation provision of section 251(b)(5).[21] At the same time, the Commission established an interim compensation arrangement for the delivery of ISP-bound traffic, in which incumbent LECs generally pay competitive LECs a progressively decreasing per-minute rate.[22] The Commission emphasized, however, that the new compensation regime applies only prospectively "as carriers renegotiate expired or expiring interconnection agreements," and "does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions."[23]

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[20] *Merger Order*, 15 FCC Rcd at 14310, App. D at ¶ 32 ("paragraph 32").

[21] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9154–56, ¶¶ 4–6 (2001) ("*Order on Remand*"). Section 251(g) of the Act provides, in pertinent part, that "each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on [February 7, 1996]." 47 U.S.C. § 251(g).

[22] *Order on Remand,* 16 FCC Rcd at 9155-57, ¶¶ 7–8.

[23] *Id.* at 9189, ¶ 82; *see id.* at 9186–91, ¶¶ 77–85. We note that, prior to the release of the *Order on Remand*, on December 27, 2000, the Commission's Common Carrier Bureau ("CCB") issued a letter stating that the paragraph 32 condition applies to reciprocal compensation provisions of interconnection agreements. *See* Letter from Carol Mattey, Common Carrier Bureau, to Michael Shor, Swidler Berlin Sheriff Friedman, LLP, 16 FCC Rcd 22 (2000). In response to this letter, Verizon asked CCB to clarify its position regarding the applicability of the condition to intercarrier compensation for ISP-bound traffic. *See* Letter from Gordon Evans, Verizon Communications, to Dorothy Attwood, Common Carrier Bureau, Feb. 20, 2001. CCB issued a *Public Notice* on March 30, 2001, asking "whether there are grounds to waive or modify the relevant MFN [most favored nation] conditions." Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders, *Public Notice*, 16 FCC Rcd 6873, 6874 (2001). As of the release date of this Order, the Commission has taken no action regarding the *Public Notice*.

8. On July 24, 2000, Global NAPs notified Verizon that, pursuant to paragraph 32 of the merger conditions, it wished to adopt the Rhode Island Agreement in Virginia and Massachusetts.[24] On November 15, 2000, Global NAPs and Verizon agreed that, effective July 24, 2000, Global NAPs could adopt, in Massachusetts and Virginia, all provisions of the Rhode Island Agreement that it could adopt consistent with paragraph 32 of the merger conditions.[25] The parties disagreed, however, about whether paragraph 32 of the merger conditions entitles Global NAPs to adopt in Massachusetts and Virginia section 5.7.2.3 of the Rhode Island Agreement. The parties attempted to settle their disagreement for about nine months.[26] Throughout the course of their dispute, Verizon continued to send Global NAPs ISP-bound traffic in Massachusetts and Virginia, but Verizon did not pay Global NAPs intercarrier compensation for that traffic.[27]

9. On April 27, 2001, Global NAPs filed its complaint alleging that paragraph 32 of the merger conditions required Verizon to allow Global NAPs to opt into section 5.7.2.3 of the Rhode Island Agreement in Massachusetts and Virginia.[28] Global NAPs asserts that "Verizon's conditioning and limitation of adoption of the *Rhode Island Agreement* in Virginia and Massachusetts constitutes a violation of 47 U.S.C. § 201(b) entitling Global NAPs to a payment of money" damages.[29] The complaint alleges, therefore, that Verizon owes Global NAPs "reciprocal compensation payments from July 24, 2000 to the present for ISP-bound traffic in those states at the appropriate rate(s) based on the *Rhode Island Agreement*,"[30] which allegedly amounts to $26,871,153.92.[31] According to Global NAPs, this is the amount of reciprocal compensation that Verizon owes Global NAPs for Global NAPs' transport and termination of Verizon-originated ISP-bound calls in Massachusetts and Virginia from July 24, 2000 through March 31, 2001.[32]

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24 *Global NAPs Complaint* at Ex. 5.

25 *Joint Statement* at 2, ¶ 5; *see Global NAPs Complaint* at Exs. 3–4 (two letter agreements that both parties signed on November 15, 2000).

26 *See Global NAPs Complaint* at Exs. 6–12 (referring to letters and e-mails that the parties exchanged).

27 *Joint Statement* at 2, ¶¶ 5–6.

28 In its complaint, Global NAPs labels its various assertions as "counts" that do not make specific allegations of statutory or regulatory violations, but instead describe legal arguments. Thus, we construe "Count I," "Count II," and "Count III" as merely parts of the main body of the complaint. *See Global NAPs Complaint* at 18–20, ¶¶ 42–48 (Count I), 20–40, ¶¶ 49–90 (Count II), 40–48, ¶¶ 91–109 (Count III). We view Count IV as Global NAPs' true claim. *See id.* at 49, ¶¶ 110–11. Accordingly, Count IV is the only count that we address in this Order.

29 *Id.* at 50, ¶ 114.

30 *Id.* at 49–50, ¶ 113.

31 *Id.* at 50, ¶ 114.

32 *Id.*

III. DISCUSSION

10. Although we find that paragraph 32 is ambiguous as applied to the circumstances at issue here, we conclude that it is best read as requiring Verizon to make available for adoption in other states the entire Rhode Island Agreement, including section 5.7.2.3, or any discrete provision thereof.[33]

11. Global NAPs focuses on the fact that paragraph 32 requires Verizon to make available for adoption across state lines any "provisions of an interconnection agreement **(including an entire agreement)** subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC…."[34] In Global NAPs' view, therefore, the key question is whether the entire Rhode Island Agreement, including section 5.7.2.3, is "subject to 47 U.S.C. § 251(c)" within the meaning of paragraph 32.

12. Assuming for the moment that Global NAPs asks the right question, by focusing on the entire agreement rather than on individual provisions thereof, we agree with Global NAPs' answer that the Rhode Island Agreement, including section 5.7.2.3, is "subject to 47 U.S.C. § 251(c)" within the meaning of paragraph 32 (and thus Global NAPs is entitled to opt into it.) First, this interconnection agreement is subject to section 251(c) because this is the agreement that Verizon negotiated to comply with its obligations under that section. In other words, this agreement incorporates the terms governing the exchange of telecommunications traffic in the state of Rhode Island pursuant to section 251(c). This agreement embodies not only many of those terms listed in section 251(c), but other provisions that the parties found appropriate for inclusion as well. Moreover, section 251(c)(1) states that an incumbent LEC must "negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection."[35] No one disputes that the Rhode Island Agreement was negotiated pursuant to section 251(c) or subject to the good faith provisions of section 251(c). The fact that the agreement included other provisions does not take it out of the ambit of section 251(c).[36]

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[33] We note that paragraph 32 (in a portion not quoted above) does create exclusions from the adoptability requirement for certain items (*e.g.*, paragraph 32 excludes price- and state-specific performance measures for interconnection arrangements and UNEs). Any statements in this Order about paragraph 32 requiring the "entire" interconnection agreement to be made available for adoption should not be interpreted as overriding these exclusions.

[34] *Merger Order*, 15 FCC Rcd at 14310, App. D at ¶ 32 (emphasis added). Paragraph 39 of the *Merger Order*, which requires Verizon to offer unbundled network elements ("UNEs") in accordance with the *UNE Remand Order* and the *Line Sharing Order* until a final, non-appealable judicial decision to the contrary, has no bearing on the issue disputed in this matter. *See id.* at 14316, App. D at ¶ 39 ("paragraph 39"); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"). Paragraph 39 merely leaves in place the requirements contained in certain Commission orders implementing section 251(c) of the Act subject to appellate review.

[35] 47 U.S.C. § 251(c)(1).

[36] In contrast, certain pre-1996 Act interconnection agreements are outside the scope of section 251(c). *See Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 762–65 (8th Cir. 2000).

Accordingly, we find that the entire Rhode Island Agreement is "subject to 47 U.S.C. § 251(c)" as that phrase is used in paragraph 32 of the merger conditions. Because this is a section 251(c) agreement and paragraph 32 permits opting into an "entire" such agreement, then under Global NAPs' approach, the entire Rhode Island Agreement is eligible for adoption in Virginia and Massachusetts, and Verizon must offer it to requesting carriers to meet its obligations under the *Merger Order*.[37]

13. Verizon, however, poses a different initial question than Global NAPs does. Verizon asserts that the phrase "subject to 47 U.S.C. § 251(c)" limits the terms it must offer to those that are specifically enumerated in section 251(c)(2)–(6) (*e.g.*, unbundled access, collocation); thus, according to Verizon, because section 251(c) does not specifically address reciprocal compensation for ISP-bound traffic, paragraph 32 does not require Verizon to offer a provision, such as section 5.7.2.3, that concerns such compensation.[38] We disagree for two reasons.

14. First, Verizon's interpretation of paragraph 32 would require us to read the phrase "subject to 47 U.S.C. § 251(c)" as modifying the term "provisions" rather than modifying the directly antecedent language "interconnection agreement (including an entire agreement)." We reject Verizon's interpretation. We believe that the more natural reading of this phrase matches the term "interconnection agreement (including an entire agreement)" with its verb "that was voluntarily negotiated," so that the subject and verb agree. Because the phrase "subject to 47 U.S.C. § 251(c)" modifies "agreement," paragraph 32 allows requesting carriers to opt into an *agreement*, or to any discrete provisions thereof, as long as that *agreement* was subject to section 251(c). As discussed above in paragraph 11, the Rhode Island Agreement satisfies this requirement.

15. Second, Verizon's interpretation would mean that competitors could rarely, if ever, invoke paragraph 32 to opt into an "entire agreement." Verizon itself indicated in a joint stipulation that its interconnection agreements in the former Bell Atlantic territory "typically contain terms in addition to those listed in 47 U.S.C. § 251(c)(1)-(6)."[39] Under Verizon's interpretation, requesting carriers would not be entitled to opt into "entire agreements" if the agreements contain any terms not expressly listed in section 251(c). Thus, reading paragraph 32 as Verizon contends would render virtually meaningless the phrase "including an entire agreement." We decline to construe paragraph 32 in such a cramped manner.

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[37] As our determination rests on the text of paragraph 32 itself, Verizon's comparisons between the language in the *SBC/Ameritech Merger Order* and the language at issue here are inapposite. *See Verizon Answer* at 6, ¶ 13; Brief of Defendants Verizon New England, Inc., and Verizon Virginia, Inc., File No. EB-01-MD-010, at 4–5 (filed July 16, 2001) ("*Verizon Brief*") (citing *Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Merger Order*")).

[38] *See Verizon Answer* at 4-8, ¶¶ 7–17; *Verizon Brief* at 1–6; Reply Brief of Defendants Verizon New England, Inc., and Verizon Virginia, Inc., File No. EB-01-MD-010, at 1–6 (filed Aug. 6, 2001) ("*Verizon Reply*").

[39] Joint Stipulation, File No. EB-01-MD-010, at 1 (filed June 19, 2001).

16. Verizon also argues that "even if the merger condition were somehow construed (incorrectly) to apply to matters covered by section 251(b)(5)," the Commission's *Order on Remand* establishes that Internet-bound traffic is not covered by section 251(b)(5).[40] Verizon states that because the Commission has determined in the *Order on Remand* that ISP-bound traffic falls within section 251(g), such traffic must be excluded from section 251(b)(5).[41] We find Verizon's arguments to be irrelevant to the determination in the instant Order. As discussed above, our conclusion that the Rhode Island Agreement, as a whole, is subject to section 251(c) does not turn on which statutory provision governs reciprocal compensation for ISP-bound traffic.

17. Verizon also asserts that construing paragraph 32 in the manner sought by Global NAPs would conflict with the *Order on Remand*, because the Commission's determination that ISP-bound traffic is covered by section 251(g) of the Act rather than section 251(b) demonstrates that "[p]ayment of inter-carrier compensation for Internet-bound traffic is . . . contrary to stated Commission policy."[42] We disagree. The *Order on Remand* governs the exchange of ISP-bound traffic on a prospective basis, after its effective date of June 14, 2001.[43] Global NAPs' complaint, however, asks the Commission to examine Verizon's actions from July 24, 2000 to March 31, 2001.[44] The *Order on Remand* expressly "does not alter existing contractual obligations, except to the extent the parties are entitled to invoke contractual change-of-law provisions."[45] Our decision here fully comports with this determination that pre-existing contractual obligations between Verizon and Global NAPs remain in effect. As noted above, on November 15, 2000, Verizon and Global NAPs entered into an agreement that Global NAPs, as of July 24, 2000, could opt into any provision of the Rhode Island Agreement to which paragraph 32 applied. Because we find that Global NAPs was entitled to opt into the entire agreement, we conclude that the parties' November 15, 2000, agreement qualifies as an "existing contractual obligation" that remains unchanged by the *Order on Remand*.[46]

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40 *Verizon Answer* at 5, ¶ 9; *Verizon Brief* at 2–3; *see also* Letter from Carol Mattey, Common Carrier Bureau, to Michael Shor, Swidler Berlin Sheriff Friedman, LLP, 16 FCC Rcd 22 (2000) (stating that section 251(b) is incorporated explicitly into section 251(c)).

41 *Verizon Answer* at 4, ¶ 8; *Verizon Brief* at 2–3.

42 *Verizon Brief* at 8; *see also Verizon Answer* at 2–5, ¶¶ 3–8; *Verizon Brief* at 1–2; *Verizon Reply* at 2–3.

43 *See* 68 Fed. Reg. 26800 (2001).

44 *See Global NAPs Complaint* at 50, ¶ 114.

45 *See Order on Remand*, 16 FCC Rcd at 9189, ¶ 82. Verizon argues that the *Order on Remand* "makes clear that any provision dealing with reciprocal compensation for ISP traffic is not and has never been subject to section 252(i)." *Verizon Reply* at 11. We disagree. The *Order on Remand* specifically states that "as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to rates paid for the exchange of ISP-bound traffic." *Order on Remand*, 16 FCC Rcd at 9189, ¶ 82. The statement that carriers may "no longer" invoke section 252(i) "as of this date" indicates that, prior to this date, such provisions were eligible for opt-in pursuant to section 252(i).

46 We do expect, however, that once these agreements expire, the *Order on Remand* will govern the exchange of ISP-bound traffic between Global NAPs and Verizon. *See Merger Order*, 15 FCC Rcd at 14172, ¶ 301.

18. We recognize that the interpretation proposed by Global NAPs does to some extent render the language "subject to 47 U.S.C. § 251(c)" arguably superfluous, because paragraph 32 also refers to section 252(a)(1) to identify the kind of interconnection agreements within its scope. Nevertheless, for the reasons explained above, this interpretation makes far more sense than the interpretation proffered by Verizon. Thus, we adopt Global NAPs' approach here.

19. Finally, we note that paragraph 32 specifically states that interconnection terms adopted across state lines must be "consistent with the laws and regulatory requirements of the state for which the request is made."[47] Thus, we conclude that, although the Commission may determine whether an agreement is eligible for adoption pursuant to paragraph 32, only the relevant state commission may ultimately decide whether particular terms of the agreement should be adopted in that state, and if so, what those terms mean.

20. Because paragraph 32 concerns voluntarily negotiated agreements, we expect Verizon and Global NAPs to submit the Rhode Island Agreement to the Virginia and Massachusetts commissions for approval pursuant to section 252(e)(1) of the Act.[48] The parties should follow the procedures that the Massachusetts and Virginia commissions have established for submitting such voluntarily negotiated agreements.[49] We also expect that these agreements will contain section 5.7.2.3 of the Rhode Island Agreement, if Global NAPs chooses to include it. As specified by the Act, each state commission will then determine the acceptability of specific provisions under section 252(e)(2).[50]

21. In sum, because paragraph 32 allows for requesting carriers to opt into entire agreements across state lines, Verizon should have offered the entire Rhode Island Agreement, including section 5.7.2.3, to Global NAPs in Virginia and Massachusetts to satisfy Verizon's commitments under the *Merger Order*. Verizon's failure to do so violates section 201(b) of the Act. Accordingly, we grant Count IV of Global NAPs' complaint.

IV. DAMAGES

22. Global NAPs asserts that, if we rule that Verizon violated section 201(b) of the Act by refusing to allow Global NAPs to adopt in Virginia and Massachusetts section 5.7.2.3 of the

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47 *Id.* at 14310, App. D at ¶ 32.

48 *See* 47 U.S.C. § 252(e)(1) (requiring interconnection agreements to be submitted to state commissions for approval).

49 Verizon indicated orally to Commission staff and Global NAPs that staff at the Virginia commission has stated informally that Verizon should not submit agreements opted into from other states with the Virginia commission. In the absence of an official state ruling that indicates otherwise, however, we cannot assume that the Virginia or Massachusetts commissions will decline to carry out their responsibilities set forth in section 252 of the Act.

50 *See* 47 U.S.C. § 252(e)(2)(A) (listing the grounds upon which state commissions reject negotiated interconnection agreements).

Rhode Island Agreement, we should award Global NAPs $26,871,153.92 in damages.[51] This is the amount that Global NAPs alleges Verizon would have paid in reciprocal compensation for ISP-bound traffic in Virginia and Massachusetts from July 24, 2000, through March 31, 2001, based on the minutes of traffic delivered to Global NAPs and the compensation rate under the Rhode Island Agreement during that time period.

23. Global NAPs' request for damages is premature. As described above, in accordance with this Order, Global NAPs and Verizon must submit interconnection agreements containing section 5.7.2.3 of the Rhode Island Agreement to the Massachusetts and Virginia commissions for approval under section 252(e)(1) of the Act. Only if and when the state commissions approve the interconnection agreements, pursuant to section 252(e)(2) of the Act, will the issue of Global NAPs' entitlement to damages under those agreements be ripe for the appropriate regulatory agency to adjudicate. Accordingly, we deny Global NAPs' claim for damages without prejudice.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, that Global NAPs' complaint IS GRANTED IN PART to the extent described herein, and in all other respects IS DENIED.

25. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, that the parties' joint request to dismiss Verizon Communications, Inc., as a defendant IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[51] *See Global NAPs Complaint* at 49–50, ¶¶ 113–14.

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

In the Matter of	)	File No. EB-01-IH-0519
	)	Acct. No. 200232080021
VERIZON COMMUNICATIONS INC.	)	FRN Numbers 0003708500, 0004673182, 0005733449, 0005779111, 0006190037

ORDER

Adopted: August 16, 2002 **Released: August 20, 2002**

By the Chief, Enforcement Bureau:

1. In this Order, we adopt a Consent Decree terminating an investigation into compliance by Verizon Communications, Inc. ("Verizon") with the Merger Conditions under *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000) ("*BA/GTE Merger Order*").

2. The Enforcement Bureau and Verizon have negotiated the terms of a Consent Decree that would terminate the staff's investigation. A copy of the Consent Decree is attached hereto and is incorporated by reference.

3. We have reviewed the terms of the Consent Decree and we conclude that the public interest would be served by approving the Consent Decree and terminating the investigation.

4. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j) and 503(b) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j) and 503(b), and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the attached Consent Decree is ADOPTED.

5. Verizon shall make its voluntary contribution to the United States Treasury by mailing a check or similar instrument, or by wire transfer, payable to the order of the Federal Communications Commission, Forfeiture Collection Section, Finance Branch, P.O. Box 73482, Chicago, Illinois 60673-7482.[1]

[1] The payment should reference Acct. No. 200232080021and FRN Numbers 0003708500, 0004673182, 0005733449, 0005779111, 0006190037.

6. IT IS FURTHER ORDERED that the Commission staff investigation into the matter described herein IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

CONSENT DECREE

I. Introduction

1. This consent decree is entered into by the Enforcement Bureau of the Federal Communications Commission ("Bureau") and Verizon Communications Inc. ("Verizon"), terminating an informal Bureau investigation into Verizon's compliance with the Merger Conditions imposed by the Commission in *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000) ("*BA/GTE Merger Order*").

II. Background

2. On June 16, 2000, the Commission approved, subject to explicit conditions, the transfer of licenses and lines from GTE Corporation ("GTE") to Bell Atlantic Corporation ("BA") (collectively, "Verizon") in connection with the merger of the two companies. To offset the potential harms arising out of the merger, Verizon proposed, and the Commission adopted, a series of conditions intended to enhance local competition and to strengthen the incentives of Verizon to expand competition outside its territories. Verizon also proposed conditions designed to avoid violations of section 271 of the Act as a result of the merger.[1] In particular, Verizon proposed, and the Commission adopted, a condition to spin-off substantially all of GTE's nationwide data business to a separate public corporation (*i.e.*, Genuity).

3. Market-Opening Condition V of the *BA/GTE Merger Order* requires Verizon to file publicly monthly performance measurement data under a Carrier-to-Carrier Performance Assurance Plan ("PAP").[2] The PAP measures Verizon performance in 17 different categories or metrics, which are broken down into numerous sub-metrics, and which address functions that can affect Verizon's local competitors and their customers. These categories cover key aspects of pre-ordering, ordering, provisioning, maintenance and repair, and billing associated with unbundled network elements ("UNEs"), interconnection, and resold services. Under the PAP, Verizon shall make voluntary payments to the U.S. Treasury if Verizon fails to provide a certain level of performance. Verizon is subject to voluntary payments of up to $1.164 billion for continued poor performance over three years.[3]

4. Market-Opening Condition XIX of the *BA/GTE Merger Order* requires Verizon to submit quarterly consumer service quality reports.[4] Market-Opening Condition XIX also requires

[1] Section 271 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 271, prohibits a Bell operating company ("BOC"), or its affiliate, from entering the in-region, interLATA market, unless the BOC demonstrates that its local market is open to competition in accordance with the requirements of section 271. *BA/GTE Merger Order* at ¶ 26.

[2] *BA/GTE Merger Order* at Appendix D, ¶¶ 16-17 & Attachment A.

[3] *Id.* at Appendix D, ¶ 16.

[4] The consumer service quality reports must be submitted in accordance with a Service Quality White Paper, which was adopted by the National Association of Regulatory Utility Commissioners ("NARUC"), Technology Policy Subgroup in November 1998. NARUC's Service Quality White Paper measures

Verizon to report special access service quality data to the Commission and an independent auditor in order to protect against discrimination in favor of Genuity in the provision of special access services.[5]

5. Market-Opening Condition XXII and Genuity Condition VI of the *BA/GTE Merger Order* require Verizon to engage annually an independent auditor to examine Verizon's compliance with the Merger Conditions. The annual audit provides a thorough and systematic evaluation of Verizon's compliance with the Merger Conditions and the sufficiency of Verizon's internal controls.

6. On June 1, 2001, PricewaterhouseCoopers ("PWC") filed an audit report addressing Verizon's compliance with certain Market-Opening Conditions under the *BA/GTE Merger Order*, from June 30, 2000 through December 31, 2000 ("PWC Audit Report"). The PWC Audit Report indicates that Verizon failed to submit certain historical performance data to PWC, which limited the scope of the audit. The PWC Audit Report indicates that Verizon did not provide the independent auditor data for 2 of 17 Carrier-to-Carrier performance measurements and 2 of 5 special access performance measurements.[6] The PWC Audit Report and Verizon's Assertions accompanying the audit report also identify performance reporting inaccuracies.[7] Verizon states in its Assertions that its performance reporting inaccuracies were due to problems with systems development, long-term systems enhancement, data extraction, data calculations, report mapping, data posting, and misapplication of business rules. Errors in performance reports can affect the amount of Verizon's voluntary payments for failing to meet performance levels specified in the PAP. Verizon has disclosed in the 2001 audit, in reports to the Commission, and in discussions with the Bureau similar performance reporting inaccuracies that appear to have occurred during the January 1 through December 31, 2001 period.

7. Also on June 1, 2001, Verizon filed with the Commission an audit report by Mitchell & Titus, LLP ("M&T") addressing Verizon's compliance with the Genuity Conditions under the *BA/GTE Merger Order*, from June 30, 2000 through December 31, 2000 ("M&T Audit Report"). During the audit, the independent auditor tested agreements between Verizon and Genuity for compliance with the Genuity Conditions. Of 157 agreements disclosed to M&T by Verizon before June 1, 2001, M&T reported that 11 were submitted by Verizon too late for M&T to test them in time for the June 1, 2001 filing. After June 1, 2001, Verizon disclosed to M&T that

installation and repair performance, switch and transmission facility outages, consumer complaints, and answer time performance. This condition was designed to deter service quality degradation and motivate Verizon to improve service quality. *BA/GTE Merger Order* at ¶ 328.

[5] *Id.* at ¶ 330.

[6] PWC Audit Report at 1 ("The Company did not maintain historical transaction data related to Verizon East (South) Network Performance-1 (Condition V), Verizon East Average Installation Interval (Condition XIX) and Verizon East Percentage Commitment Met (Condition XIX) measurements, and the historical transaction data for the Verizon East Provisioning-09 (Condition V) measurement was only available within a timeframe of 45 days. The unavailability of this historical transaction data prevented us from applying the procedures we considered necessary in the circumstances to test these reported measurements.").

[7] May 31, 2001 Report of Management on Compliance with Merger Conditions ("Assertions") at Attachment A (Condition V - Carrier-to-Carrier Performance Plan) & Attachment C (Condition XIX - Additional Service Quality Reporting).

additional agreements between Verizon and Genuity existed besides the 157 previously disclosed to M&T.

8. The Bureau initiated an Investigation of Verizon's potential non-compliance with the *BA/GTE Merger Order* arising out of the facts disclosed in the PWC and M&T Audit Reports and continuing through December 2001. In particular, the Bureau's Investigation focused on Verizon's compliance with the performance reporting requirements and the audit requirements.

III. Definitions

9. For the purposes of this Consent Decree the following definitions shall apply:

(a) "Commission" or "FCC" means the Federal Communications Commission.

(b) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.

(c) "Verizon" means Verizon Communications Inc. and any subsidiaries.

(d) "Parties" means Verizon and the Bureau.

(e) "Adopting Order" means an Order of the Bureau adopting the terms and conditions of this Consent Decree.

(f) "Effective Date" means the date on which the Bureau releases the Adopting Order.

(g) "Investigation" means the investigation initiated by the Bureau regarding the matters discussed in paragraphs 6 – 8 above, concerning Verizon's conduct during the June 30, 2000 to December 31, 2001 period.

IV. Agreement

10. Verizon agrees that the Bureau has jurisdiction over the matters contained in this Consent Decree and the authority to enter into and adopt this Consent Decree.

11. Verizon agrees to implement the Compliance Plan attached hereto and incorporated by reference, to help ensure Verizon's future compliance with the Merger Conditions under the *BA/GTE Merger Order*.

12. Verizon agrees that it shall make a voluntary contribution to the United States Treasury in the amount of $260,000 (two hundred sixty thousand dollars). This amount shall be paid within 30 days of the date on which the order adopting this Consent Decree becomes final. Such contribution shall be made, without further protest or recourse, by certified check, cashiers check, wire transfer, or money order drawn to the order of the Federal Communications Commission, and shall be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482, or be submitted by wire transfer according to instructions provided by the Bureau. Reference should be made on the check or money order to "Acct. No. 200232080021."

13. In express reliance upon the covenants and representations contained in this

Consent Decree, the Bureau agrees to terminate its Investigation into the matters discussed in paragraphs 6 - 8 above, without any finding of liability on the part of Verizon.

14. The Bureau agrees that, based on the facts developed in this Investigation and in the absence of material new evidence related to this matter, it will not use the facts developed in this Investigation through the Effective Date of the Consent Decree or the existence of this Consent Decree to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against Verizon concerning the matters discussed in paragraphs 6 – 8 above. The Bureau also agrees that, based on the facts developed in the Investigation, and in the absence of material new evidence related to this matter, it will not use the facts developed in this Investigation through the Effective Date of this Consent Decree or the existence of this Consent Decree to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Verizon with respect to its basic qualifications, including its character qualifications, to be a Commission licensee or with respect to compliance with the Commission's rules and policies.

15. Nothing in this Consent Decree shall prevent the Commission from adjudicating complaints filed pursuant to section 208 of the Communications Act, as amended, 47 U.S.C. § 208, against Verizon or its affiliates for alleged violations of the *BA/GTE Merger Order*, or for any other type of alleged misconduct, regardless of when such misconduct took place. If any such complaint is made, the Commission's adjudication of that complaint will be based solely on the record developed in that proceeding. Nothing in this Consent Decree shall prevent the Commission from instituting new investigations or enforcement proceedings against Verizon pursuant to sections 4(i), 403 and 503 of the Communications Act in the event of any alleged future misconduct.

16. In the event that Verizon is found by the Commission or its delegated authority to have engaged in a violation of the *BA/GTE Merger Order* subsequent to the release of the Adopting Order, the Commission or its delegated authority reserves the right to consider the conduct described in paragraphs 6 - 8 above in determining an appropriate sanction. If such conduct is considered by the Commission or its delegated authority in determining an appropriate sanction, Verizon will not be estopped from litigating the issues of whether such conduct or the facts involved in such conduct actually violated the Act or the Commission's rules, the merits of Verizon's conduct, or the relevance or weight to be given such conduct under section 1.80 of the Commission's rules.

17. Verizon waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Order adopts the Consent Decree without change, addition, or modification.

18. Verizon waives any rights it may have under any provision of the Equal Access to Justice Act, 5 U.S.C. § 504.

19. In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, this Consent Decree shall become null and void and may not be used in any manner in any legal proceeding.

20. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Verizon nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Verizon and the

Commission will waive any statutory right to a trial *de novo* with respect to any matter upon which the Adopting Order is based, and shall consent to a judgment incorporating the terms of this Consent Decree.

21. The Bureau and Verizon agree that this Consent Decree is for settlement purposes only and that it does not constitute an admission, denial, adjudication on the merits, or a factual or legal determination regarding any compliance or noncompliance with the requirements of the *BA/GTE Merger Order*.

22. Verizon agrees that any violation of the Consent Decree or the Adopting Order will constitute a separate violation of a Commission order, entitling the Commission to exercise any rights or remedies attendant to the enforcement of a Commission order.

23. This Consent Decree may be signed in counterparts.

For the Enforcement Bureau
Federal Communications Commission

____
David H. Solomon
Chief

____
Date

For Verizon Communications Inc.

____
Jeffrey Ward
Senior Vice President

____
Date

COMPLIANCE PLAN OF
VERIZON COMMUNICATIONS, INC.

To better ensure compliance with the Merger Conditions set forth in the *BA/GTE Merger Order*, Verizon Communications, Inc. ("Verizon") will establish a formal compliance program, which will consist of the following remedial actions:

1. Vice Presidential steering committees

Verizon will establish one or more Vice Presidential steering committees to review the accuracy of performance and service quality reporting pursuant to Market-Opening Conditions V and XIX, the retention and submission of relevant data needed by independent auditors to examine compliance with Market Opening Conditions V, XIX and XXII and Genuity Condition VI, and the remedial actions and process improvements for compliance with such conditions set forth in this Consent Decree. The primary goals of the steering committees will be to ensure that there are reasonable assurances that (1) the performance as measured and reported by Verizon is equivalent to the performance that Verizon has actually delivered, and (2) all relevant information needed to demonstrate compliance with the Market-Opening Conditions V, XIX and XXII and Genuity Condition VI during the annual merger audits is retained and submitted to the independent auditors. The steering committee will oversee Verizon's process improvements and remedial actions for improving performance reporting accuracy and the retention and submission of data. To accomplish this, the steering committee will oversee the following principal efforts:

- Examine Verizon's processes for reviewing reporting accuracy in order to ensure that Verizon consistently can and does appropriately capture, process and report performance information in accordance with the applicable business rules.
- Conduct analysis of sample metrics data sets and change controls between data providers and data reporters to ensure metric accuracy and business rule compliance.
- Perform independent internal calculations of performance measures through a dedicated Verizon Quality Assurance Team that performs metrics replication independently of data providers and data reporters to verify metric calculation accuracy and business rule compliance.
- Implement the measures set forth in this Consent Decree regarding the retention and submission of data to the independent auditors conducting the annual merger audits of Market-Opening Conditions V, XIX, XXII and Genuity Condition VI.

Verizon will implement these activities within 45 days of the Effective Date of this Consent Decree.

2. Error analysis and prevention process

Verizon will implement a performance metrics error prevention process that will track and analyze metrics reporting accuracy for Market-Opening Conditions V and XIX. Verizon will develop a tracking mechanism that will be used in error prevention and root cause analysis. Effective with the implementation of the tracking mechanism, Verizon data providers and data reporters will be graded for their ability to deliver data in a timely and accurate manner, while their errors will be identified and analyzed for error prevention activities in order to reduce their recurrence. Vice Presidential-level employees responsible for the production of this data will have, as material elements in their performance evaluations, the accuracy, timeliness and retention of this data, and submission of this data to the independent auditors. Verizon will implement these activities within 45 days of the Effective Date of this Consent Decree.

3. Refresher training

Verizon will provide refresher training to all data providers and data reporters on proper guidelines for interpretation of business rules and change control process for Market-Opening Conditions V and XIX. Verizon will complete a training package that will be ready for use within 45 days of this Consent Decree. Verizon will review metrics business rules and their interpretations, along with the metrics change control process, with Verizon data providers and data reporters within 4 months of the Effective Date of this Consent Decree.

4. Data Retention

Annually, Verizon will communicate to all responsible executives for each Merger Condition the importance of retaining relevant information to demonstrate compliance with the Merger Conditions in the annual merger audits. Within 30 days of this Consent Decree, Verizon will (1) retain all data that Verizon used in the calculation of Market-Opening Conditions V and XIX reports for a period ending 12 months after the relevant annual audit report is issued; and (2) issue training materials to data providers to meet this requirement.

5. Data Warehouse

Verizon will establish a “data warehouse” for Market-Opening Condition V reporting data in Verizon East, and later incorporate the existing one in Verizon West, that will store and retain data for calculation of all reports in a centralized location within 12 months for Verizon East, and within 18 months for Verizon West, from the Effective Date of this Consent Decree. The data warehouse will produce a data reporting architecture for Market-Opening Condition V that will provide common platforms and procedures across the Verizon footprint for reporting metrics. Verizon will provide a progress report on this remedial action to the Enforcement Bureau every 6 months from the Effective Date of this Consent Decree until the data warehouse is completed.

6. Submission of Genuity Transactions

No later than 45 days after the Effective Date of this Consent Decree, if Verizon has not already done so, Verizon will reinforce in writing and orally, with Verizon managers responsible for transactions between Verizon and Genuity companies, the requirement for timely provision of Genuity transactions to Verizon’s Genuity audit management group in order to timely submit such transactions to the independent auditor for the relevant audit period. Reinforcement will be made in writing in Genuity Condition compliance messages periodically sent to such managers and in quarterly compliance reporting process documents. Vice Presidential-level employees responsible for the submission of these transactions will have, as a material element in their performance evaluations, the submission of these transactions to the independent auditors.

7. Review with the Enforcement Bureau

By December 31, 2002, Verizon will provide to the Enforcement Bureau a report on the effectiveness of these remedial actions and the need, if any, for further process improvements for Market-Opening Conditions V, XIX and XXII and Genuity Condition VI.

8. Compliance audit

Review of Verizon's compliance with these remedial actions will be included in the annual audits of Verizon's internal controls and compliance under Market-Opening Condition XXII.

9. Term of Consent Decree

These remedial actions will expire when the related Merger Conditions expire in accordance with the terms of the *BA/GTE Merger Order*, or subsequent orders by the Commission or its delegated authority concerning the merger.