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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-0432
)
Apparent Liability for) NAL/Acct. No. 200132080011
Forfeiture)
)
)
)

ORDER ON REVIEW

Adopted: May 24, 2001 Released: May 29, 2001

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this order, we affirm the March 15, 2001 Order of Forfeiture¹ issued by the Enforcement Bureau ('`Bureau'') finding SBC Communications, Inc. ('`SBC'') to have willfully and repeatedly violated certain of the conditions imposed when the Commission approved the merger application of Ameritech Corp. ('`Ameritech'') and SBC.² We also affirm the Bureau's imposition of a forfeiture penalty of eighty eight thousand dollars (\$88,000.00) upon SBC. Therefore, we deny SBC's April 16, 2001 Application for Review.

II. BACKGROUND

2. Under the merger conditions, SBC was required to submit specific performance data to the Commission. An independent

audit by Ernst and Young of SBC's compliance with the merger conditions reported ``material'' violations of the merger conditions, including ``instances of noncompliance regarding the accuracy of performance data.''³ In addition, the auditor also stated that SBC's ``annual compliance report did not appropriately disclose all errors related to performance measurements.''⁴ Based on the underlying data in SBC's monthly filings with the Commission, the deficiencies in those filings noted in the independent audit report, and the statements made by SBC in its Assertion on Compliance⁵ accompanying the audit report, the Bureau issued a Notice of Apparent Liability⁶ and then a Forfeiture Order.

3. In its Application for Review, SBC raises the same arguments it made in its Response to the NAL. Specifically, SBC contends that: 1) the Forfeiture Order is unlawful because SBC has substantially complied with performance reporting obligations; 2) any noncompliance was not willful; and 3) the Bureau's calculation of the forfeiture amount is arbitrary.

III. DISCUSSION

4. Based upon our review of SBC's Application for Review and the record in this matter, we find no reason to reverse the Bureau's decision in this case. Accordingly, we adopt the reasoning of the Forfeiture Order and incorporate the same here, with the limited additional comments below.

5. We reject SBC's contention that it has substantially complied with its performance reporting obligations.⁷ Using misleading statistics and ``apples to oranges'' comparisons, SBC argues that its performance reports were ``near-perfect'' and that the Bureau's finding of substantial noncompliance is ``preposterous.''⁸ Our examination of the data points impacted by SBC's errors reveal that SBC has significantly overstated the accuracy of its filings. For instance, in Attachment A to its Application for Review, SBC compares 17 ``alleged errors'' for January 2000 with more than 1500 ``total measures and submeasures reported.''⁹ A more appropriate calculation would compare the 17 types of errors described in the Forfeiture Order to the 60 performance measurements for the SWBT, PacBell, and Nevada Bell regions. This calculation would raise SBC's non-compliance rate to 28 percent. Moreover, each of the 17 types of errors impacted numerous reported measures.⁹ Our own analysis concludes that SBC's reporting violations in its January, 2000 report affected 546 data points out of the 2769 measures SBC reported that month for all seven states in SBC's SWBT, PacBell, and Nevada Bell regions. Thus, we find that almost 20 percent of SBC's data for January 2000 was flawed. To the extent that later reports contained fewer errors, we find that they were nonetheless part of a pattern of noncompliance sufficient to warrant forfeiture.

6. We also reject SBC's contention that no forfeiture is appropriate because SBC's errors represented reasonable interpretations of the Business Rules.¹⁰ Like the Bureau, we find that the rules at issue were clear, and that SBC unilaterally modified these rules in the way in which it reported the data without first obtaining the necessary permission. The SBC/Ameritech Merger Order clearly stated that SBC was required to obtain explicit approval from the Commission for any changes it wished to implement in the Business Rules.¹¹ Moreover, we reject SBC's argument that the Common Carrier Bureau's alleged failure to object to these unrequested changes constituted consent to their implementation.¹² The Common Carrier Bureau informed SBC in May, 2000 that it was concerned about SBC's failure to seek Commission approval of several changes to the

Business Rules before they were implemented and reiterated the prior approval requirement.¹³ Thus, we reject SBC's argument that its reporting of certain performance measurements in a manner contrary to that clearly stated in the Commission's Business Rules was reasonable.¹⁴

7. We also reject SBC's suggestion that certain of its interpretations of the Business Rules were not only reasonable, but were the only reasonable interpretation, i.e. that the Bureau's interpretation was simply wrong.¹⁵ Contrary to SBC's assertion in this regard, we find that the Business Rules for performance measurements 4c, 12b, and 12c clearly specify the disaggregation level to be used, and that SBC did not follow these requirements. The auditor found material errors, and SBC's own Assertion on Compliance confirms that there were ``disaggregation errors,' ' in these measurements.¹⁶ Therefore, we affirm the Bureau's findings.

8. We agree with the Bureau's determination that SBC willfully and repeatedly failed to comply with the merger conditions.¹⁷ As the Bureau correctly stated, it has long been established that the word ``willfully,' ' as employed in section 503(b) of the Act, does not require a demonstration that SBC knew that it was acting unlawfully. Section 503(b) requires only a finding that SBC knew it was doing the acts in question and that the acts were not accidental. Even assuming, moreover, that we accept SBC's argument that Midwest Radio-Television¹⁸ somehow requires the Commission to find a lack of concern or indifference on the part of the licensee for compliance with our rules before we may assess a forfeiture, SBC's repeated and substantial violations of the relevant Business Rules demonstrate a lack of care sufficient to satisfy SBC's proffered willfulness standard. Given the number of violations at issue, SBC has failed to demonstrate that its conduct reflected diligence in complying with the Commission's requirements.

9. Finally, we find that the Bureau's calculation of the forfeiture penalty is reasonable and appropriate. Section 503(b)(2)(D) of the Act and the Forfeiture Policy Statement allow the Commission considerable flexibility to determine the appropriate forfeiture.¹⁹ Contrary to SBC's contention, the Bureau was not required to limit its consideration of SBC's past history of noncompliance to cases involving performance measurement reporting.²⁰ The Bureau appropriately considered adjudicated findings of violations of the Act or Commission rules by SBC other than violations of the merger reporting requirements. We also reject SBC's assertion that the Bureau may have ``double counted' ' the fact that the violations were repeated by using that fact both to determine that a forfeiture was warranted under 47 U.S.C. § 503 (b)(1)(A) and to determine that an upward adjustment of the base forfeiture amount set forth in the Forfeiture Policy Statement was appropriate.²¹ There is nothing unlawful or inappropriate about taking account of the repeated nature of the violations in both contexts. In summary, we find nothing unreasonable in imposing a \$88,000 forfeiture on a company of SBC's resources for the types of violations at issue here.

IV. ORDERING CLAUSES

10. For the reasons discussed above, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), and 503 of the Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 503, the Application for Review filed by SBC Communications IS DENIED.

11. 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 SHALL FORFEIT to the United States Government the sum of eighty eight thousand dollars (\$88,000.00) for willfully or repeatedly violating the Commission's merger conditions in the SBC/Ameritech Merger Order.

12. 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 will be referred to the Department of Justice for collection pursuant to section 504(a) of the Act, 47 U.S.C. § 504(a).

13. IT IS FURTHER ORDERED that a copy of this Order on Review 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

Magalie Roman Salas
Secretary

DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH

RE: SBC COMMUNICATIONS INC. APPARENT LIABILITY FOR FORFEITURE,
ORDER ON REVIEW, FILE NO. EB 00-IH-0432, NAL/ACCT. NO.
200132080011.

I respectfully dissent from the Commission's decision to affirm the Order of Forfeiture issued by the Enforcement Bureau (Bureau) finding SBC Communications, Inc. (SBC) to have willfully and repeatedly violated certain of the conditions imposed when the Commission approved the merger application of Ameritech Corp. and SBC. I am troubled by the Commission's finding that SBC ``willfully'' and ``repeatedly'' violated the complex set of rules imposed by the merger conditions. Although the Bureau and the Commission find that the rules at issue were ``clear,'' I suspect that they were at the very least open to reasonable differences of interpretation. I would have preferred an ongoing dialogue with SBC to reach an understanding of SBC's obligations under the merger conditions, rather than finding a willful violation of our rules. Although I do have continuing concerns about the merger conditions, this is not the basis of my concern here. Once adopted, I expect strict compliance with the Commission's rules. But rules must be clear if they are to be fairly enforced.

1SBC Communications, Inc., Order of Forfeiture, DA 01-680 (Mar. 15, 2001) ('`Forfeiture Order'').

2Applications 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, 14856 (1999) ('`SBC/Ameritech Merger Order'').

3 See Aug. 31, 2000 Report of Independent Auditors, Ernst & Young, LLP, at 2 ('`Auditor's Report on Compliance''). This report only covered SBC's conduct in Texas, Oklahoma, Kansas, Missouri, and Arkansas, California and Nevada from October 8, 1999 through December 31, 1999. See also Aug. 31, 2000 Report of Management on Compliance with the Merger Conditions ('`Management's Assertion on Compliance''), Attachment A at 13.

4 Auditor's Report on Compliance at 2.

5 Management's Assertion on Compliance; NAL at ¶ 6; Forfeiture Order at ¶¶ 2, 4.

6 SBC Communications, Inc., Notice of Apparent Liability for Forfeiture, DA 00-2858 (Dec. 20, 2000) ('`NAL'').

7 Application for Review at 14.

8 Application for Review at i and 11.

9 See Application for Review at 11.

10 The Business Rules accompanying the Carrier-to-Carrier Performance Plan describe the specific data requirements and measurement standards for each performance measurement. See SBC/Ameritech Merger Order, Appendix C, Attachments A-2a and A-2b.

11 See SBC/Ameritech Merger Order, Appendix C, Attachment A at ¶ 4.

12 Application for Review at 16.

13 Letter from Carol Matthey, Deputy Chief, Common Carrier Bureau, to Marian Dyer, Vice President-Federal Regulatory, SBC, dated May 30, 2000.

14 See Application for Review at 17. SBC's reliance on *United States v. Rust Communications Group, Inc.*, 425 F.Supp. 1029, 1033 (E.D. Va. 1976), is inapposite. In *Rust*, the court found the antenna input power rule at issue did not provide the licensee with requisite notice of the specific conduct that the Commission considered to be a violation warranting a sanction. Here, by contrast, the Business Rules clearly specified the performance data SBC was required to submit to the Commission pursuant to the merger conditions.

15 Application for Review at 14-15.

16 Management's Assertion on Compliance, Attachment A at 13.

17 Forfeiture Order at ¶¶ 14-17.

18 See *Midwest Radio-Television, Inc.*, Memorandum Opinion and Order, 45 FCC 1137, 1141 (1963).

19 Forfeiture Order at ¶ 20. 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, 12 FCC Rcd 17087, 17100 (1997) ('`Forfeiture Policy Statement''); recon. denied 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

20 Application for Review at 23-24. See 47 U.S.C. § 503(b)(2)(D) (emphasis added) ('`In determining the amount of such a forfeiture penalty, the Commission or, its designee shall take into account... with respect to the violator,... any history of prior offenses....'').

21 Application for Review at 25.