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

In the Matter of	)	
	)	File No. EB-01-IH-0339
SBC Communications, Inc.	)	
	)	NAL/Acct. No. 200132080059
Apparent Liability for Forfeiture	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: October 12, 2001 **Released: October 16, 2001**

By the Commission:

I. INTRODUCTION

1. This Notice of Apparent Liability and Order ("NAL") relates to a matter at the heart of the Commission's processes -- the completeness and accuracy of information submitted by regulated companies to the agency. Since April 2001, the Commission's Enforcement Bureau has conducted an informal investigation into potential misconduct by SBC Communications, Inc. ("SBC") relating to inaccurate statements in three affidavits filed by the company in the proceeding in which the Commission granted SBC the authority to provide long-distance service in Kansas and Oklahoma.[1]

2. Based on our evaluation of the information that SBC has supplied to the Commission during the course of this investigation, we find that SBC is apparently liable for a forfeiture for: (1) apparently failing to notify the Commission within 30 days that information contained in its section 271 application for Kansas and Oklahoma was no longer substantially accurate or complete in all significant respects, in apparent violation of section 1.65 of the Commission's rules, 47 C.F.R. § 1.65; (2) apparently making a misrepresentation or a willful material omission bearing on a matter within the jurisdiction of the Commission in a written statement submitted by SBC in connection with the investigation into the filing of the incorrect affidavits in the Kansas/Oklahoma section 271 proceeding, in apparent violation of section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17; and (3) apparently failing to comply with the terms of a consent decree that resolved an earlier investigation of SBC involving analogous issues and required SBC to train certain employees on Commission rules relating to contacts with the agency.[2]

3. Based on these findings, we find SBC apparently liable for a forfeiture in the amount of two million, five hundred twenty thousand dollars ($2,520,000), which is the statutory maximum for these apparent violations. In addition to these specific apparent violations, we also note our more general concern that SBC has not exercised the degree of care we expect from our regulatees in dealing with the Commission. Finally, we also order SBC to file certain reports regarding future compliance with section 1.65 and the *SBC/SNET Consent Decree*.

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[1] *Joint Application by SBC Communications, Inc., Southwestern Bell Tel. Co., and Southwestern Bell Commun. Serv., Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, FCC 01-29 (rel. Jan. 22, 2001) (*"Kansas/Oklahoma Order"* or *"Order"*), *appeal pending sub nom. Sprint Communications Co. L.P. et al. v. FCC,* No. 01-1076 (D.C. Cir. 2001). The Enforcement Bureau also is separately investigating additional inaccurate affidavits filed by SBC in the Kansas/Oklahoma section 271 proceeding relating to the company's Loop Maintenance Operating System ("LMOS"). SBC, on June 8, 2001, notified the Commission pursuant to section 1.65 of our rules that information filed concerning LMOS was inaccurate. Letter from Geoffrey M. Klineberg, Esq., Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. to Magalie Roman Salas, Secretary, Federal Communications Commission at 1 (June 8, 2001).

[2] *SBC Communications, Inc.,* Order, 14 FCC Rcd 12741 (1999) ("*SBC/SNET Consent Decree*") (resolving investigation into potential violations by SBC of sections 271 and 272 of the Communications Act and section 1.65 of the Commission's rules, and potentially inaccurate statements made by SBC employees, all in relation to SBC's application for transfer of various authorizations from Southern New England Telephone Company ("SNET") to SBC).

II. FACTS

A. SBC Applies for Section 271 Authority in Kansas and Oklahoma

4. On October 26, 2000, SBC filed an application with the Commission seeking authorization to provide in-region, interLATA services in Kansas and Oklahoma in accordance with section 271 of the Communications Act of 1934, as amended.[3] Under section 271, SBC had to demonstrate that it provided competitors with nondiscriminatory access to unbundled network elements, pursuant to section 251(c) and 252(d) of the Act.[4] As part of its obligation to provide access to these network elements, SBC also had to show that it provided competing carriers with nondiscriminatory access to its operations support systems (OSS), which are used by carriers for pre-ordering, ordering, provisioning, maintenance and repair, and billing services.[5]

5. The Kansas/Oklahoma section 271 proceeding marked the first time that an applicant, as part of its section 271 showing, had to demonstrate compliance with the terms of the Commission's *UNE Remand Order*.[6] The *UNE Remand Order* required, among other things, that an incumbent local exchange carrier such as SBC make loop qualification information available to competitors as part of the pre-ordering functionality of its OSS.[7] SBC thus had to show, as part of the section 271 proceeding, that it provided competitors with the same level of access to loop information as that available to itself, so that a competitor could determine during the pre-ordering stage whether a requested loop was capable of supporting advanced services equipment.[8]

6. In its application, SBC maintained that it provided access to loop qualification information in accordance with the *UNE Remand Order*.[9] On November 15, 2000, however, IP

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[3] 47 U.S.C. § 271. Although our decision granting SBC's section 271 application refers to the SBC affiliates that applied for section 271 approval as "SWBT" (the acronym for the SBC affiliate Southwestern Bell Telephone Co.) throughout this Notice of Apparent Liability and Order we will refer to SBC and its affiliates simply as "SBC."

[4] *See* 47 U.S.C. § 271(c)(2)(B)(ii).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15752, paras. 516-18 (1996) (subsequent history omitted); *see also Application by 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 20,543, 20,614, paras. 131-32 (1997).

[6] *Kansas/Oklahoma Order*, para. 121.

[7] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, 15 FCC Rcd 3696, 3885, paras. 427-31 ("*UNE Remand Order*").

[8] *Kansas/Oklahoma Order*, para. 121 n.325 (citing *UNE Remand Order,* 15 FCC Rcd at 18426, para. 148).

[9] *See* Affidavit of Carol Chapman, para. 105-08, attached to *Brief in Support of Joint Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217 (filed Oct. 26, 2000) ("SBC Brief").

Communications Corp. ("IP") filed comments alleging that SBC "filtered" its loop qualification information for requesting carriers in violation of the *UNE Remand Order*.[10] IP contended that SBC did not provide access to all of the information contained in its own electronic databases, but rather provided information on only the "best loop," as determined by SBC, to the particular end user. According to IP, this withholding of information amounted to improper "filtering" in contravention of Commission rules.

7. Two weeks later, IP made a second, but related, allegation. IP claimed that SBC's loop qualification system failed to return information on available copper loops to requesting carriers when an end user was served by both copper and fiber.[11] IP asserted that, where an end user had both copper and fiber loops to its premises, requesting carriers would not receive loop qualification information on the copper loop because SBC's loop qualification system only returned fiber as the "best loop." As IP noted, competing carriers that were capable of providing service only over copper loops would effectively be precluded from offering service because such carriers would not know that the copper loops existed.[12] IP asserted that this practice also violated the requirements of the *UNE Remand Order*.

8. On December 11, 2000, SBC filed its reply brief and supporting affidavits in the Kansas/Oklahoma section 271 proceeding. In response to IP's allegations, SBC denied that it unlawfully filtered information in its loop qualification system. SBC first argued that it had no obligation to return information on more than one loop to a requested address and that therefore IP's first allegation was irrelevant. Additionally, SBC contended that the method by which its loop qualification system retrieved and returned information to requesting carriers was without regard to the "best loop."[13] Relying on three supporting affidavits, SBC claimed that its loop qualification process utilized the same logic as its provisioning system. Thus, according to the affiants, in returning loop information, SBC's system would behave as if it were actually provisioning the service requested to a particular address, including, where necessary, piecing together previously unassociated parts of a loop. Since the system could provision digital subscriber line (xDSL) service only over a copper loop, the loop qualification system would provide information about such loops in response to queries from competitors.[14]

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[10] Comments of IP Communications Corp. on SBC's Applications for 271 Relief in Kansas and Oklahoma, CC Docket No. 00-217, at 12-14 (filed Nov. 15, 2000) ("IP Comments").

[11] Letter from Howard J. Siegel, Vice President of Regulatory Policy, IP Communications Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed Nov. 30, 2000) ("IP *Ex Parte* Letter").

[12] *Id.* at 2.

[13] *See Reply Brief of Southwestern Bell In Support of InterLATA Relief in Kansas and Oklahoma*, CC Docket No. 00-217, at 69-70 (filed December 11, 2000) ("SBC Reply Brief").

[14] *See* Affidavit of Mark Welch paras. 5-6, Affidavit of Angela Cullen paras. 2-7, and Affidavit of Carol Chapman paras. 5-12, attached to SBC Reply Brief.

9. The Commission accepted this explanation. In the *Order* granting the application, the Commission found that SBC had demonstrated that it provided competing carriers with nondiscriminatory access to the same detailed information about the loop, in the same time frame, as the company made available to itself.[15] In so finding, the Commission referred to the representations made by the SBC personnel in their reply affidavits, including representations that the loop qualification process used the same logic as the provisioning process.[16] In addressing the IP "filtering" allegations, the Commission determined, with respect to IP's first allegation, that it was "not self-evident from the *UNE Remand Order*" that SBC had to return information on *all* loops to a given address.[17] As a result, the Commission declined to find that SBC had violated the *UNE Remand Order* on those grounds. The Commission also rejected IP's allegations that SBC did not return loop information on copper loops at an address also served by fiber. Although the Commission stated that, if IP's second allegation was true, this practice would "appear to violate the *UNE Remand Order*," it concluded that SBC had satisfactorily refuted the IP allegations.[18]

10. The three affidavits supporting the reply brief that addressed the loop qualification issue were signed by SBC employees Carol Chapman, Mark Welch, and Angela Cullen (collectively, "the reply affiants"). As noted above, each of the reply affiants claimed in his or her affidavit that SBC's loop qualification system searched for information about loops as if it were provisioning the particular service requested. Therefore, if a carrier requested xDSL service over a copper loop, SBC's loop qualification system would return information as if it were actually provisioning xDSL service over the copper loop. In reality, however, SBC's system provided information only about the "first" loop in SBC's records, regardless of whether that loop was a xDSL-capable copper loop or a fiber loop. Thus, where an address was served by both copper and fiber loops, unless the copper loop was also the "first loop" in SBC's systems, SBC's loop qualification system would not disclose that loop to a requesting CLEC.

B. The Operation And Oversight Of SBC's Loop Qualification System At The Time The Reply Affidavits Were Filed

11. Generally, xDSL service may only be provided via loops using copper wire, as opposed to loops composed of fiber optic cable. Thus, before a carrier undertakes to provide xDSL service to a given customer, the carrier first determines whether that customer is connected to the wider telephone network via a copper loop. Without a copper loop, that customer cannot receive xDSL service. Until April 2001, SBC's loop qualification system identified only the "first" loop loaded in SBC's Loop Facilities Assignment and Control System

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[15] *Kansas/Oklahoma Order* para. 124.

[16] *See, e.g.*, *id.* para. 126 n.342, para. 128 n.352, para. 129 nn.355-56.

[17] *Id.* para. 128.

[18] *Id.* para. 129.

(LFACS).[19] Thus, when a carrier sought to learn whether it could provide xDSL service to a potential customer, SBC's loop qualification system would tell the carrier about a copper loop only if it was the "first" loop on SBC's system. Otherwise, SBC would only inform the carrier that the potential customer was served only by a non-copper loop.[20]

12. Beginning about June 2000, John Mileham was the loop qualification project manager for SBC. In that position, Mr. Mileham was responsible for the day-to-day management of SBC's loop qualification system and was therefore one of the most knowledgeable people at the company on the system.[21] In August 2000, Mr. Mileham prepared an overview describing the process by which SBC's loop qualification system searched for information on behalf of requesting carriers. Mr. Mileham's overview discussed the process of returning information to a carrier that requested actual loop information.[22] Mr. Mileham wrote that the loop qualification process would first query a back-end database, LFACS. LFACS would then return a list of circuit identifiers for the requested end user address, and the loop qualification system would search LFACS for the specific loop make-up information on the "first circuit" from that list (as opposed to the first *copper* circuit).[23] Mr. Mileham forwarded his

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[19] Letter from Priscilla Hill-Ardoin, Senior Vice President, SBC Communications, Inc. to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission at 4 (Apr. 6, 2001) ("SBC Report").

[20] SBC estimates that this scenario could have happened no more than five percent of the time. *See* Letter from Edwardo Rodriguez, Jr., Director, Federal Regulatory, SBC Communications, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission at 5 (Apr. 13, 2001) ("SBC 1.65 Report").

[21] After submitting its April 6 report, SBC produced additional information in response to a letter of inquiry from the Enforcement Bureau dated May 4, 2001. Letter from David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission to Sandra L. Wagner, Vice President-Federal Regulatory, SBC Telecommunications, Inc. (May 4, 2001) ("Letter of Inquiry"). Additionally, at the request of the Enforcement Bureau, SBC made available six employees for informal interviews: Carol Chapman, Angela Cullen, John Mileham, Edwardo Rodriguez, Jr., Dennis Schuessler, and Mark Welch. Unless otherwise indicated, references to statements by these employees refer to their statements in these interviews.

[22] SBC's loop qualification system allows competitors to request access to three different types of loop make-up information. Most relevant, competitors could request access to actual loop information that SBC may have in its electronic databases based on a particular address. The pre-ordering transactions at the heart of this NAL involve actual loop information requests. Competitors could also request design loop information, which is the theoretical make-up of a loop based on the standard loop design for the longest loop to the end-user's distribution area, or could request that SBC perform a manual search of its paper records to determine actual loop information. *Order*, para. 122 & n.329.

[23] As fully described in Mr. Mileham's loop qualification overview:

> **Process**: Loop Qual performs a facility assignment query into LFACS based on the service address. LFACS returns a list of circuit id's associated with that address. The list order is not in any predictable order but is repeatable for any given address. *Loop Qual then performs a loop makeup query into LFACS using the first circuit id from the facility assignment list*. LFACS builds the loop makeup starting at the service address and working backwards toward the central office gathering cable length, gauge break, load coil, bridged tap, disturber and risk data. Added to this is information based on the distribution area such as Pronto RT capability and Loop Medium Type. The loop makeup (LMU) is then presented to the requestor.

(continued….)

overview to numerous persons within SBC, including SBC's legal department and at least one of the SBC reply affiants, Carol Chapman.

13. In addition, as part of his duties as loop qualification project manager, Mr. Mileham hosted technical meetings and conference calls with competing carriers designed to provide a forum for questions and answers concerning technical aspects of the loop qualification system. During these sessions, which began in June 2000, competing carriers complained to him that they were receiving insufficient information on available copper loops. After making inquiries, he determined that the system could be programmed to return information on copper loops. Mr. Mileham told Enforcement Bureau staff that, beginning in or around September 2000, he began the pre-work on a copper loop availability change request. At some point between mid-December 2000 and January 10, 2001, Mr. Mileham submitted a change request to effectuate this modification.[24]

14. Mr. Mileham was unquestionably aware that SBC's loop qualification system did not use provisioning logic, and that the system sometimes did not return loop make-up information about available copper loops serving particular end users. As events unfolded, however, Mr. Mileham's knowledge of the SBC loop qualification system was not reflected in the reply affidavits. Instead, each of those affiants submitted an affidavit asserting that SBC's system worked in a manner contrary to the facts.

C. The Preparation And Submission Of The Inaccurate Reply Affidavits

1. The Angela Cullen Affidavit

15. Angela Cullen was one of the reply affiants. At the time the affidavits were filed, Ms. Cullen was a Director in SBC's information technology organization. As part of her duties in that position, she measured the performance of SBC's loop qualification system and stated she was familiar with the loop qualification process. Earlier in the Kansas/Oklahoma section 271 proceeding, Ms. Cullen had filed an affidavit addressing the technical method by which competing carriers interacted with SBC's OSS for pre-ordering and ordering xDSL capable loops.[25] After IP made its "filtering" allegations, SBC chose Ms. Cullen to submit another affidavit to accompany the reply brief refuting IP's claims.

16. Before Ms. Cullen began preparing her affidavit, however, she received an e-mail from an SBC attorney stating that SBC's loop qualification system returned information on the loop that the system would actually provision, if the requesting carrier had requested xDSL or

(Continued from previous page)
John D. Mileham, SBC Loop Qual System Overview 2 (Aug. 22, 2000) (emphasis added).

[24] In his interview with the Enforcement Bureau, Mr. Mileham said that he submitted the change request in mid-December, following his review of Mr. Welch's Reply Affidavit in the Kansas/Oklahoma proceeding.

[25] Affidavit of Angela Cullen, para. 2, attached to SBC Brief.

line sharing service.[26] According to Ms. Cullen, she was asked to "verify" that the loop qualification system worked as described in the attorney's e-mail. Ms. Cullen told the Enforcement Bureau that she copied the attorney's description (with minor non-substantive changes) into an e-mail she sent to two other SBC employees whom she believed to be subject matter experts on the SBC system. In her e-mail message, Ms. Cullen stated that "[w]e need to present rebuttal testimony that says from a technical perspective LoopQual provides" and then inserted the attorney's description.

17. Over the next few days, Ms. Cullen's e-mail message was forwarded to several other SBC employees, including Mr. Mileham and Dennis Schuessler, who was an area manager at SBC and responsible for SBC's pre-ordering OSS electronic interface.[27] Although she did not originally direct her e-mail to Messrs. Mileham and Schuessler, Ms. Cullen told the Enforcement Bureau that she considered both men to be subject-matter experts regarding loop qualification.

18. The day after receiving Ms. Cullen's message, Mr. Schuessler responded that the e-mail's description of the loop qualification system was "basically accurate."[28] Mr. Schuessler said that requesting carriers sent requests for loop qualification information to SBC's LFACS, which behaved as if it were actually provisioning the loop requested, and that when the system "requests actual information from LFACS, LFACS uses the same algorithms that it would to provision the order."[29] Mr. Schuessler noted that he would "leave the technical details to John Mileham to answer," and copied Mr. Mileham on his response.[30]

19. Mr. Schuessler has stated that, at the time he responded to Ms. Cullen's e-mail, he did not consider himself to be an expert on SBC's loop qualification system. Mr. Schuessler has also stated that he did not perform any research into the company's system following his receipt of the Cullen e-mail. Rather, he gave an answer that was his best understanding of the system at

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[26] *See* Attachment G to SBC Report. Ms. Cullen's block quote, and the portion of her e-mail that originated from the SBC attorney's e-mail to her, states (emphasis in original):

> . . .loop qual info on the loop that would be provisioned if the customer requested an xDSL-capable loop or a HFPL UNE for the customer (address searched). Our systems are *provisioning* systems, which, when an order is placed, search for a specific loop at that … requested address on which we can provision an xDSL capable loop. The systems aren't designed to merely provide "information;" they design service and tell technicians what to provision so that we can provide that service. If a specific telephone number using a specific loop is requested for line sharing (note that this doesn't or shouldn't matter with a new, stand-alone xDSL-capable loop), and the loop provisioned isn't the same as the existing loop used for voice service, we do a line station transfer (LST) to ensure that the voice service is transferred to the xDSL-capable loop.

[27] *See* Attachment G to SBC Report.

[28] *Id.*

[29] *Id.*

[30] *Id.*

the time. In an interview with the Enforcement Bureau, Mr. Schuessler admitted that he should not have responded substantively to Ms. Cullen's e-mail, but that he simply wanted to help her in light of the failure by other persons to respond to her request for assistance. According to Mr. Schuessler, Mr. Mileham was the actual expert on the subject at issue, and he assumed that Mr. Mileham would correct his statement if he were wrong. Although he and Mr. Mileham had several conversations regarding SBC's loop qualification system between December 2000 and April 2001, the two claim that they never discussed Ms. Cullen's e-mail or her subsequent affidavit.

20. Both Ms. Cullen's e-mail and Mr. Schuessler's response were forwarded to Mr. Mileham while he was on vacation. According to Mr. Mileham, when he returned home on December 3, 2000, he opened his e-mail from home and read some of approximately three hundred e-mail messages before shutting down his computer. The next day at the office, he claims, he discovered that the e-mails he had downloaded the day before were missing. As Mr. Mileham told the Enforcement Bureau, when he returned home to retrieve the "missing" e-mails, his computer crashed for some reason and he was forced to reload his operating system onto his home computer, apparently deleting the "missing" e-mails forever.

21. Mr. Mileham represents that, although his previous job involved desktop computer support, he did not attempt to recover the three hundred lost e-mails. As he told the Enforcement Bureau, he assumed that they were lost when he re-loaded his operating system. Nor did Mr. Mileham solicit anyone's help in recovering the lost e-mails or tell any other SBC employees, including his supervisors, about his computer crash. According to Mr. Mileham, he was the only SBC employee who had experienced this problem. Finally, Mr. Mileham did not disclose the deletion of his e-mails to any of the competing carriers who communicated with him via e-mail to resolve questions about SBC's loop qualification system. Mr. Mileham stated that because of this system crash, he did not review Ms. Cullen's e-mail or Mr. Schuessler's response until March 2001. According to Mr. Mileham, had he reviewed either message at the time they were sent, he would have explained that the loop qualification system found the first loop to the given address, but would not necessarily identify a copper loop if one was present.

22. Angela Cullen knew Mr. Mileham was responsible for loop qualification. Even though she had received no response from him, however, Ms. Cullen never tried to contact him after receiving Mr. Schuessler's response. Instead, Ms. Cullen proceeded to draft an affidavit based upon her own research and the feedback she received from Mr. Schuessler and another SBC affiant, Carol Chapman. In the affidavit accompanying SBC's reply comments, Ms. Cullen asserted that SBC's loop qualification system returned information to requesting carriers by querying the LFACS provisioning system. Ms. Cullen stated, consistent with Mr. Schuessler's e-mail, that when a carrier requested information from SBC's loop qualification system, LFACS presented the requesting carrier with information on the loop that the system would use to provision the requested service.[31] More precisely, Ms. Cullen said that LFACS "simply provides

[31] Reply Affidavit of Angela Cullen, para. 4, attached to SBC Reply Brief ("Cullen Reply Aff.").

the information on the loop that would be assigned to fulfill a request for DSL service to the address."[32]

2. The Mark Welch Affidavit

23. Mark Welch, a General Manager in SBC's Network Regulatory organization, also submitted a reply affidavit responding to IP Communications' allegations. Mr. Welch was responsible for developing SBC's network policies, primarily with respect to the outside network.[33] Prior to his reply affidavit, Mr. Welch had never testified or submitted an affidavit on the topic of SBC's loop qualification system. Rather, Mr. Welch said his participation in regulatory proceedings had focused on other topics, such as provisioning, maintenance and repair testing, and general wholesale products functionality matters.

24. In a five-page affidavit attached to SBC's reply comments, Mr. Welch explained that SBC would perform a line and station transfer ("LST") when provisioning a competitor's order in the event that the competitor requested DSL or line sharing service to an end user that was being served by facility already in use. In such situations, LFACS would identify or create from existing pieces of the network a spare circuit over which SBC could provision the service requested by the competitor. In a single sentence, Mr. Welch's affidavit then claimed SBC would provide loop qualification information on a xDSL-capable facility, if available, and would perform the LST to provision the requested xDSL capable loop, rather than return information to the requesting carrier on an existing fiber loop.[34] This assertion was wrong.

25. Mr. Welch said that when he drafted his affidavit, he relied upon his understanding of the loop qualification system, which developed during his attendance at State collaborative DSL proceedings. At these proceedings, he primarily discussed physical provisioning of DSL and line sharing. Mr. Welch said he gained his loop qualification knowledge not from his official duties but simply from being "present" when others discussed the loop qualification system. Mr. Welch told the Enforcement Bureau, however, that he did not write the language in his affidavit regarding loop qualification and that it was not his idea to include the subject in his affidavit. Mr. Welch stated that when he initially drafted his reply affidavit, he did not include anything about the loop qualification system. Mr. Welch could not recall how the sentence got into his affidavit, who wrote it, or whose idea it was to add it to his affidavit. But in a separate interview with the Enforcement Bureau, Carol Chapman indicated that she had suggested to Mr. Welch that he include language regarding SBC's loop qualification system in his affidavit, although she did not recall drafting any specific language.

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[32] *Id.* para. 4.

[33] Reply Affidavit of Mark Welch para. 1, attached to SBC Reply Brief ("Welch Reply Aff.").

[34] Welch Reply Aff. para. 6. Mr. Welch wrote: "If there is an available DSL-capable facility to that address, SWBT will provide the loop qualification information for that DSL-capable facility and perform the LST versus providing loop qualification information for the line that is served by DLC and therefore is not DSL-capable." *Id.*

26. On December 6, 2000, Mr. Welch sent a draft of his five-page affidavit -- which by then contained the loop qualification sentence -- by e-mail to a number of SBC employees, including Mr. Mileham, Mr. Schuessler, and Ms. Chapman.[35] In the e-mail, Mr. Welch briefly summarized the main points in his affidavit, attached it, and asked for comments. The only person who responded to his request was John Mileham, who (now back from vacation) sent his response the next day. Mr. Mileham made only minor edits and failed to correct the one sentence in Mr. Welch's affidavit that described matters within Mr. Mileham's job responsibilities.[36] Mr. Mileham admits that the Welch affidavit was incorrect and that he understood at that time how the system actually worked. Mr. Mileham claimed in an affidavit filed with the Commission during the Enforcement Bureau investigation that he reviewed Mr. Welch's affidavit "late at night" and that he "must have 'skipped' this important sentence."[37] As discussed below, however, the evidence demonstrates that Mr. Mileham actually reviewed Mr. Welch's affidavit around noon.[38]

3. The Carol Chapman Affidavit

27. Carol Chapman submitted the third SBC reply affidavit addressing the IP allegations. At the time SBC filed the reply affidavits, Ms. Chapman was an associate director in SBC's wholesale marketing group and, like Ms. Cullen, had drafted a previous affidavit accompanying SBC's application. In late November 2000, she was approached to draft a reply affidavit addressing a number of issues raised by competing carriers, including the IP allegations concerning loop qualification. Ms. Chapman told the Enforcement Bureau that, in writing her reply affidavit, she relied on draft versions of the Welch and Cullen affidavits, specifically using their explanations of how the loop qualification system worked. But Ms. Chapman also stated that she was the person who suggested to Mark Welch that he discuss loop qualification in his affidavit, although she did not recall drafting any language for use in the Welch affidavit. Ms. Chapman did not attempt to contact Mr. Mileham about the issue even though she knew he oversaw SBC's loop qualification system.

28. Like those of Ms. Cullen and Mr. Welch, Ms. Chapman's affidavit incorrectly described how the loop qualification system functioned. Specifically, Ms. Chapman represented that LFACS, upon receipt of a loop qualification request, would perform the same type of query as if it were provisioning the service requested and that the "the loop qualification process follows the same process as the assignment process."[39]

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[35] *See* Letter from Sandra L. Wagner, Vice President-Federal Regulatory, SBC Telecommunications, Inc. to Brad Berry, Deputy Chief, Enforcement Bureau, Federal Communications Commission (May 3, 2001) ("May 3, 2001 Letter").

[36] Mileham Aff. para. 7.

[37] *Id.*

[38] *See* May 3, 2001 Letter.

[39] Reply Affidavit of Carol Chapman para. 5, attached to SBC Reply Brief.

29. In addition to allegedly relying on Mr. Welch and Ms. Cullen in her reply affidavit, Ms. Chapman used her own understanding of the loop qualification process. Specifically, she had worked on SBC's team that developed the loop qualification offering between January and May 2000. According to Ms. Chapman, because of a series of changes in the loop qualification system during this period, it was not unusual for team members to have different understandings of how the system worked. Ms. Chapman stated that at one point, she believed that the loop qualification system looked only for the first available loop to an end-user, but was informed otherwise by another SBC employee.

30. But well before she submitted her reply affidavit, Ms. Chapman had received and read the loop qualification overview drafted by John Mileham. As described above, the Mileham overview accurately stated that SBC's loop qualification system would provide information only about the "first" loop on SBC's system. Thus, carriers requesting a copper loop to a given address would be told of such a loop only if that loop was also the "first" loop. Ms. Chapman stated in an interview with the Enforcement Bureau that she misread the overview at that time and mistakenly thought that the description referred to the LFACS search for copper loops during provisioning. Ms. Chapman stated that Mr. Mileham's overview accurately describes the loop qualification as it actually worked at that time, that is, by looking for the "first" loop. Ms. Chapman stated that she did not consult the loop qualification overview during the preparation of her reply affidavit.

D. Questions Arise Regarding The Accuracy Of The Reply Affidavits

31. On December 11, 2000, SBC submitted its reply brief to the Commission and included the affidavits from Ms. Cullen, Mr. Welch and Ms. Chapman. The Commission granted SBC's application and, in the *Order* released on January 22, 2001, referred to SBC's representations concerning the operation of the loop qualification system and how LFACS would return information to a requesting carrier as if it were provisioning the service requested.[40]

32. In early February 2001, a few weeks after the Commission released the *Order*, Dennis Schuessler read the *Order's* loop qualification discussion. During his review, Mr. Schuessler discovered what he believed was an apparent inconsistency between the Commission's description of how SBC's loop qualification system worked and what he had learned about the system in a state loop qualification proceeding in Illinois.[41]

33. Within the next few days, Mr. Schuessler met with Angela Cullen regarding this issue.[42] In that meeting, he expressed concern that the Commission had incorrectly described SBC's loop qualification system, and had done so in reliance on the reply affidavits. But rather than investigating the matter further, Ms. Cullen simply reminded Mr. Schuessler that he had

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[40] *Kansas/Oklahoma Order*, para. 128 n.352.

[41] Affidavit of Dennis W. Schuessler ("Schuessler Aff.") para. 10, SBC Report, Attachment F.

[42] *Id.* para. 11.

reviewed her affidavit before it was submitted. According to Mr. Schuessler, she suggested that he raise the issue with Ms. Chapman. Despite the concerns Mr. Schuessler raised about her affidavit, Ms. Cullen stated in an interview with the Enforcement Bureau that she made no attempt to verify whether her statements had been accurate or to make other SBC employees aware of Mr. Schuessler's concerns. And although Mr. Schuessler now concedes that Mr. Mileham would have been the best person with whom to confer regarding the loop qualification system's functionality, Mr. Schuessler states he never did so after reviewing the *Order*.

34. Mr. Schuessler did relay his concerns to Mark Welch. According to Mr. Welch, around the time that the Commission released the *Order*, Mr. Schuessler approached him after a meeting. Mr. Welch told the Enforcement Bureau that Mr. Schuessler said he was concerned that the loop qualification system did not work as described in the reply affidavits. In response, Mr. Welch said he told Mr. Schuessler that the system "had to work" that way. Mr. Welch stated in the Enforcement Bureau interview that he felt that Mr. Schuessler was wrong and told him to check the *Order* and confer with "the experts." Despite this conversation, Mr. Welch claims that he did not review his affidavit to determine if he had included any potentially incorrect information or attempt to verify that the other affidavits containing loop qualification system information were correct. Mr. Welch also states that he did not contact or inform anyone else about his conversation with Mr. Schuessler.

35. On March 6, 2001, approximately one month after he relayed his concerns to Ms. Cullen and Mr. Welch, Mr. Schuessler spoke with Carol Chapman. In the interim, he had exchanged calls with Ms. Chapman and left a message explaining that he and Ms. Cullen had spoken and that they had questions about the Commission's order. According to Ms. Chapman, Mr. Schuessler told her that his reading of the Commission's discussion of SBC's loop qualification system did not match his understanding of how the system actually worked. Specifically, Mr. Schuessler told Ms. Chapman that he believed the Commission's statement that the system followed provisioning logic was incorrect. He then asked if her affidavit and the Commission's description of the system in the *Order* were consistent. She told him they were, and that it would be a "problem" if the system did not work as described in the affidavits.

36. Almost immediately after her conversation with Mr. Schuessler, Ms. Chapman called John Mileham and described the problem. Mr. Mileham told her that the description in the SBC affidavits was wrong and that the reply affiants should have checked with him (apparently failing to recall his involvement with the Welch affidavit). Ms. Chapman, believing that the affidavits might well contain incorrect statements, called SBC's legal department. She did not attempt to contact Ms. Cullen or Mr. Welch to discuss the matter. Soon after that, Ms. Cullen and Mr. Welch were informed that their affidavits were inaccurate.

E. SBC Notifies The Commission Of The Inaccurate Affidavits

37. In mid-to-late March 2001, SBC was preparing to file its application for section 271 authority for Missouri. At the same time, the company was also investigating the inaccuracies in its Kansas/Oklahoma affidavits. While SBC was attempting to determine why it had filed inaccurate affidavits in the Kansas/Oklahoma proceeding, it also had to ascertain how its loop qualification system actually functioned before it filed its Missouri application. In the

Kansas/Oklahoma proceeding, SBC had asserted in numerous places that its OSS (of which the loop qualification system was a part) was identical throughout its five-state SWBT region (*i.e.*, Kansas, Oklahoma, Missouri, Texas, and Arkansas). SBC contended that it used the same systems in the same locations to provide access to its OSS throughout the SWBT region and a competitor accessing the system in Texas would follow the same procedures and use the same functionalities of the OSS when it accessed the system in Kansas, Oklahoma, or Missouri.[43] Thus, before SBC could file its Missouri application, it had to conclude its internal inquiry into the Kansas/Oklahoma affidavits and determine how the system worked because any uncertainty about the loop qualification functionality in Kansas and Oklahoma also applied to the system in Missouri. Once it determined how its system actually worked, SBC was faced with the prospect of representing to the Commission and interested parties in the Missouri 271 application that the loop qualification system functioned differently than as represented in the Kansas/Oklahoma proceeding.

38. Faced with these parallel, yet inextricably linked, matters, SBC informed the Commission of the concerns with the loop qualification system. In a preliminary meeting with the Commission's Common Carrier Bureau on or about March 26th, when SBC was on the verge of submitting its Missouri application, SBC indicated that something had arisen that might affect its Missouri application. SBC explained to CCB staff that it had filed affidavits in the Kansas/Oklahoma proceeding that may have contained inaccurate statements concerning the operation of its loop qualification system. Moreover, SBC indicated that the loop qualification system in Kansas, Oklahoma, and Missouri did not work as described in the Commission's *Kansas/Oklahoma Order*. The Common Carrier Bureau advised that SBC should not submit its section 271 application for Missouri until it had remedied this matter and that the company should inform the Commission's Enforcement Bureau of this development. SBC agreed.[44]

39. On or about March 30, 2001, SBC then met with the Enforcement Bureau to give its preliminary understanding of the problem. At the conclusion of the meeting, Bureau staff requested that SBC file a report describing its understanding of the circumstances surrounding the filing of the inaccurate affidavits. On April 6, 2001, SBC filed a report signed by a Senior

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[43] *See* SBC Brief at 19-20.

[44] On April 3, 2001, SBC implemented an enhancement to its loop qualification system that caused the system to return actual loop make-up information on a loop connected to the customer address requested by the competitive carrier, if such information exists in SBC's LFACS system and can be located, retrieved and returned within two minutes. The enhancement causes the system to search LFACS first for a non-loaded copper loop connected to the end user for which actual information exists. If the system finds such actual information, then it will return it to the requesting carrier. *See* Affidavit of Brian Horst, attached to *Brief in Support of Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Missouri*, CC Docket No. 01-88 (filed April 4, 2001). Moreover, in a footnote to an affidavit submitted with its 271 application for Missouri, SBC stated that it "has learned that, contrary to its subject matter experts' early understanding of the interrelationship between LFACS and the loop qualification system software, the LFACS provisioning logic was not being used to search for loop makeup information. The recent enhancement to the loop qualification system, however, was designed to search for loop makeup information in a manner similar to how LFACS would attempt to provision an xDSL-capable loop if one were requested by a CLEC." *See* Affidavit of Derrick Hamilton at 4, n.3, Attachment J to SBC Report.

Vice President in which it admitted that the reply affidavits contained inaccuracies. SBC attached to this report a new round of affidavits from each of the reply affiants (Mr. Welch, Ms. Chapman and Ms. Cullen) and from Messrs. Mileham and Schuessler. The affidavits attached to the report described generally the process by which the reply affiants collected and included the inaccurate information in their reply affidavits, how Messrs. Mileham and Schuessler and other SBC employees responded or, in some cases, failed to respond to inquiries concerning the functionality of the loop qualification system, and the information upon which the reply affidavits were based.

40. Shortly thereafter, on or about April 9, 2001, Enforcement Bureau staff contacted SBC and inquired as to whether the company intended to file a section 1.65 notice in the Kansas/Oklahoma proceeding. Under section 1.65 of the Commission's rules, absent good cause, applicants are required to disclose inaccuracies in their pending applications as promptly as possible, and in any event within 30 days, whenever information furnished in the application "is no longer substantially accurate or complete in all significant respects" or there has been a "substantial change as to any other matter which may be of decisional significance."[45] On April 13, 2001, SBC filed a letter pursuant to section 1.65 of the Commission's rules in which it advised that certain reply affidavits filed in the Kansas/Oklahoma proceeding contained inaccurate information on a loop qualification issue.[46]

III. DISCUSSION

41. Under section 503 of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any of the provisions of the Act, or any rule

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[45] Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, states in relevant part:

> **Section 1.65(a). Substantial and significant changes in information furnished by applicants to the Commission.** Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

[46] SBC 1.65 Report at 1.

or order issued by the Commission under the Act, shall be liable for a forfeiture penalty.[47] 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.[48] 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.[49] 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 Commission rules and a Commission Order.

42. The duty of absolute truth and candor is a fundamental requirement for those appearing before the Commission. Our decisions rely heavily on the completeness and accuracy of applicants' submissions because we do not have the resources to verify independently each and every representation made in the thousands of pages submitted to us each day. For that reason, we are disturbed by SBC's apparent actions here. SBC did not exercise reasonable care in verifying the information regarding the operation of its loop qualification system before submitting the three affidavits at issue. Moreover, although our rules require companies promptly to correct inaccurate or incomplete information submitted to the Commission, SBC took over two months after the company first focused on the fact that the affidavits were (or may have been) incorrect to notify the Commission that the reply affidavits were wrong. Furthermore, when the Commission began to investigate those inaccuracies, an SBC employee apparently intentionally misrepresented facts to the Commission in an affidavit attached to a report signed by an SBC Senior Vice President. Finally, SBC apparently violated the terms of the June 1999 *SBC/SNET Consent Decree*, in which SBC promised to train its employees who have regular contact with the Commission as part of their assigned duties in our rules governing contacts with, and representations to, the Commission.

A. The Evidence Does Not Warrant a Finding of Apparent Liability for Intentional Misrepresentation Regarding the Three Reply Affidavits

43. The Commission initiated this investigation primarily to determine whether SBC intentionally misrepresented the functionality of its loop qualification system in order to obtain a grant of its section 271 application. We have determined that the evidence, although deeply troubling, does not support a finding that SBC apparently engaged in making intentional misrepresentations in violation of section 1.17 of the Commission's Rules in connection with the three reply affidavits.[50] With that said, we do conclude that SBC was negligent in collecting the

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

[48] 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

[49] *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).

[50] Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, states in relevant part:

(continued….)

information it relied upon in its reply affidavits and in making its showing under section 271. While such negligence does not violate the Communications Act or any Commission rule,[51] we expect a higher degree of care from our regulatees than that exhibited here by SBC.

44. SBC's negligence in collecting the information submitted to the Commission is easily summarized. First, SBC began the process when an SBC attorney, apparently without consulting anyone with specialized knowledge of the loop qualification system, wrote a description of the functionality of the system and sent it to Angela Cullen.[52] The description incorrectly indicated that the system returned loop information as if it were actually provisioning the service requested. Ms. Cullen copied and pasted the description into an e-mail she sent to various persons within the company with responsibility for loop qualification matters. Her e-mail message was then forwarded to Dennis Schuessler, whose responsibilities included OSS interfaces (but not the back office systems operations) and John Mileham, who was SBC's principal loop qualification expert. Without doing any independent research, Mr. Schuessler told Ms. Cullen that her description of the system was "basically accurate" and said that he would "leave the technical details to John Mileham to answer." Mr. Schuessler copied Mr. Mileham on his e-mail. Mr. Mileham, however, never responded to this message or Ms. Cullen's initial e-mail. Then, despite never hearing from the company's foremost loop qualification expert, and despite Mr. Schuessler's advice that Mr. Mileham should give her the technical details, Ms. Cullen drafted and SBC submitted an affidavit that included an incorrect description of the loop qualification system.

45. SBC also submitted inaccurate affidavits signed by Mark Welch and Carol Chapman. Mr. Welch, an SBC employee with little loop qualification experience, included one sentence in his affidavit that incorrectly described the functionality of the loop qualification system. While Mr. Welch claims that it was not his idea to include this sentence in his affidavit, he could not recall how the sentence made its way into his affidavit or who suggested that he include it. Ms. Chapman, for her part, claims that she relied on the draft affidavits of Ms. Cullen and Mr. Welch when writing the section of her own affidavit pertaining to the loop qualification system. However, despite this stated reliance on Mr. Welch's affidavit, Ms. Chapman claims

(Continued from previous page)

> **Section 1.17 Truthful written statements and responses to Commission inquiries and correspondence**. . . .No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

[51] Commission precedent makes clear that misrepresentation requires an intent to deceive on the part of the allegedly offending party. *See Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8478, para. 60 (1995). *Cf. Ass'n of American Physicians and Surgeons, Inc. v. Clinton*, 187 F.3d 655, 661-662 (D.C. Cir. 1999) (reversing district court finding that party's declaration filed with court had been submitted in bad faith; holding that district court had not cited any evidence that at the time the declaration was drafted, declarant disbelieved what he was stating or that the declarant's statements were objectively unreasonable).

[52] Although SBC has declined to identify the attorney, the evidence shows that none of the persons from SBC's legal department who worked on the 271 application possessed any expertise on loop qualification matters.

that she was the one who suggested to Mr. Welch that he include something in his affidavit concerning the operation of the loop qualification system. Before submitting his affidavit, Mr. Welch sent a copy to Mr. Mileham and Mr. Schuessler, among others, for their review and comment. While Mr. Schuessler failed to respond, Mr. Mileham did review it. However, Mr. Mileham did not correct Ms. Welch's inaccurate description, claiming that he must have "skipped" the relevant sentence relating to system because he read it "late at night."[53] Ms. Chapman, on the other hand, never consulted with Mr. Mileham for assistance in writing her affidavit even though she understood that he was the company's loop qualification expert.

46. The confluence of errors committed by SBC during this process is, as noted above, troubling. But after close consideration of the available evidence, we conclude that the company did not apparently violate section 1.17 of our rules when it submitted the three reply affidavits. Though the company's lack of care could hardly be more evident, we find that it is not reasonable to infer that the company *intentionally* submitted false affidavits to the Commission during the 271 proceeding.[54] As we discuss in more detail below, it is certainly permissible, as a general matter, to infer an intention to mislead from the circumstances surrounding the making of a false statement.[55] However, we believe the evidence here is more indicative of sloppiness on SBC's part in submitting the three affidavits in question than any plan to mislead the Commission about the true workings of the loop qualification system.

B. SBC Apparently Violated Its Duty To Disclose The Inaccurate Statements In A Timely Manner To The Commission

47. We conclude that SBC apparently violated section 1.65 of the Commission's rules, 47 C.F.R. § 1.65. Under section 1.65(a), applicants generally must disclose inaccuracies in their pending applications within 30 days: (1) whenever information furnished in the pending application "is no longer substantially accurate or complete in all significant respects"; and (2) whenever "there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application."[56] The purpose of section 1.65 is to inform the Commission, the public, and concerned parties of material changes in the application.[57] Moreover, section 1.65 imposes an affirmative obligation on regulated entities to inform the Commission of the facts needed to fulfill its duties. As one

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[53] Mileham Aff., para. 7.

[54] As noted above, Commission precedent makes clear that misrepresentation requires an intent to deceive on the part of the allegedly offending party. *See Swan Creek Communications*, 39 F.3d at 1222; *Fox Television Stations, Inc*., 10 FCC Rcd at 8478, para. 60.

[55] *See* para. 66, *infra*.

[56] 47 C.F.R. § 1.65(a).

[57] *See Pinelands, Inc. and BHC Communications, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6064 n.25 (1992); *WPIX, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 782, 783-84, para. 3 (1972).

court has stated, "[t]he Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth.'"[58]

48. There is no question that SBC's principal loop qualification expert, John Mileham, knew throughout the time period relevant to this investigation that the system did not routinely provide loop make-up information regarding copper loops when both copper loops and fiber loops were present. Mr. Mileham stated as much in an interview with the Enforcement Bureau, and his August 2000 memorandum documents his knowledge in this regard. There is also no question that Mr. Mileham reviewed at least one of the three reply affidavits before they were submitted. He received and edited the five-page Welch affidavit, but claims to have "skipped" the sentence that erroneously described SBC's loop qualification system -- the only sentence in the affidavit dealing with his area of responsibility. Given Mr. Mileham's admitted knowledge of the true workings of SBC's loop qualification system, and his participation in the drafting of at least one of the three affidavits at issue, a strong argument can be made that the clock under section 1.65 began running as early as December 11, 2000 -- the date SBC filed the reply affidavits with the Commission.

49. Nevertheless, under the facts here presented, we hold that the section 1.65 clock did not begin to run until the time that a relevant SBC manager, Dennis Schuessler, first reviewed the *Kansas/Oklahoma Order* and recognized the reply affidavits were or may have been inaccurate.[59] While we do not know the precise date this occurred, the available evidence indicates that it occurred in early February, more than two months before SBC filed its section 1.65 statement in the Kansas/Oklahoma proceeding.[60]

50. In early February 2001, shortly after the Commission released the *Order* on January 22, Mr. Schuessler recognized an inconsistency between the loop qualification system as described in the *Order* and his then-current understanding of the actual operation of the system. At that time, Mr. Schuessler was a manager at SBC with substantial responsibilities concerning SBC's OSS. Mr. Schuessler's concerns upon reviewing the *Order* led him to initiate separate conversations in the first week of February with reply affiants Welch and Cullen. However, neither Ms. Cullen nor Mr. Welch, also SBC managers, made any effort to verify the accuracy of their statements or to investigate Mr. Schuessler's concerns. And, like Mr. Schuessler, they made no efforts to bring the matter to the Commission's attention or to urge others to do so. Despite his concerns, Mr. Schuessler waited an entire month before finally speaking to Ms. Chapman. By his own admission, he attempted to call her only two or three times during that month, and left a single message on her voicemail in which he told her only that he had a

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[58] *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981) (internal citations omitted).

[59] We note that under section 1.65, which requires applicants to notify the Commission of substantial changes "as promptly as possible and in any event within 30 days," the 30-day time limit is the *maximum* amount of time that an applicant is allowed before it must file its notification, absent "good cause." 47 C.F.R. § 1.65(a).

[60] In his affidavit, Mr. Schuessler states that he received a copy of the *Order* on January 31, 2001 and reviewed it sometime between that date and February 5, 2001. Schuessler Aff. at 4-5, paras. 10-11.

question for her about the *Order*. He did not attempt to explain his specific concern to her either in a voicemail or an e-mail. Furthermore, he made no attempt to ascertain whether his concerns were well-founded by researching the functionality of the system. Although Ms. Chapman, soon after her discussion with Mr. Schuessler, brought the matter to the attention of SBC's legal department on or about March 6, 2001, the company did not file its section 1.65 statement until April 13, 2001.[61]

51. Section 1.65 requires applicants to disclose additional or corrected information whenever prior filings are "no longer substantially accurate or complete in all significant respects" or "there has been a substantial change as to any other matter which may be of decisional significance …."[62] We find that the inaccuracies in the reply affidavits were of such significance that SBC should have notified the Commission no later than 30 days of the discovery by Mr. Schuessler that the affidavits were or may have been inaccurate. The significance of the inaccuracies to the proceeding is demonstrated by the Commission's express reliance on the reply affidavits in the text of the *Order*. Due to its reliance on the reply affidavits, the Commission did not reach the question about whether SBC's loop qualification system, as it actually operated, complied with the *UNE Remand Order*.[63]

52. Moreover, SBC's delay in filing the section 1.65 notice had potentially important impacts on the Commission's processes. SBC's delay in submitting the 1.65 statement effectively deprived the Commission and interested parties of the opportunity for reconsideration of the *Order* under the procedures set forth in sections 1.106 and 1.108 of the Commission's rules. We thus find that SBC's delay in filing the 1.65 statement materially affected the Commission's processes.

53. Neither SBC's meetings with Commission staff in late March 2001, nor its April 6th report to the Enforcement Bureau alleviate our concerns about the late section 1.65 filing. More specifically, we do not find that SBC constructively discharged its section 1.65 obligations prior to its actual notice filed on April 13. Section 1.65 requires a written filing in the docket of the relevant proceeding so that all interested parties may become aware of the new changed information. Oral representations to Commission staff do not suffice for this purpose. Nor could SBC's April 6th report serve as a section 1.65 notification. That report was not served on interested parties nor was it placed in the record of the 271 proceeding. Indeed, SBC initially requested confidential treatment of the report, which, under Commission rules, required the Enforcement Bureau to keep it confidential for the time being.[64] Indeed, as noted below, the

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[61] Even assuming the 30-day clock did not begin until March 6, 2001, SBC still apparently violated the requirements of section 1.65 by failing to file its report until April 13, 2001. Even then, the Enforcement Bureau had to remind SBC of its obligations under section 1.65 before the company ultimately filed its notice.

[62] 47 C.F.R. § 1.65(a).

[63] *UNE Remand Order,* para. 129.

[64] After discussions with Bureau staff concerning its request for confidential treatment, SBC withdrew its request by letter on April 18, 2001. *See* Letter from Sandra L. Wagner, Vice President-Federal Regulatory, SBC (continued….)

appeal of our *Order* was and remains pending before the D.C. Circuit. Without a section 1.65 filing from SBC, the parties to that appeal had no knowledge of this development. SBC's contacts with the Commission staff prior to April 13, 2001 thus did not serve the purposes behind section 1.65.[65]

54. We also note that SBC's Kansas and Oklahoma 271 application was "pending," as that term is defined in section 1.65, during the relevant time period. Under section 1.65, an application is pending from the time that the Commission accepts the application's filing until the Commission's decision granting or denying the application is no longer subject to reconsideration by the Commission or review by the courts.[66] Since the D.C. Circuit still is considering the appeal of the Commission's *Order*, SBC's section 271 application for Kansas and Oklahoma was and remains pending for the purposes of section 1.65.

55. In light of SBC's apparent willful and/or repeated failure to comply with section 1.65 of the rules, we find that a forfeiture appears to be warranted. Section 503(b)(1) of the Act states that any person who 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.[67] 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 $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.[68] In determining the appropriate proposed 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."[69]

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Telecommunications, Inc., to Brad Berry, Deputy Chief, Enforcement Bureau, Federal Communications Commission (April 18, 2001).

[65] In any event, SBC's earliest conversations with Commission staff occurred more than thirty days after Mr. Schuessler became aware of the inaccuracies in the reply affidavits, which demonstrates that SBC apparently would have violated section 1.65 even if its oral representations in late March constituted adequate notice under that provision.

[66] 47 C.F.R. § 1.65(a).

[67] 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2). We note that "willful" is defined in the statute as not requiring specific intent to violate the law. *See, e.g., Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387, para. 5 (1991) (quoting 47 U.S.C. § 312(f)) ("willful … means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate" the Act or Commission rules; "this definition applies to Section 503 as well as Section 312"). A violation is repeated if, among other things, it continues over more than one day. *Id.* 6 FCC Rcd at 4388.

[68] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R § 1.80(b)(2).

[69] 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, para. 27 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

56. Section 1.80 of the Commission's Rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture of $3,000 for violations of section 1.65.[70] The circumstances of this case, however, appear to justify a substantial increase in this base amount under certain upward adjustment criteria contained in the Rules and the *Forfeiture Policy Statement*: the egregiousness of the misconduct and SBC's ability to pay considered with the deterrent effect of the forfeiture amount.[71] We also consider whether SBC voluntarily disclosed the inaccuracies to the Commission in determining whether a downward adjustment to the forfeiture amount is appropriate.

57. *Egregiousness*. SBC's conduct here appears particularly egregious because just two years ago, in June 1999, the company and the Commission entered into the *SBC/SNET Consent Decree*, which resolved a similar investigation. Like here, that investigation related to statements made by SBC employees before and shortly after the Commission granted an application. Both investigations involved a potential violation of section 1.65, a potential violation of section 271 of the Act (and section 272 in the case of the *SBC/SNET Consent Decree*), and whether SBC employees made intentionally inaccurate statements to the Commission.

58. In the *SBC/SNET Consent Decree*, SBC agreed to implement a compliance plan that involved training certain categories of SBC employees regarding Commission rules relating to "contacts with, and representations to, the FCC …."[72] Section 1.65 was one of these key rules, and indeed was a subject of the underlying investigation. So, in addition to the general notice provided by section 1.65 itself, SBC had actual notice of the importance of that section (including in the post-grant context) and had made commitments specifically designed to ensure future compliance. Nevertheless, less than two years after entering into this consent decree, SBC appears to have violated section 1.65(a) in a context remarkably similar to the one at issue in the *SBC/SNET Consent Decree*.

59. Moreover, the violation occurred on a material issue in a major Commission proceeding against a backdrop of repeated Commission references to the importance of section 1.65 in section 271 proceedings like the one here.[73] Section 271 proceedings are at the center of

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[70] 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd at 17114, Appendix A, Section I.

[71] *Forfeiture Policy Statement*, 12 FCC Rcd at 17001, para. 27.

[72] *SBC/SNET Consent Decree*, 14 FCC Rcd at 12751.

[73] *See, e.g., Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Order, 12 FCC Rcd 3309, 3323, para. 23 (1997) (citing 47 C.F.R. § 1.65(a) and reminding applicants of their obligation under Commission rules to maintain "the continuing accuracy and completeness of information" furnished to the Commission); *Application by SBC Communications Inc., Pursuant To Section 271 Of The Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma*, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8720, para. 60 (1997) (citing *Ameritech Michigan Order*'s reference to section 1.65 and noting that "[g]iven the expedited time in which the Commission must review these applications, it is the responsibility of the … [applicant] to submit to the Commission a full and complete record upon which to make determinations on its application.").

Congress' efforts to promote competition in the Telecommunications Act of 1996. They are the subject of significant litigation. For SBC to keep the parties and the Commission uninformed of material inaccuracies relating to its section 271 application is extremely serious.

60. *Ability to pay/deterrent effect*. In the *Forfeiture Policy Statement*, the Commission made it clear that companies with higher revenues, such as SBC,[74] could expect higher forfeitures than those reflected in the base amounts:

> [O]n the other end of the spectrum of potential violations, we recognize that for large or highly profitable communication entities, the base forfeiture amounts . . . are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level …. For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts …, we intend to take into account the subsequent violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.[75]

The statutory maximum for a continuing violation of section 1.65 is $1.2 million. While it is unclear whether such a forfeiture will act as a sufficient deterrent to SBC against future violations of section 1.65,[76] we believe that anything less is unlikely to do so. This is particularly the case in light of the fact that the $1.3 million payment made by SBC as part of the *SBC/SNET Consent Decree* apparently did not act as a sufficient deterrent with respect to the situation now before us.

61. *Voluntary disclosure*. In the *Forfeiture Policy Statement*, the Commission stated that forfeiture amounts may be reduced where a person voluntarily brings a matter to the Commission's attention.[77] We find, however, that a downward adjustment, for this reason, in the proposed forfeiture is not warranted in this case. Specifically, we find that SBC did not voluntarily disclose this problem to the Commission within the meaning of the *Forfeiture Policy Statement*. SBC's requisite disclosure of this problem did not actually occur until it filed its

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[74] In 2000, SBC had operating revenues of $51.4 billion with operating income of $10.7 billion. *See* SBC Telecomm., Inc., 2000 Annual Report at 4 (2001).

[75] *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100, para. 24.

[76] We note that Congressman Fred Upton, Chairman of the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, has introduced legislation to increase the statutory forfeiture caps. *See* H.R. 1765, 107th Cong., 1st Sess. (2001).

[77] *Forfeiture Policy Statement*, 12 FCC Rcd at 17101, para. 27; *see also* 47 U.S.C. § 503(b)(2)(D) and 47 C.F.R. § 1.80(b)(4).

section 1.65 notice on April 13, 2001, after the Enforcement Bureau brought the requirement to the company's attention. This was more than two months after its section 1.65 obligation was triggered, and more than a month after SBC's attorneys knew the reply affidavits were (or apparently were) inaccurate.

62. Moreover, SBC knew that it would be required to demonstrate in its Missouri 271 application that its loop qualification system complied with the *UNE Remand Order* and to describe how this system functioned. However, because it had claimed that its OSS was identical throughout the SWBT region in the Kansas/Oklahoma proceeding, any problem with the system functionality in Kansas and Oklahoma also applied to Missouri. Any change in SBC's description of the system operation from the Kansas/Oklahoma 271 application to the Missouri application would attract attention both from interested parties and the Commission. SBC thus had every incentive to let the Commission know of this change *before* it filed the Missouri application. We do not believe that bringing the matter to the attention of the Commission under these circumstances constitutes voluntariness within the meaning of the *Forfeiture Policy Statement* and we decline to reduce the proposed forfeiture amount on this basis.

63. Considering all of the enumerated factors and the particular circumstances of this case, as discussed above, we find that SBC is apparently liable for the statutory maximum $1.2 million forfeiture for its apparent violation of section 1.65. As discussed above, the seriousness of this matter demands that SBC be held apparently liable for the statutory maximum forfeiture. For a full two months before it filed the 1.65 notice in the Kansas/Oklahoma docket, SBC knew that the reply affidavits were or may have been inaccurate. Under these circumstances, SBC's apparent failure to comply with its affirmative obligations under section 1.65 was of a continuing nature in that it failed to inform the Commission of these matters over a significant period of time. Thus, in consideration of the facts of this case and in accordance with section 503(b)(2)(b) of the Commission's Rules, we find that SBC is apparently liable for a $1.2 million forfeiture for its apparent continuing violation of section 1.65.

64. In addition to any forfeiture we may impose, we believe it is important for SBC to inform the Commission regarding the steps it is taking to ensure compliance with section 1.65. Accordingly, we order SBC to file a report, within 30 days of the release date of this NAL, supported by affidavits of persons with personal knowledge, discussing steps it has taken to ensure future compliance with section 1.65. In addition, we order SBC to report, within nine months of the release date of this NAL, through an independent audit, on the success of its efforts to comply with section 1.65 for the period beginning 30 days from the release date of this NAL and concluding six months thereafter.

C. SBC Apparently Misrepresented Facts To The Commission During The Enforcement Bureau's Investigation

65. We conclude that SBC is apparently liable for willful and/or repeated misrepresentations committed in SBC's April 6, 2001 report to the Commission's Enforcement Bureau. That report was signed by an officer of SBC and was supported by John Mileham's affidavit, among others. We find that Mr. Mileham's affidavit, upon which SBC explicitly relied

in its report, contains apparent misrepresentations about his involvement in the review of the incorrect reply affidavits, in violation of section 1.17 of our rules.

66. Under section 1.17 of our rules, "[n]o applicant … shall in … any … written statement submitted to the Commission … make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission."[78] The Commission defines misrepresentation as an "intentional misrepresentation of fact intended to deceive"[79] and has concluded that an intent to deceive is an essential element of a misrepresentation finding.[80] The Commission has also stated that intent is a "factual question that may be inferred if other evidence shows that a motive or logical desire to deceive exists . . ."[81] The ultimate facts are often proved through circumstantial evidence, as such evidence may be the only way of proving knowledge or intent.[82] We consider misrepresentation to be a serious violation,[83] as our entire regulatory scheme "rests upon the assumption that applicants will supply [the Commission] with accurate information."[84] For this reason, applicants before the Commission are held to a high standard of candor and forthrightness.[85] Therefore, we will assess a forfeiture if we find by a preponderance of the evidence that SBC has violated section 1.17.

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[78] 47 C.F.R. § 1.17.

[79] *Silver Star Communications-Albany, Inc.* 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988).

[80] *See Swan Creek Communications v. FCC,* 39 F.3d 1217, 1222 (D.C. Cir. 1994).

[81] *Black Television Workshop*, 8 FCC Rcd 4192, 4198, n. 41 (1993), *recon. denied*, 8 FCC Rcd 8719 (1993), *rev. denied*, 9 FCC Rcd 4477 (1994), *aff'd sub nom*. *Woodfork v. FCC*, 70 F.3d 639 (D.C. Cir. 1995) (affirming ALJ's finding that the record encompasses documents containing misrepresentations).

[82] *Ned N. Butler and Claude M. Gray, D.B.A. The Prattville Broadcasting Co., Prattville, Ala.*, Memorandum Opinion and Order, 5 FCC 2d 601, 603-604 (Rev. Bd. 1966) (internal citations omitted). In criminal cases, where the burden of proof is higher, the D.C. Circuit has recognized that "[i]ntent may, and generally must, be proved circumstantially . . .," *United States v. Jackson*, 513 F.2d 456, 461 (D.C. Cir. 1975) (footnotes omitted), and has stated that it does not distinguish between "direct and circumstantial evidence in evaluating the sufficiency of the evidence." *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 901, 113 S.Ct. 287, 121 L.Ed.2d 213 (1992).

[83] *Fox Television Stations, Inc.,* Memorandum Opinion and Order, 10 FCC Rcd 8452, 8478, para. 60 (1995).

[84] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210, para. 58 (1986) (subsequent history omitted) ("*Character Policy Statement*"). "The integrity of the Commission's processes cannot be maintained without honest dealing by regulated companies." *See id.*, 102 FCC 2d at 1211, para. 61. "Regardless of the factual circumstances of each case, misrepresentation to the Commission is always an egregious violation." *Forfeiture Policy Statement,* 12 FCC Rcd at 17098, para. 21. The Commission may treat even the most insignificant misrepresentation as an event disqualifying a licensee from further consideration. *Character Policy Statement*, 102 FCC 2d at 1210, para. 60. *See also Forfeiture Policy Statement*, 12 FCC Rcd at 17098, para. 21.

[85] *WHW Enterprises Inc., v. FCC*, 753 F.2d 1132, 1138 (D.C. Cir. 1985) (upholding Commission sanctions against license applicant for misrepresentation); *Sea Island Broadcasting Corp. of S.C.*, 60 FCC 2d 146, 147, para. 3 (1976) ("The Commission insists on complete candor from its licensees and where . . . that candor has been found (continued….)

67. Mr. Mileham's explanation for his failure to correct the inaccuracies in the Cullen and Welch affidavits, submitted by SBC as part of its report to the Enforcement Bureau, appears to constitute misrepresentation. First, with respect to the draft affidavit from Mark Welch, Mr. Mileham reviewed the Welch affidavit prior to the time it was filed; and despite his knowledge of the actual workings of SBC's loop qualification system, he failed to correct the inaccuracy in the affidavit. In SBC's April 6, 2001 report and Mr. Mileham's supporting affidavit, the company explained that Mr. Mileham "must have 'skipped' this important sentence" because he reviewed Mr. Welch's affidavit "late at night."[86]

68. Mr. Mileham apparently has committed misrepresentation or a willful material omission in this regard. The e-mails between Messrs. Welch and Mileham, together with Mr. Mileham's statements during an interview with the Enforcement Bureau, show that Mr. Mileham did not review the Welch affidavit "late at night," as he claimed, but rather around noon. SBC provided the Enforcement Bureau with copies of the e-mail from Mr. Welch to Mr. Mileham and Mr. Mileham's return e-mail.[87] According to the face of the e-mail, Mr. Welch sent his affidavit to Mr. Mileham at 3:57 p.m. on December 6, 2000. In his interview, Mr. Mileham told Commission staff that he usually left his office by 6:00 p.m. each day. He also stated that he did not recall staying late to review Mr. Welch's affidavit. Mr. Mileham did state, however, that he reviewed and responded to Mr. Welch's e-mail as soon as he saw it and that, immediately after he made his corrections to the document, he sent the red-lined version back to Mr. Welch. According to the face of this e-mail, Mr. Mileham sent this version by e-mail to Mr. Welch at 12:08 p.m. on December 7, 2000.[88] Thus, it is apparent from the evidence that Mr. Mileham did not review Mr. Welch's affidavit late at night, as he claimed in his affidavit to the Commission. Based on the totality of the circumstances surrounding Mr. Mileham's inclusion of this incorrect statement in his affidavit, we conclude that he made the statement with the specific intention to mislead the Commission, not merely through inadvertence or mistake.

69. There is another ground supporting our finding of an apparent misrepresentation in the Mileham affidavit –in a sworn affidavit filed with the Commission, Mr. Mileham stated that the Cullen e-mail outlining her understanding of the loop qualification system was deleted accidentally and that he never reviewed it. Specifically, Mr. Mileham claimed that he downloaded approximately 300 e-mails from home after returning from vacation. He reviewed a few of these e-mails, then shut off his home computer. When he went into the office, the e-mails he had previously downloaded were not on his work computer. When he returned home, his home computer "crashed" and he was forced to reload his operating system, deleting all of his files, including the previously downloaded e-mails. Thus, according to Mr. Mileham's affidavit,

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lacking in response to official Commission inquiries, the Commission has terminated the license."), *aff'd*, *Sea Island Broadcasting Corp. of S.C. v. Federal Communications Commission*, 627 F.2d 240 (D.C. Cir. 1980).

86 *See* SBC Report at 5, nn. 5-6; Mileham Affidavit, ¶¶ 6-7.

87 *See* May 3, 2001 Letter.

88 In submissions to the Commission, SBC has not suggested that the times on the face of the e-mails were incorrect.

he never saw the Cullen e-mail and never had an opportunity to correct the erroneous description of SBC's loop qualification system.

70. In an interview with the Enforcement Bureau, Mr. Mileham stated that he did not attempt to recover the lost e-mails from his work or home computer. Mr. Mileham also stated that he did not disclose the loss of these e-mails to anyone at SBC -- including his supervisors -- or the competing carriers who regularly contacted him about loop qualification issues.[89]

71. We find that Mr. Mileham apparently misrepresented the facts or made a willful material omission in his affidavit when describing his lost e-mail problem, and that SBC therefore apparently violated section 1.17 of our rules when it submitted his affidavit accompanying its April 6, 2001 report to the Enforcement Bureau. As an initial matter, neither Mr. Mileham nor SBC has explained how Mr. Mileham's e-mails could disappear from his work computer simply because he downloaded them from home. But even if this were the case, we do not find it credible that Mr. Mileham -- whose previous job involved desktop computer support -- not only lost approximately three hundred e-mails in the first place, but failed to make the slightest effort to recover them, and failed to notify a single SBC employee -- including his supervisors -- about this important event. By his own account, Mr. Mileham uses e-mail extensively, referring questions and complaints from competing carriers to knowledgeable SBC employees, and relaying answers from those employees back to the competing carriers. Nevertheless, SBC contends that Mr. Mileham apparently took no corrective measures upon losing approximately three hundred unopened e-mails from people inside the company or competing carriers.

72. Nor do we find credible Mr. Mileham's claim that he thought he had no obligation to try to recover the lost e-mails since anyone who "really" wanted to contact him would simply continue trying to reach him upon receiving no response or an "out of office" reply. Indeed, SBC has informed us that neither Mr. Schuessler nor John Williamson -- the SBC employee who forwarded Ms. Cullen's e-mail to Mr. Mileham and Mr. Schuessler-- has any record of receiving such an "out of office" message from Mr. Mileham in response to their e-mails.[90] We are not aware of any plausible explanation for Mr. Mileham's statements other than that they apparently constitute misrepresentation or willful material omissions in violation of section 1.17. Thus, we conclude it is reasonable to infer that Mr. Mileham apparently intentionally engaged in misrepresentation.

73. Mr. Mileham's apparent misrepresentations were material to the Commission's investigation into the circumstances surrounding the filing of the inaccurate reply affidavits because they served to excuse both Mr. Mileham and SBC from responsibility for submitting the

[89] Mr. Mileham claimed that he may have disclosed this information to contractors, but SBC never provided the Enforcement Bureau with access to these persons.

[90] *See* Sworn Statement of Vincenzo Leone, attached to Letter from Sandra L. Wagner, Vice President-Federal Regulatory, SBC Telecommunications, Inc., to Trent Harkrader, Enforcement Bureau, Federal Communications Commission (May 11, 2001) ("May 11, 2001 Letter").

incorrect affidavits in the Kansas/Oklahoma proceeding. At the time SBC filed the reply affidavits, Mr. Mileham was the project manager for its loop qualification offering. Mr. Mileham prepared a loop qualification overview that was widely circulated within SBC and that accurately described SBC's "first loop" methodology. He also consulted widely within SBC regarding loop qualification issues raised by competing carriers. Furthermore, each of the reply affiants considered him to be a subject-matter expert on SBC's loop qualification system. Thus, his review of the Cullen e-mail and the Welch affidavit was essential to their accuracy. Nevertheless, when Mr. Mileham was contacted by Ms. Cullen and Mr. Welch, he failed to correct their inaccurate descriptions of the SBC loop qualification system. As a result, by claiming that Mr. Mileham never had an opportunity to review the Cullen e-mail because of his computer crash, and that he only reviewed Mr. Welch's affidavit "late at night" and must have missed the "important sentence," both Mr. Mileham and SBC provided a reason why the only SBC employee who admitted to understanding the actual operation of the system failed to correct the inaccurate affidavits. Thus, Mr. Mileham's explanations were consistent with and supported SBC's explanation that it did not intentionally submit incorrect affidavits to the Commission. His apparent misrepresentations directly benefited SBC in its efforts to convince the Commission that the filing of the incorrect affidavits was not intentional.[91]

74. SBC has argued to the Enforcement Bureau that it has no responsibility for misrepresentations or willful material omissions by its employees within the scope of their employment during a Commission investigation.[92] This claim is wholly without support under the Act or Commission precedent, and SBC has provided no authority for its assertion. Section 217 of the Act explicitly states, "[i]n construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier … acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier … as well as that of the person."[93]

75. Moreover, we have a long history of holding regulated entities responsible for the representations of employees or other agents acting within the scope of their employment,[94]

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[91] In this regard, we note that SBC has not filed anything with the Enforcement Bureau distancing itself from Mr. Mileham's apparent misrepresentations. Thus, SBC continues to rely on Mr. Mileham's apparently intentionally false statements as a basis for its explanation of how it unintentionally submitted the incorrect reply affidavits and continues to gain potential benefit from such apparently intentionally false statements.

[92] *See* Letter from Reid M. Figel, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission (June 20, 2001).

[93] 47 U.S.C. § 217. *See also Vista Services Corp.*, Order of Forfeiture, FCC 00-378, para. 9 (rel. Oct. 23, 2000) (rejecting argument that company not liable for conduct of telemarketing firms and third party verifiers); *Long Distance Direct, Inc.*, Order, 15 FCC Rcd 3297, 3300, para. 8 n.8 (2000); *Amer-I-Net Services Corp*, Order of Forfeiture, 15 FCC Rcd 3118, 3120, para. 7 (2000); *Heartline Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 11 FCC Rcd 18487, 18494, para. 13 (1996).

[94] *See, e.g., Russellville Educational Broadcast Foundation,* Letter, 14 FCC Rcd 11208, 11209 (Mass Media Bur. 1999) ("[L]icensees cannot be excused from responsibility for the acts of their employees."); *Hemmingford Media, Inc.*, Order of Forfeiture, 14 FCC Rcd 2940, 2941, para. 7 (Compl. and Info. Bur. 1999) ("[The Commission] remind[s] respondent that the responsibility for compliance with the terms of … [the radio station's] license rests (continued….)

including misrepresentation.[95] We have consistently found that, regardless of mitigating factors, an employer is responsible for the statements or actions of its employees[96] and "those who control the corporation must be held accountable for the conduct of those who have been delegated the authority to act in its name."[97] This is particularly true where, as here, the company relies on an employee's factual representations in a sworn report to the Commission, presumably following due diligence by the company to verify those representations.

76. We reject the argument that, in order for an employee's actions to be imputed to the company, the employee must be a partner, shareholder, officer or director of the licensee.[98] Such a result would encourage a corporation to delegate as much authority as possible to the lowest level employee possible in order to insulate itself from responsibility for misconduct.[99] As the Commission has cautioned, "[m]erely standing back and waiting for disaster to strike or for the Commission to become aware of it will not insulate corporate owners from the consequences of misconduct."[100] Where the transgressions of an employee are serious, we have held the employing licensees responsible and imposed sanctions regardless of the employer's

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solely and exclusively with the licensee."); *Zapis Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 7859, para. 5 (Mass Media Bur. 1992) ("[I]t is well established that an employer remains responsible for the actions of its employees.")

[95] *See, e.g., Rocket Radio, Inc.,* Memorandum Opinion and Order, 70 FCC 2d 413, 424-425 (holding licensee responsible for an employee's false affidavit that was submitted to the Commission), *recon. denied,* 66 FCC 2d 193 (Rev. Bd. 1977); *Sea Island Broadcasting Corp.*, 61 FCC 2d at 944, para. 43 ("It is undisputed that the denial of knowledge of fraudulent billing contained in the … statement … constituted a knowing misrepresentation by an officer or director of the licensee corporation. Moreover, even if he had been a mere employee, the licensee could not escape responsibility for his misrepresentation."); *Ned N. Butler and Claude M. Gray, D.B.A. The Prattville Broadcasting Co., Prattville, Ala.,* Decision, 4 FCC 2d 555, 563 (Rev. Bd. 1966) ("The Commission has repeatedly refused to absolve a licensee of responsibility for deceptions practiced by his employees, and in instances of serious transgressions has imposed sanctions upon the licensee notwithstanding his professed lack of knowledge.")

[96] *See, e.g., Zapis Communications Corp.*, 7 FCC Rcd at 7859, para. 5 (licensee held responsible for employee's action when, in violation of station policy, employee broadcast telephone conversation without the other party's knowledge or consent); *Frank Battaglia*, Letter, 7 FCC Rcd 2345 (Mass Media Bur. 1992) (admonishing licensee for employee hoax broadcast even though station denounced broadcast, fired employees involved, and took other corrective measures).

[97] *See generally Northwestern Indiana Broadcasting Corp.*, Initial Decision, 65 FCC 2d 73 (ALJ 1976) (station's renewal license denied after discovery that general manager/vice president submitted false information to the Commission).

[98] *See, e.g., Sea Island Broadcasting Corp.*, 61 FCC 2d at 944, para. 43 (license revoked where management misrepresented station's billing practices to Commission and Commission noted that even if offending person had been "a mere employee" instead of an officer or director of the company, licensee would still be responsible).

[99] *Character Policy Statement*, 102 FCC 2d at 1218, para. 78 ("A corporation must be responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment. To hold otherwise would, *inter alia,* encourage corporate owners to improperly delegate authority over station operations in order to 'neutralize' any future misconduct.").

[100] *Id.*

lack of knowledge.[101] Indeed, the employee training efforts that SBC promised to undertake in the *SBC/SNET Consent Decree* were directed at avoiding precisely this type of situation.

77. SBC volunteered Mr. Mileham as an employee with knowledge of the facts and explicitly relied on Mr. Mileham's affidavit. For instance, SBC's April 6, 2001 report, which was signed by a SBC Senior Vice President, states that Mr. Mileham's affidavit "help[s] to explain how it came about that [the] reply affidavits contained inaccurate statements."[102] SBC's report specifically cites Mr. Mileham's apparently untruthful statements that he did not review the Cullen e-mail because it was "accidentally deleted" and that he reviewed the Welch affidavit "late at night" and "must have skipped" the relevant sentence.[103]

78. For these reasons, we hold that SBC is responsible for Mr. Mileham's apparent misrepresentations in the affidavit attached to SBC's April 6, 2001 submission to the Enforcement Bureau.[104]

79. In light of SBC's apparent willful and/or repeated failure to comply with section 1.17 of the Commission's rules, we find that a substantial proposed forfeiture is warranted. Section 503(b)(1) of the Act states that any person who 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.[105] 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 $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.[106] In determining the appropriate proposed 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

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[101] *KWK Radio, Inc.,* 34 FCC 1039 (1963) (revoking broadcast license due to fraud by station's general manager in conducting a "treasure hunt" contest), *aff'd*, *KWK Radio, Inc. v. FCC,* 337 F.2d 540 (1964); *Eleven Ten Broadcasting Corp.,* Decision, 32 FCC 706, 708-09, paras. 6-7 (1962) (denying renewal in part because of log alterations made by station employee), *aff'd sub nom. Immaculate Conception Church v. FCC*, 320 F.2d 795 (D.C. Cir. 1963); *Carol Music, Inc*., Decision, 37 FCC 379, 380, para. 3 (1964) (adopting in relevant part initial decision revoking license based in part on refusal by station manager to furnish information requested by the Commission).

[102] SBC Report at 4.

[103] SBC Report at 5, nn. 5-6.

[104] SBC's argument that it is not responsible for the statements of its employees in this context raises potentially troubling concerns in other contexts as well. Regardless of whether SBC continues to make this legal argument in any response to this NAL, we request that, as part of any such response, or separately if it does not file a response (*e.g.*, if it simply pays the proposed forfeiture), SBC identify any other situations where it believes the Commission should treat SBC employees acting within the scope of their employment as not speaking on behalf of SBC. This will assist us in considering the extent to which it is appropriate for us to rely (or not to rely) on written or oral statements by SBC employees in any such other contexts.

[105] 47 U.S.C. §503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

[106] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R § 1.80(b)(2).

to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[107]

80. Considering all of the enumerated factors and the particular circumstances of this case, we find that SBC is apparently liable for the maximum $120,000 forfeiture for its apparent violation of section 1.17. First, we note that the base forfeiture for misrepresentation is the statutory maximum.[108] In this regard, as noted above, the Commission has indicated that misrepresentation "always is an egregious violation."[109] We have further stated that "[a]ny entity or individual that engages in this type of behavior should expect to pay the highest forfeiture applicable to the service at issue."[110] Moreover, the apparent misrepresentation is particularly egregious here because it occurred in the context of an investigation into possible misrepresentation, *i.e.*, in a context where the company and its employees should have had a heightened awareness of the importance of not submitting misrepresentations to the Commission. As with the proposed finding regarding section 1.65, the relationship to the *SBC/SNET Consent Decree* and the need for a sufficient deterrent also support a substantial proposed forfeiture here.

D. SBC Apparently Violated The *SBC/SNET Consent Decree*

81. We also conclude that SBC apparently willfully or repeatedly violated the terms of the June 1999 Consent Decree arising out of the merger between SBC and Southern New England Telephone Corporation. The *SBC/SNET Consent Decree* resolved an informal investigation by the Commission into allegations (similar to the ones at issue here) that SBC violated sections 271 and 272 of the Act, that SBC violated section 1.65 of the Commission's Rules, and that SBC employees made inaccurate statements to the Commission. The Commission agreed to resolve the matter by Consent Decree following SBC's promise to, among other things, institute a training program for employees dealing with the Commission.[111] We conclude that SBC apparently willfully or repeatedly violated the terms of the *SBC/SNET Consent Decree* by ignoring its obligation to train one of its affiants in the section 271 proceeding in the Commission's rules regarding contacts with and representations to the agency.

82. Under the terms of the Compliance Plan incorporated by reference into the *SBC/SNET Consent Decree*, SBC employees who engage in regular contacts with the Commission as part of their assigned duties must be informed of the Plan and the Commission's rules and regulations regarding contacts with, and representations to, the Commission through a

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[107] 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17100, para. 27; 47 C.F.R. § 1.80(b)(4).

[108] 47 C.F.R. §1.80.

[109] *Forfeiture Policy Statement*, 12 FCC Rcd at 17098, para. 21.

[110] *Id.*

[111] *Order*, para. 3.

Compliance Primer.[112] The covered employees subject to this requirement include, among others, those employees assigned to SBC's Washington, D.C. office, subject matter experts, attorneys, and other employees who meet with the Commission on a regular basis.[113] These employees also must certify that they have reviewed and understand SBC and Commission requirements for interaction with the agency.[114] Finally, these employees must ensure that other employees participating in Commission contacts are informed of the Compliance Plan and the applicable Commission rules and regulations.[115]

83. In an inquiry letter, the Enforcement Bureau directed SBC to explain whether certain of its employees, including Carol Chapman, Angela Cullen, Mark Welch, Dennis Schuessler, and John Mileham, were informed of the Compliance Plan and to describe any training these persons received regarding SBC's ethical standards and the Commission's rules and policies with respect to contacts and representations to the Commission.[116] SBC's response was silent about whether any of these persons received any information about the Compliance Plan or received training on the Commission's rules regarding contacts with and representations to the agency.[117] Rather, SBC represented that the named employees "were advised of their obligation to provide truthful information to the Commission at all times … and each understood that obligation."[118] These individuals also "were advised or were aware that they should advise legal counsel and/or their superior if they discovered that information they provided to the Commission was inaccurate." SBC added that each of the individuals also reviewed and acknowledged understanding of SBC's Code of Business Conduct, which states that SBC employees "should comply not only with the letter, but the intent of the law" and proscribes "deliberate misrepresentations of facts, assets or records in order to deceive someone who relies on the representation."[119] Additionally, SBC represented that Ms. Cullen, Ms. Chapman and Mr. Welch knew that they should contact "271 legal counsel" in the event that there was a change in

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[112] *See SBC/SNET Consent Decree*, 14 FCC Rcd at 12751 ("SBC employees who make regular contacts with the FCC ("SBC's FCC representatives") as part of their assigned duties (e.g. employees assigned to SBC's Washington D.C. office, subject matter experts, attorneys and other employees who meet with the FCC on a regular basis) will be informed of this Plan and the FCC's rules and regulations regarding contacts with, and representations to, the FCC through a Compliance Primer and will be required to ensure that other employees participating in FCC contacts are informed of the Plan and the applicable FCC rules and regulations.")

[113] *See SBC/SNET Consent Decree*, 14 FCC Rcd at 12751.

[114] *Id.*, 14 FCC Rcd at 12749.

[115] *Id.*, 14 FCC Rcd at 12751.

[116] *See* Letter of Inquiry at 4.

[117] *See* Affidavit of Sandra L. Wagner, Vice President--Federal Regulatory, SBC, attached to May 11, 2001 Letter.

[118] *Id.* at 2-3.

[119] *Id.* at 3.

the information they submitted to the Commission.[120] Ms. Chapman and Ms. Cullen also received witness training emphasizing the obligation to be truthful in testimony.[121]

84. We first conclude that SBC was required to inform Ms. Chapman of the requirements set out in the Compliance Plan. Specifically, the *SBC/SNET Consent Decree* required that SBC employees who "make regular contacts with the FCC … as part of their assigned duties … will be informed" of the Compliance Plan and the Commission's rules and regulations "regarding contacts with, and representations to, the FCC through the Compliance Primer ...."[122] Ms. Chapman's responsibilities demonstrate that she should have received the required training and instruction. Specifically, in affidavits submitted to the Commission, including the affidavit supporting the SBC Report in this investigation, Ms. Chapman describes her responsibilities at SBC as representing SBC's positions to regulatory bodies and monitoring state and federal regulatory proceedings affecting SBC's wholesale marketing.[123] Moreover, Ms. Chapman's actual interaction with the Commission supports this conclusion, as she was heavily involved with SBC's section 271 applications for Texas and Kansas/Oklahoma. In those proceedings, she submitted sworn direct and reply affidavits and met with CCB staff at least three times to discuss the company's showing.[124] In giving examples of employees having regular contacts with the Commission, the *SBC/SNET Consent Decree* made clear that not only did the requirements cover "employees assigned to SBC's Washington, D.C. office," but also "subject matter experts … who meet with the FCC on a regular basis." Thus, based on her own description of her job responsibilities and her regular contacts with the Commission, Ms. Chapman should have received a Compliance Primer informing her of the Compliance Plan and the Commission's rules concerning contacts with and representations to the Commission.

85. We also conclude that SBC's other efforts to train Ms. Chapman do not demonstrate compliance with the *SBC/SNET Consent Decree*. In response to a specific Bureau inquiry, SBC has provided no information indicating that it educated Ms. Chapman about the Compliance Plan or about the Commission's rules, as required by the *SBC/SNET Consent Decree*.[125] Under the Consent Decree, Ms. Chapman also had to certify that she had reviewed

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[120] *Id.*

[121] *See id*. SBC also described other company policies but, from its response, did not make clear that the individuals about whom the Enforcement Bureau inquired knew or were informed about these policies. Specifically, SBC represented that legal counsel repeatedly and routinely advised all witnesses that information presented in 271 proceedings must be accurate and complete. Additionally, SBC represented that its practice is "to advise all employees submitting sworn testimony or information to the Commission that they must provide true and correct information." *Id.*

[122] *SBC/SNET Consent Decree*, 14 FCC Rcd at 12751.

[123] *See e.g.*, Attachment B to SBC Report, para. 1; Affidavit of Carol Chapman, para. 1, attached to SBC Brief.

[124] We also note that, subsequent to the Kansas/Oklahoma proceeding, Ms. Chapman submitted affidavits in SBC's Missouri and Missouri/Arkansas 271 proceedings.

[125] *See* Letter of Inquiry at 4. Indeed, it appears from this and other information submitted to the Bureau that SBC failed to train any employees who regularly submitted affidavits to the Commission.

the SBC Compliance Primer and understood the Commission's standards for interaction with the agency.[126] But in response to the Bureau's inquiry, SBC has offered no evidence that it fulfilled any of these requirements with respect to Ms. Chapman. SBC has asserted, however, that it had a Code of Conduct in place for many years prior to and after the Consent Decree. Although we acknowledge the existence and importance of this Code of Conduct, we also note its apparent ineffectiveness in preventing company employees from making inaccurate statements to the Commission, and its apparent failure to ensure timely notification of inaccuracies in pending applications. We also note that this Code of Conduct was in effect during the relevant time when the Commission was investigating SBC's conduct that led to the more specific requirements in the *SBC/SNET Consent Decree*. That is precisely why the more specific requirements were included in the *SBC/SNET Consent Decree*.

86. Moreover, under the terms of the *SBC/SNET Consent Decree*, Ms. Chapman (as an SBC employee "who make[s] regular contacts with the FCC" and as a "subject matter expert … who meet[s] with the FCC on a regular basis") should have informed Mr. Welch, Ms. Cullen, Mr. Schuessler, and Mr. Mileham about the Compliance Plan and the applicable FCC rules and regulations.[127] Once again, SBC has offered no evidence on this point in response to the Bureau's inquiry.[128]

87. In light of SBC's apparent willful and/or repeated failure to comply with the terms of the *SBC/SNET Consent Decree*, we find that a proposed forfeiture is apparently warranted. As noted above, section 503(b)(1) of the Act states that any person who willfully and/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.[129] 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 $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.[130] 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

[126] *SBC/SNET Consent Decree*, 14 FCC Rcd at 12749.

[127] *Id*. at 12751 (SBC employees who make regular contacts with the Commission as part of their assigned duties "will be required to ensure that other employees participating in FCC contacts are informed of the Plan and the applicable FCC rules and regulations.")

[128] We are concerned by the lack of training provided to Ms. Cullen, Mr. Welch, Mr. Schuessler and Mr. Mileham but find that their contacts with the Commission were not sufficiently regular under the terms of the *SBC/SNET Consent Decree* to warrant their inclusion in the same group as Ms. Chapman.

[129] 47 U.S.C. §503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

[130] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R § 1.80(b)(2).

to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[131]

88. We note that there is no base amount for violations of consent decrees in the *Forfeiture Policy Statement* and section 1.80 of the Commission's Rules. The Commission has made clear, however, that such an omission "should not signal that the Commission considers any unlisted violation as nonexistent or unimportant."[132] We believe that a consent decree violation, like misrepresentation, is particularly serious. The whole premise of a consent decree is that enforcement action is unnecessary due, in substantial part, to a promise by the subject of the consent decree to take the enumerated steps to ensure future compliance.[133] Where, as here, it appears that a regulated entity violated a consent decree, we believe a substantial proposed forfeiture is warranted. This is particularly true where, as here, it appears that the consent decree violation may have caused the precise type of violations it was designed to avoid. Although we can only speculate, had SBC properly carried out the compliance provisions of the *SBC/SNET Consent Decree* regarding contacts with the Commission, these troubling events, or at least significant parts of them, might never have occurred.

89. As with the section 1.65 proposed forfeiture, in addition to the seriousness of the violation, we believe considerations of ability to pay/deterrent effect and the repeated/continuing nature of the violation also counsel in favor of a substantial proposed forfeiture. Accordingly, considering all of the enumerated factors and the particular circumstances of this case, we find that SBC is apparently liable for a $1.2 million forfeiture, the statutory maximum, for its apparent willful or repeated violation of the terms of the Consent Decree. As with the section 1.65 issue, in addition to any forfeiture we may impose, we believe it is important for SBC to inform the Commission about the steps it is taking to ensure future compliance with the portions of the *SBC/SNET Consent Decree* dealing with Commission contacts. Accordingly, we order SBC to file a report, within 30 days of the release date of this NAL, supported by affidavits of persons with personal knowledge, discussing steps it has taken to ensure future compliance with the relevant portions of the *SBC/SNET Consent Decree*. In addition, we order SBC to report, within nine months of the release date of this NAL, through an independent audit, on the success of its efforts to comply with the relevant portions of the *SBC/SNET Consent Decree* for the period beginning 30 days from the release date of this NAL and concluding six months thereafter.

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[131] 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100, para. 27; 47 C.F.R. § 1.80(b)(4).

[132] *Forfeiture Policy Statement*, 12 FCC Rcd at 17099, para. 22.

[133] *See, e.g., SBC/SNET Consent Decree*, 14 FCC Rcd at 12741 (citing SBC's promises regarding its compliance program and employee training efforts as factors supporting adoption of Consent Decree).

E. SBC Did Not Violate Section 271 of the Act

90. Finally, we hold that the evidence before us does not demonstrate that SBC ceased to meet a condition of the Commission's approval of its 271 application.[134] During the Kansas/Oklahoma proceeding, IP suggested that, where both fiber and copper loops served an end user address, SBC returned information on only the fiber loop, thereby failing to inform the carrier that a copper loop was available. IP asserted that this practice violated the *UNE Remand Order*.[135] In the *Order* granting SBC's application, the Commission found that, *if true*, this practice would "appear to violate the *UNE Remand Order*."[136] Based on the evidence generated during this investigation, we conclude that SBC's provision of loop qualification information between October 26, 2000 and April 3, 2001 met the requirements of section 271. Although the evidence indicates that SBC's loop qualification system in some instances provided detailed information on a fiber loop even when a copper loop was available for a particular address, we find this was not competitively significant under the circumstances in this case.[137]

IV. CONCLUSION

91. We find SBC apparently liable for a total forfeiture of $2,520,000. SBC has apparently willfully or repeatedly violated section 1.65 of the Commission's rules concerning the disclosure of information that is of "decisional significance" or that renders prior filings "no longer substantially accurate or complete in all significant respects." Additionally, we conclude that SBC apparently willfully or repeatedly violated section 1.17 of the Commission's rules by submitting an affidavit with misrepresentations or willful material omissions to the Commission during its investigation into SBC's inaccurate reply affidavits in the Kansas/Oklahoma proceeding. We also find that SBC apparently willfully or repeatedly violated the terms of the *SBC/SNET Consent Decree* by failing to inform its employees who made regular contacts with the Commission about the Compliance Plan and about the Commission's regulations regarding contacts with, and representations to, the Commission and by those persons failing to relay that information to other relevant employees. Finally, we order SBC to file certain reports regarding future compliance with section 1.65 of the Rules and the *SBC/SNET Consent Decree*.

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[134] *See* 47 U.S.C. § 271(c) and (d)(6).

[135] IP also claimed that SBC's failure to return information on all available loops to an address was a violation of the Commission's requirements in the *UNE Remand Order*. In the order granting SBC's Kansas and Oklahoma applications, the Commission found that, despite SBC's acknowledgement that it returned information on only one loop, it was not self-evident from the *UNE Remand Order* that SBC was required to provide information on all loops serving a particular address. Therefore, the Commission found that SBC was not in violation of the *UNE Remand Order*. *See Order*, para. 128.

[136] *Id.*, para. 129.

[137] Based on the record in this proceeding, (i) these circumstances occurred no more than five percent of the time, and (ii) even in those cases, the inquiring customer would be informed about copper loops in the distribution plant serving a customer's general area, at which point the customer could request detailed information on copper loops through a manual query at no additional charge. *See* SBC 1.65 Report.

V. ORDERING CLAUSES

92. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,[138] and section 1.80 of the Commission's Rules,[139] SBC Communications, Inc. is HEREBY NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of two million, five hundred twenty thousand dollars ($2,520,000.00) for willfully or repeatedly violating sections 1.17 and 1.65 of the Commission's Rules and the terms of the *SBC/SNET Consent Decree*.

93. 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 AND ORDER, SBC Communications, Inc. 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.

94. 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.

95. 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.

96. 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, Inc. c/o Sandra L. Wagner, Vice President-Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

97. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 218 and 403 of the Act,[140] SBC Communications, Inc. SHALL FILE a report within thirty (30) days of the release date of this NOTICE OF APPARENT LIABILITY AND ORDER, supported by affidavits of persons with personal knowledge, discussing steps it has taken to ensure future compliance with section 1.65. IT IS FURTHER ORDERED that SBC Communications, Inc. SHALL REPORT within nine (9) months of the release date of this NOTICE OF APPARENT LIABILITY AND ORDER, through an independent audit, on the success of its efforts to comply with section 1.65

[138] 47 U.S.C. § 503(b).

[139] 47 C.F.R. § 1.80.

[140] 47 U.S.C. §§ 154(i), 218 and 403.

for the period beginning thirty (30) days from the release date of this NOTICE OF APPARENT LIABILITY AND ORDER and concluding six months thereafter.

98. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 218 and 403 of the Act, SBC Communications, Inc. SHALL FILE a report within thirty (30) days of the release date of this NOTICE OF APPARENT LIABILITY AND ORDER, supported by affidavits of persons with personal knowledge, discussing steps it has taken to ensure future compliance with the portions of the *SBC/SNET Consent Decree* concerning training of relevant employees regarding contacts with the Commission. IT IS FURTHER ORDERED that SBC Communications, Inc. SHALL REPORT within nine (9) months of the release date of this NOTICE OF APPARENT LIABILITY AND ORDER, through an independent audit, on the success of its efforts to comply with portions of the *SBC/SNET Consent Decree* concerning training of relevant SBC Communications, Inc. employees regarding contacts with the Commission for the period beginning 30 days from the release date of this NOTICE OF APPARENT LIABILITY AND ORDER and concluding six months thereafter.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary