

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

In the Matter of)
BellSouth Telecommunications, LLC,) File No.: EB-IHD-14-00017954
d/b/a/ AT&T Southeast) NAL/Acct. No.: 201632080007
) FRN: 0020882668
)
)

ORDER

Adopted: July 29, 2020

Released: August 11, 2020

By the Commission: Commissioner O’Rielly issuing a statement; Commissioner Rosenworcel dissenting and issuing a statement; Commissioner Starks concurring and issuing a statement.

I. INTRODUCTION

1. In 2016, the Commission issued a Notice of Apparent Liability for Forfeiture (NAL)1 to BellSouth Telecommunications, LLC, d/b/a AT&T Southeast (AT&T or the Company) for apparently failing to charge two Florida school districts the lowest corresponding price for telecommunications services it provided under the E-Rate program. Specifically, the NAL proposed a forfeiture of \$106,425 against AT&T for apparent violation of section 254(h)(1)(B) of the Communications Act of 1934, as amended (the Act) and section 54.511(b) of the Commission’s rules.2 Because the Act requires the Commission to issue a notice of apparent liability within one year of a violation and these apparent violations occurred more than one year prior to the issuance of the NAL,3 the Commission, through this Order, cancels the NAL and proposed forfeiture.4

II. BACKGROUND

A. The LCP Requirement

2. The schools and libraries universal service support mechanism, commonly referred to as the E-Rate program, enables eligible schools, libraries, and consortia to receive discounts on telecommunications services, Internet access, internal connections, basic maintenance costs, and managed internal broadband services.5 Section 254(h)(1)(B) of the Act requires that providers offering services to E-Rate eligible schools and libraries “shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) [of this section] provide such services to

1 BellSouth Telecommunications, LLC, d/b/a AT&T Southeast, Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 8501 (2016) (NAL).

2 47 U.S.C. § 254(h)(1)(B); 47 CFR § 54.511(b).

3 47 U.S.C. § 503(b)(6)(B); see also 47 CFR § 1.80(c)(4).

4 See 47 CFR §1.80(f)(4).

5 See 47 CFR § 54.502 (identifying categories of E-Rate eligible services, including Telecommunications, Telecommunications Services, and Internet access, as defined in 47 CFR § 54.5, and internal connections, basic maintenance, and managed internal broadband services, as defined in 47 CFR § 54.500).

elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.”⁶

3. To implement this statutory mandate, the Commission established a rule, which, as a condition of participation in the E-Rate program, prohibits service providers from charging a price above the lowest corresponding price. Specifically, pursuant to section 54.511(b) of the Commission’s rules, “[p]roviders of eligible services shall not submit bids for or charge schools, school districts, libraries, library consortia, or consortia including any of these entities a price above the lowest corresponding price for supported services, unless the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory.”⁷ Our rules define the lowest corresponding price as “the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.”⁸ The LCP Requirement “ensure[s] that a lack of experience in negotiating in a competitive telecommunications service market does not prevent some schools and libraries from receiving [competitive, cost-based prices].”⁹

4. Pursuant to section 503(b) of the Act, the Commission is empowered to assess forfeiture penalties on any person who willfully or repeatedly failed to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder.¹⁰ However, the Commission may not assess forfeitures for violations “if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.”¹¹

B. Procedural History

5. On July 27, 2016, the Commission issued an *NAL* against AT&T for its apparent violation of the LCP Requirement.¹² The *NAL* alleged that AT&T was apparently liable for failing to charge two Florida districts, Dixie County School District (Dixie County) and Orange County School District (Orange County) (collectively, the Districts) the lowest corresponding price for telecommunications services supplied by AT&T. The Commission explained that, by submitting forms for reimbursement and annual service provider certification, “AT&T caused USAC to disburse funds to reimburse . . . at prices that were not compliant with the LCP Requirement.”¹³ In its discussion assessing the proposed forfeiture, the *NAL* alleged that AT&T’s violations were continuing “because the forms have not been corrected and AT&T has retained the excessive reimbursements.”¹⁴ Although the Commission found that AT&T apparently violated the LCP Requirement repeatedly from July 2012 to June 2015, exercising its discretion, the Commission limited the forfeiture determination to the 2014-2015 funding year.¹⁵ The *NAL* proposed a forfeiture of \$106,425, based on the difference between the price the Districts should have been charged and the price they were actually charged, trebled for damage caused

⁶ 47 U.S.C. § 254(h)(1)(B).

⁷ 47 CFR § 54.511(b).

⁸ 47 CFR § 54.500.

⁹ *Id.* at 9031-9032, paras. 484-485.; *see Fed.-State Joint Bd. on Universal Serv.*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5398, para. 133 (1997).

¹⁰ 47 U.S.C. § 503(b).

¹¹ 47 U.S.C. § 503(b)(6)(B).

¹² 47 CFR § 54.511(b); *NAL*, 31 FCC Rcd at 8501, para. 1. We collectively refer to the statutory provision, section 254(h)(1)(B), and the corresponding Commission rule, section 54.511(b), as the LCP Requirement.

¹³ *Id.* at 8524, para. 67.

¹⁴ *Id.*

¹⁵ *Id.* at 8524-25, paras. 67-71.

by the unlawful charges to the Fund and submission to USAC of false certifications of compliance with the E-Rate rules.¹⁶

6. On August 26, 2016, AT&T responded to the *NAL*, arguing the *NAL* should be dismissed.¹⁷ AT&T argued the proposed forfeiture is time-barred because the violations occurred when the prices in question were billed, which was more than one year before the issuance of the *NAL*.¹⁸ According to AT&T, because the LCP Requirement is tied to rates charged, the Commission cannot tenably rely on a continuing violation theory for failing to correct reimbursement forms.¹⁹ Specifically, AT&T argued the LCP Requirement precludes providers from “*charg[ing]*” prices above the lowest corresponding price,²⁰ it last charged Dixie County for the relevant services on July 1, 2014, and Orange County for the relevant services on June 1, 2015,²¹ and therefore, the latest date a timely *NAL* could have been issued was June 1, 2016. Since the *NAL* is dated July 27, 2016, AT&T concludes it was not issued before the statute of limitations expired.²²

III. DISCUSSION

7. Upon further review and consideration of our rules and the facts presented in this case, we conclude that AT&T’s apparent violation of the LCP Requirement occurred more than one year prior to the issuance of the *NAL*. First, section 54.511(b) of the Commission’s rules states that “[p]roviders of eligible services shall not . . . charge schools [or] schools districts . . . above the lowest corresponding price for supported services”²³ We agree that based on this wording, the lowest corresponding price violations occurred in the instant case when AT&T apparently charged the non-compliant prices to the two school districts.

8. Second, we find that each alleged failure to charge rates in compliance with the LCP Requirement was a single event that is not continuing in nature because the apparent violations occurred and were perfected when each allegedly non-compliant invoice was issued. A continuing violation may be deemed to occur where the offending conduct is ongoing, rather than when it is limited to a discrete event.²⁴ The *NAL* alleged—without citing any precedents—that these “violations are continuing because the forms have not been corrected and AT&T has retained the excessive reimbursements.”²⁵ But just because the incidental *consequence* flowing from offending conduct continues does not mean that the

¹⁶ *Id.* at 8501, para. 1, 8524-25, paras. 67-71.

¹⁷ *BellSouth Telecommunications, LLC, d/b/a AT&T Southeast*, Response to Notice of Apparent Liability (Aug. 26, 2016) (on file in EB-IHD-14-00017954) (*NAL* Response).

¹⁸ *NAL* Response at 44-45.

¹⁹ *Id.* at 47-49.

²⁰ *Id.* at 45 (emphasis in original).

²¹ *Id.*

²² *Id.* at 44-45.

²³ 47 CFR § 54.511(b).

²⁴ See *U.S. v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939), *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952). We note that the Commission has found that certain violations, including but not limited to unauthorized transfers of control, are continuing in nature. For example, the Commission has found that the transfer of ownership of a station license without Commission approval was a violation that continued throughout the period that the ownership arrangement remained unauthorized. See *First Broadcasting Corp.*, 3 FCC Rcd 2758 (1988). This interpretation is supported by the legislative history accompanying Congress’ 1989 amendments to Section 503(b) of the Communications Act, where the House Report stated that “if an unauthorized transfer of control of a broadcast license is accomplished by the sale of stock, the sale is a one-time, continuing violation for each day that the parties fail to obtain the necessary authorization.” See H.R. Conf. Rep. No. 101-386, 101st Cong., 1st Sess., 1989 U.S.C.C.A.N. 3018, 3038.

²⁵ *NAL*, 31 FCC Rcd at 8524, para. 67.

conduct itself should be deemed ongoing. Indeed, defining continuing improper conduct by its ongoing incidental effects would make a continuing violation indistinguishable from a perfected violation since almost every perfected violation could be expected to have certain negative ongoing consequences. Instead, we give meaning to the distinction and, given the text of the rule at issue, find the conduct was perfected when AT&T issued each invoice. In short, the mere existence of such continuing consequences, standing alone, is not a basis for finding a continuing violation of the underlying offense of failure to charge the Districts the lowest corresponding price.

9. We therefore find that the statute of limitations for each apparent violation began to run from when AT&T last billed Dixie County and Orange County a price allegedly above the lowest corresponding price. Because the last bill or charge to the two school districts cited in the *NAL* was more than a year before the issuance of the *NAL* and in the absence of a continuing violation in this instance, the forfeiture is time-barred by the Act's statute of limitations.²⁶ Due to the expiration of the one-year statute of limitations, as codified in section 503(b)(6)(B) of the Act, we find that a forfeiture against AT&T for apparent violation of the LCP Requirement against the Districts is time barred, and cancellation of the forfeiture proposed in the *NAL* is appropriate.²⁷ We thus hereby cancel the *NAL* against AT&T and the proposed forfeiture.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to 47 U.S.C. § 503(b)(6)(B) and 47 CFR § 1.80(f)(4), the Notice of Apparent Liability for Forfeiture and proposed forfeiture for \$106,425 issued to BellSouth Telecommunications, LLC, d/b/a AT&T Southeast are hereby **CANCELLED**.

11. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by first class mail and certified mail, return receipt requested, to Jeanine Poltronieri, Assistant Vice President, Federal Regulatory, AT&T Services and BellSouth Telecommunications, LLC, d/b/a AT&T, 1120 20th St. NW, Suite 1000, Washington, DC 20036, and to AT&T's attorneys, Helgi C. Walker, Russell B. Balikian and David A. Schnitzer, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ 47 U.S.C. § 503(b)(6)(B).

²⁷ Because we are cancelling the *NAL* due to the expiration of the statute of limitations, we need not address AT&T's arguments that it complied with the LCP Requirement during the period in question.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *BellSouth Telecommunications, LLC, d/b/a/ AT&T Southeast*, File No.: EB-IHD-14-00017954.

I fully support the decision to cancel this Notice of Apparent Liability and proposed forfeiture. The previous Commission's attempt to evade the applicable statute of limitations through its continuing violation theory was offensive to the rule of law and must be thoroughly rejected.

While I don't object to the decision to resolve this matter purely on procedural grounds, I would point out that the NAL was substantively defective as well; AT&T likely would have prevailed even if the claims against it weren't time-barred. According to the facts in the record, the two school districts in question chose to purchase services on a month-to-month basis directly from AT&T, rather than through the statewide consortium's multi-year contract. Requiring AT&T to charge those school districts the same rates charged to those buying services from the bulk consortium contract would be a misapplication of our "lowest corresponding price" rule, which prohibits service providers from charging E-Rate eligible entities a price above what they charge "similarly situated" non-residential customers for "similar services."

Flexible month-to-month service (which the two school districts indeed seemed to want, based on the record) is not "similar" to service provided through a fixed-length or multi-year contract. Further, a single school district is not "similarly situated" to a consortium that negotiates to purchase high-volume capacity over a long term. The two school districts could have chosen to purchase service through the consortium but, for whatever reason, chose instead to purchase service directly from AT&T. Finding that they can bypass the consortium (and its applicable fees for negotiating and administering the contract) and still be eligible for the consortium's bulk negotiated rates would confer an unfair advantage. Further, this would defeat the purpose of joining consortia in the first place, in turn undermining the Commission's policy of encouraging consortia and bulk purchasing in the E-Rate program.

I fully support our decision to rescind this flawed NAL and vote to approve.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
DISSENTING**

Re: *BellSouth Telecommunications, LLC, d/b/a/ AT&T Southeast*, File No.: EB-IHD-14-00017954.

This decision revisits an earlier Notice of Apparent Liability for Forfeiture regarding allegations that a provider did not live up to its duty to charge schools the “lowest corresponding price” for services under the E-Rate program. I respect my colleagues’ decision today to conclude that this prior effort was procedurally untimely. However, I supported the underlying NAL and continue to believe that there are merits to our earlier approach. In particular, I believe our initial decision would support greater accountability with respect to universal service funds than the course the agency adopts today. That is because our prior approach recognized that some violations of our rules should be treated as continuing until they are remedied. In addition, our earlier approach sought to count infractions from the date of universal service disbursements. This could be a more transparent point for action than the one we adopt here involving counting from when schools are billed by a provider. The agency may not become aware of billing until well after an infraction has taken place and as a result the approach in today’s decision could make enforcement of our rules more difficult. For this reason, I choose to dissent.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS
CONCURRING**

Re: *BellSouth Telecommunications, LLC, d/b/a/ AT&T Southeast*, File No.: EB-IHD-14-00017954.

In the coming months, schools and libraries will have to do more with less—a daunting proposition given the challenges of teaching and learning during the pandemic. School districts across the country face budget shortfalls and layoffs.¹ The American Federation of Teachers estimates that schools face roughly \$116.5 billion in costs associated with safe reopening, not including the costs associated with retrofitting buildings that need changes like upgrades to ventilation systems or reconfiguration of classrooms. Limited funding will have to stretch further than ever. There is so much more the Commission should be doing to help schools and libraries help Americans during this crisis, but the very least we can do is ensure E-Rate beneficiaries get the benefit of the “lowest corresponding price” rule. As with countless other problems, COVID-19 has made this issue all the more urgent.

I do not disagree with today’s outcome, but I want to emphasize how much more needs to be done to give the lowest corresponding price rule the teeth it needs. The rule requires E-Rate service providers to offer participating schools and libraries rates at or below what they charge similarly situated customers for the same services—protecting schools, libraries, and the Universal Service Fund from inflated prices.

I recognize that the statute of limitations is, as the name indicates, set by statute and not a matter of our discretion. But after four years of letting the underlying Notice of Apparent Liability linger, I would have expected the Commission to be in a position to say *something* about the merits of this case to give all parties a modicum of guidance and allow school districts to set firm pricing expectations.

Going forward, we may need to adjust our rules or enforcement practices to ensure we actually punish and deter violations of the lowest corresponding price rule. Detecting these violations is challenging, and the Universal Service Administrative Company is our first line of defense. Due to the timing of various steps in the E-Rate funding cycle, however, USAC may not learn about the price a service provider has charged an E-Rate beneficiary until weeks or months later. The Commission should consider how we can best promote timely detection of violations to avoid future problems with the statute of limitations. If we don’t, schools and libraries will not get the full benefit of the lowest corresponding price rule.

¹ Daarel Burnette II and Madeline Will, *Thousands of Educators Laid Off Already Due to COVID-19, and More Expected*, Education Week, July 14, 2020.