

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:)
)
Petition of MCImetro Access)
Transmission Services, LLC for)
Arbitration of Interconnection)
Agreement with BellSouth)
Telecommunications, Inc.)
_____)

Docket No. 050419-TP

REBUTTAL TESTIMONY OF MICHAEL J. LEHMKUHL

On Behalf of

**MCImetro Access Transmission Services LLC
(MCI)**

DECEMBER 1, 2005

DOCUMENT NUMBER-DATE

11358 DEC-1 2005

FPSC-COMMISSION CLERK

1 the purpose of providing directory assistance.¹ As I stated in my direct
2 testimony, the FCC recently ruled that imposing use restrictions on the
3 directory assistance data was discriminatory.

4 In the FCC's 2001 *DAL Provisioning Order*, the FCC clarified that
5 251(b)(3) prevented LECs such as BellSouth from imposing restrictions on the
6 use of DA data that they themselves were not subject. The FCC explained that
7 since LECs were free to use DA data as they wished, subject to state and
8 federal laws, LECs could not impose use restrictions on competitive DA
9 providers outside those imposed by state or federal law. In response to
10 BellSouth's Petition for Reconsideration of that order, the FCC's 2005
11 decision specifically stated that LECS "may not impose specific contractual
12 restrictions on competing DA provider's use of DA data." The FCC's
13 decision plainly rejected BellSouth's petition for reconsideration in which
14 BellSouth argued that it be allowed to retain such restrictions on use of
15 directory assistance data.

16 Similarly, to the extent provided below, we deny in part
17 Petitioners' requests that the Commission impose additional
18 limitations to prohibit certain uses of DA data obtained pursuant
19 to section 251(b)(3). Specifically, SBC/BellSouth request that
20 the Commission prohibit the use of DA databases for bulk
21 resale to other DA providers; for subsequent use by a DA
22 provider serving as an agent to serve multiple carrier principals;

¹ Bellsouth Telecommunications, Inc. Florida, General Subscriber Service Tariff, §§ A38.1.2.B and A38.1.1.

1 and for so called “non-DA purposes” such as direct marketing,
2 telemarketing, and sales solicitation.²

3 The FCC stated that under the principles of 251(b)(3)
4 “nondiscriminatory access,” LECs should not wield the veto power to decide
5 what are and are not appropriate uses of the data-- rather state and federal laws
6 consistent with 251(b)(3) (e.g. the FCC’s Do-Not-Call regulations) are
7 sufficient to apply equally to all carriers in preventing undesirable uses of the
8 data.³

9 For the same reasons I discussed in my direct testimony regarding
10 nondiscriminatory pricing, it is not enough to limit BellSouth’s competitors to
11 the same use restrictions or price for DADS, when BellSouth is not similarly
12 limited. As it stands now, BellSouth’s tariff inhibits nondiscriminatory access
13 to directory assistance listings in violation of 251(b)(3) of the Act.

14 **Q. MS. TIPTON, ON PAGE 33 OF HER DIRECT TESTIMONY, STATES**
15 **THAT MCI’S REQUEST FOR A DOWNLOAD OF DADS SHOULD BE**
16 **REJECTED. DO YOU AGREE WITH THIS STATEMENT?**

17 A. No. Not only is MCI currently receiving a download of DADS updates from
18 BellSouth, but BellSouth is specifically required to provide competing

² See, FCC Order on Reconsideration FCC Order on Reconsideration, *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Docket 99-273, FCC 05-93 (adopted May 3, 2005) (“*DAL Order on Reconsideration*”) at ¶ 9. The FCC’s Footnote 32 of ¶9 cites as an example “... BellSouth Feb. 13, 2004 *Ex Parte* Letter at 4-7 (submitting that BellSouth has experienced a revenue decline in its DA listings market as a result of the resale of its listings by competitors, and contending that LECs should be allowed to address consumer privacy concerns by imposing contractual restrictions on the use of DA listings for “non-DA purposes,” such as telemarketing).”

³ *Id.* at ¶ 10

1 providers with download access to directory assistance information.⁴ As this
2 Commission is aware, the FCC (as well as many other state commissions)
3 found that the per-query or per “dip” access to directory assistance listing
4 databases previously imposed by LECs, and as is advocated by Ms. Tipton’s
5 testimony, is discriminatory under Section 251(b)(3).⁵

6 **Q. DO YOU AGREE WITH MS. TIPTON’S CLAIM THAT THE FCC**
7 **REJECTED DOWNLOAD ACCESS IN THE *TRO*?**

8 A. No. Ms. Tipton is referring to the FCC’s de-classification of call-related
9 databases as UNEs in the *TRO*. Directory assistance databases are not
10 considered call-related databases and were not under consideration in the *TRO*.⁶
11 The citation to which Ms. Tipton refers specifically addresses download access
12 to Calling Name Databases (“CNAM”) under the FCC’s UNE rules. Directory
13 assistance listings were not a part of the FCC’s decision in the *TRO*. In this
14 proceeding, however, the question is whether BellSouth provides
15 nondiscriminatory access to DADS under 251(b)(3) and not under UNE rules.
16 Ms. Tipton’s argument regarding download access to DADS based on the
17 UNE rules is both misplaced and incorrect.⁷

⁴ See e.g., 47 CFR § 51.217(b)(3)(iii).

⁵ *In the Matters of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information*, Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, at ¶ 152 (September 9, 1999) (hereinafter, “1999 Directory Listing Information Order”).

⁶ See, *TRO* at ¶ 549.

⁷ Interestingly, while the FCC de-listed call-related databases as UNEs, its discussion in the *TRO* actually encouraged consideration of the download access to call-related databases under the nondiscriminatory access provision of Section 251(b)(3) which was beyond the scope of the *TRO*. *TRO* at ¶558.

1 **Q. DOES THE *TRO* OR UNEs HAVE ANYTHING TO DO WITH DADS?**

2
3 A. No. While directory assistance databases were initially considered to be
4 UNEs, the FCC has clarified that Section 251(b)(3) of the Act applies.⁸

5 **Q. CAN YOU PROVIDE ANY FURTHER EXPLANATION AS TO WHY**
6 **NONDISCRIMINATORY ACCESS FOR LOCAL DA LISTINGS IN**
7 **FLORIDA IS SO IMPORTANT?**

8 A. Yes. First, there is no “market” for local DA Listings anywhere in the country,
9 including the BellSouth’s region, so this is not just limited to Florida. For
10 purposes of our discussion however, I will limit it to Florida.

11 As with most LECs, BellSouth obtains most local listings “for free” as
12 an artifact of its control of local exchange service to most customers in its
13 operating region. When new customers sign up, BellSouth gathers the DA
14 information for its subscribers through its service order process. In addition,
15 when competitors like MCI provide service to Florida end-users, they typically
16 provide their subscriber listing data to BellSouth in exchange for, *e.g.*, having a
17 BellSouth affiliate provide a white page listing and directory delivery. In this
18 manner, BellSouth becomes the ***only source*** for the vast majority of up-to-date
19 local DA listings in Florida. Any company that provides access to Florida DA
20 listings ultimately gets those DA listings from BellSouth.

21 The FCC recognized this fact in its *DAL Provisioning Order* when it
22 determined that without nondiscriminatory access to the incumbent’s directory
23 assistance databases, competing DA providers would be unable to offer a

⁸ See, *UNE Remand Order* at ¶ 455; see also, *1999 Directory Listing Information Order*

1 competitive directory assistance product.⁹ This finding was upheld again later
2 when the FCC denied BellSouth's petition for reconsideration of the Order.

3 **Q. HOW SHOULD THE COMMISSION DECIDE ISSUE 31?**

4 A. The issue before this Commission is whether BellSouth provides
5 nondiscriminatory access to DADS both in its use restrictions and its pricing as
6 required by Section 251(b)(3) of the Telecommunications Act of 1996. The
7 Commission should adopt MCI's proposed language regarding DADS and
8 impose MCI's suggested interim nondiscriminatory rate of \$0.001 per update
9 listing and a \$100 recurring monthly charge. The Commission should require
10 BellSouth to file an appropriate cost study so that the Commission can
11 determine a proper nondiscriminatory cost-based rate for DADS.

12 Where LECs have a lock on the vast majority of the directory
13 assistance listings within its operating area as does BellSouth in this state, it is
14 not enough that those listings be made available only among the other
15 competing LECs at terms dictated by BellSouth. Since those LECs also
16 compete with BellSouth, it is important to ensure that BellSouth does not
17 discriminate between itself and other competitive providers either with respect
18 to use restrictions or price.

19 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

20 A. Yes.

⁹ *DAL Provisioning Order* at ¶3