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June 15, 1998

Mrs. Blanca S. Bayó
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Florida Public Service Commission
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Re: Docket No. 971560-TP (National Directory Assistance)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White
Nancy B. White (Pw)

Enclosures

cc: All parties of record
A. M. Lombardo
R. G. Beatty
William J. Ellenberg II

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Docket No. 971560-TP

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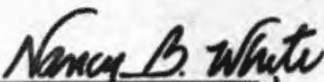
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth
Telecommunications, Inc. for waiver
of Rule 25-4.115, F.A.C., Directory
Assistance, and for authorization to
provide National Directory Assistance
(NDA) in Florida

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Docket No. 971560-TL

Filed: June 15, 1998

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF

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STATEMENT OF THE CASE

On November 26, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for waiver of Rule 25-4.115, Florida Administrative Code to enable BellSouth to provide National Directory Assistance ("NDA") service to its Florida customers. Notice of the rule waiver request was duly published in the Florida Administrative Weekly on December 19, 1997. No party submitted comments on the proposed rule waiver. On February 17, 1998, at its regular Agenda Conference, the Commission voted to grant BellSouth's petition to waive Rule 25-4.115 to enable BellSouth to provide NDA service, and issued its Proposed Agency Action Order No. PSC-98-0362-F0F-TL on March 5, 1998. On March 26, 1998, MCI filed a Protest of the Commission's Proposed Agency Action Order. On April 16, 1998, the initial Issue Identification Workshop was held, with a follow-up workshop held on April 21, 1998. As a result of these workshops, all of the parties agreed on the four (4) issues to be decided in this proceeding. Since all four issues were determined to be legal issues, the Commission directed, in Order No. PSC-98-06156-PCO-TL, issued May 4, 1998 that the parties submit these matters to the Commission through written legal briefs rather than through the use of live hearings. This brief is being submitted pursuant to the Commission's May 4, 1998 Order.

STATEMENT OF BASIC POSITION

NDA service is a lawful, adjunct-to-basic directory assistance ("DA") service, and is not an interLATA service. DA is, and has been, historically treated in a special manner by the U.S. District Court that issued the Modification of Final Judgment ("MFJ") as well as the Federal Communications Commission (FCC). BellSouth's use of its

internal official services network, that in some cases traverses LATA boundaries to access operator locations and/or DA or NDA databases, has also been recognized as permissible, and such efficient utilization of the network does not convert legitimate DA into an interLATA service. NDA is nothing more than a natural extension of historical DA service and therefore may be lawfully provided by BellSouth. The Commission should reaffirm its decision to waive Rule 25-4.115 F.A.C., find MCI's challenge to the rule waiver to be without merit, and take such action as it deems necessary to effectuate the waiver of the rule to allow BellSouth to continue its provision of NDA in the State of Florida.

STATEMENT OF POSITION ON THE ISSUES

Issue 1: Is the provision of NDA service a permissible activity for BellSouth under the MFJ and Section 271(f) of the Telecommunications Act?

****Position:** Yes. The provision of DA service on a centralized basis using the 411 dialing code and employing BellSouth's official services network is, and has always been, a permitted service under the Communications Act and the MFJ. Therefore, BellSouth is permitted to provide NDA service as a natural extension of its existing and permissible DA service.

GENERAL

While NDA service is not an "interLATA service," as that term is used in the Act, even if NDA is provided over BellSouth facilities that cross LATA boundaries, the service, just like historical DA, remains an "official service" permitted under the MFJ and grandfathered under Section 271(f) of the Act.

The Bell Operating Companies (BOCs), including BellSouth, have long been permitted to provide DA service on a centralized basis using their internal official service networks. DA service has been determined to be neither a prohibited interLATA service under the MFJ¹ nor an enhanced service under the FCC's rules.² Nothing in the addition of extra-territorial listings to this service offering converts it into an interLATA service prohibited by the Act or into an enhanced service.

A. BellSouth's National Directory Assistance Service

The only new or different feature presented by NDA service is the range of telephone numbers available to the calling customers. Otherwise, the service is indistinguishable from historical DA service.

Pursuant to its NDA service, BellSouth offers both local and nationwide directory assistance listings from a single telephone number. Callers dial the same "411" or "1 + 411" sequence they always have for directory assistance³ but are now greeted by a slightly modified automated directory assistance voice intercept and prompt. Thus, where callers previously were greeted by a "What city? What listing?" prompt, they now encounter a "What state? What city? What listing?" prompt.

¹ See, *United States v. Western Electric*, 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983).

² See, *North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF No. 84-2, 101 FCC2d 349 (1985) ("*NATA/Centrex Order*"), *aff'd on recon.*, 3 FCC Rcd 4385 (1988).

³ Callers in Kentucky, Tennessee, Mississippi, Alabama, and Louisiana historically have dialed "1+ 411" for directory assistance, while callers in Georgia, Florida, North Carolina, and South Carolina historically have simply dialed "411." Since this difference is of historical origins and has no bearing on issues presented in this proceeding, BellSouth's references to "411" herein should be considered inclusive of both dialing patterns.

If the caller requests a number for a listing within the caller's own NPA, the information is provided in the same manner as it always has been, *i.e.*, the call is routed to an operator with access to the appropriate directory listing database. On any such call, the caller, the operator, and the database all may be in separate LATAs due to BellSouth's centralization of databases and operator positions. If the caller instead seeks a number for a listing outside the caller's own NPA, the same thing happens: the call is routed to an appropriate operator who has access to an NDA database.⁴ As above, the caller, the operator, and the database frequently will be in different LATAs. Thus, the service is the same as historical DA, except for the addition of a broader base of telephone numbers.

B. National Directory Assistance Service is Not An InterLATA Service Subject to Section 271 of the Act.

MCI has asserted that provision of NDA service by BellSouth in the manner described above violates Section 271⁵ of the Act because: (a) provision of a telephone number of a telephone subscriber in a distant LATA somehow transforms an otherwise legitimate directory assistance service into an illegitimate service because that telephone number *may* be used to place a subsequent interLATA call; or (b) NDA service would have been contrary to the MFJ. Neither logic nor statutory construction supports MCI's reading of Section 271 applying to NDA service.⁶ Further, arguments of what "would have been" under the MFJ are irrelevant to consideration of what is

⁴ Listings outside the 9 state BellSouth region are compiled by and obtained from an unaffiliated vendor.

⁵ 47 U.S.C. § 271.

⁶ As information, BellSouth has obtained approval for its NDA service in seven (7) of its nine (9) states. MCI did not object to the legality of the NDA service in those states and did not intervene in those states..

permitted under the Act.⁷ Therefore, under applicable law, BellSouth is not prohibited from providing NDA service in the manner described. Attempting to split hairs to discern whether an indisputably permitted DA service is rendered impermissible based on a caller's subsequent use of information obtained from that DA service is absurd. What the customer does with the information on a subsequent call has no bearing whatsoever on the status of the call to DA. Under MCI's theory, if a caller wanted to wait to dial the number he received from "local" DA until after he was in a distant location, that would render the previous "local" DA into an interLATA service. The lack of merit of this argument is apparent on its face.

Similarly, callers presently seeking "long distance information" may choose to use an IXC's DA service by dialing 1 + NPA + 555-1212.⁸ Often, however, callers do not know the NPA they need to dial. Thus, before calling the "long distance information" service, they will dial 411 to obtain the appropriate NPA information which BellSouth has been providing for years. Under MCI's theory, the provision of NPA information by BellSouth to allow the customer to place an interLATA call over an IXC's network to reach "long distance information" (and thus to facilitate placing a possible subsequent interLATA call to another subscriber) would also seem to be a prohibited

⁷ Rather than incorporating or adopting MFJ provisions or interpretations as the substance of the Telecommunications Act of 1996, Congress chose instead expressly to divorce any proscriptive effects of the MFJ from application of the new statute. Thus, in Title VI, Effect on Other Laws, Section 601(a)(1) of the 1996 Act, Congress specifically directed that "[a]ny conduct or activity that was, before enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed [by the 1996 Act] and shall not be subject to the restrictions and obligations of such Consent Decree." Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 601(a)(1), 110 Stat. 56, 142.

⁸ Customers also have other choices, such as the internet white pages directories, independent local exchange companies (ICOs), competitive local exchange carriers (CLECs), and wireless carriers.

interLATA activity. BellSouth can neither find nor fathom any statutory support for such splitting of hairs based on subsequent use of DA information or for such consequential irrational results.

The Act simply provides no basis for distinguishing between a DA offering that is inclusive of national listings and one that is not. Indeed, the only reference to directory assistance in Section 271 appears in the enumeration of checklist items in Section 271(c)(2)(B). In that Section, Congress imposed an obligation on BOCs to provide other carriers non-discriminatory access to "directory assistance services to allow the other carrier's customers to obtain *telephone numbers*." Congress imposed no qualifications or limitations on either the "directory assistance services" or the scope of the "telephone numbers" that would be provided.

Based on the above, BellSouth submits that its provision of NDA service is not an interLATA service, but rather is a permissible extension of historical DA service.

Issue 2: Is the provision of NDA service an incidental interLATA service as defined in Section 271(g) of the Act, which BellSouth may offer pursuant to Section 251(b)(3)?

****Position:** No. NDA service is not an interLATA service, incidental or otherwise. Therefore, the service is not subject to any of the provisions of Section 271(g) of the Act.

In order to trigger Section 271 (g) in the first instance, the activity being considered must be an interLATA service. Since, as established in BellSouth's discussion of Issue 1 above, NDA is not an interLATA service, by definition it could not

be an incidental interLATA activity. Section 271(g)(4) is the closest activity to NDA in the list of incidental interLATA activities listed in Section 271(g), and the activity defined there is basically an information service (customer retrieval of stored information located in a different LATA from the customer). However, as BellSouth demonstrates in its discussion of Issue 3 below, DA services are not enhanced or information services. Therefore, it is inappropriate to apply Section 271(g) analysis to NDA.

Issue 3: Is the provision of NDA service an adjunct-to-basic service, and therefore a permissible activity for BellSouth?

****Position:** Yes. NDA service is an adjunct-to-basic service no different from BellSouth's existing DA offerings. The FCC has concluded that adjunct-to-basic services are to be treated as telecommunications services for purposes of the Act.⁹

The FCC adopted the regulatory classification of adjunct-to-basic services to capture those services that, while otherwise meeting the literal definition of enhanced services, were otherwise "basic" in purpose and use.¹⁰ Services in that category are those that "facilitate use of the basic network without changing the nature of basic telephone service."¹¹ Further, the FCC found that this "significance of purpose [test]... is perhaps most clear in the case of directory assistance"¹² This is commonly referred to as the NATA/Centrex significance of purpose test.

⁹ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 96-489, at ¶ 107.

¹⁰ *NATA/Centrex Order*, 101 FCC2d at 359.

¹¹ *Id.* at 361.

¹² *Id.* at 360 (emphasis added).

Nothing in the FCC's assessment of DA as the "most clear" example of an adjunct-to-basic service hinged on any geographic characteristics of the service or on the identity of the service provider. Indeed, in its analysis, the FCC compared DA with "Dial-it" service, an interstate, interLATA information retrieval service offered by AT&T. The FCC found that the "only significant difference between Dial-it and directory assistance is that the latter service provides only that information about another subscriber's telephone number which is necessary to allow use of the network to place a call to that other subscriber."¹³ Clearly, the FCC perceived no difference between the services based on geography, the identity of the service provider, or the number being provided and thereby solidified the rational conclusion that NDA service is an adjunct-to-basic service.

The inclusion in a DA service of subscriber listings of other carriers does not have any bearing on the regulatory classification of the DA service. As an example, BellSouth has long had agreements to include listings of independent telephone company subscribers in its DA services and, as a result of the Act, is similarly required to include listings of competitive local exchange carriers' (CLEC) subscribers.¹⁴ Thus, the fact that listings available through BellSouth's DA services are comprised not only of its own end user customers, but also additional listings for customer outside

¹³ *Id* (emphasis added).

¹⁴ The FCC also requires that BellSouth "must" include CLEC listings in its DA offerings so CLEC customers may obtain "all" possible listing information. Since CLEC serving territories may not be contiguous with BellSouth's, if BellSouth is not permitted to offer broader historical DA services, such a result could frustrate the Act's and the FCC's requirements that BellSouth's DA services deliver the broadest possible scope of listing information.

BellSouth's serving area, simply has no bearing on whether DA services continue to meet the *NATA/Centrex* significance of purpose test.

Finally, just as a customer's subsequent placing of an interLATA call to a telephone number received from DA service does not render the DA service an impermissible interLATA service, neither does it alter the adjunct-to-basic regulatory classification of the DA service. Even if the subsequent call is interLATA, the DA service has merely facilitated completion of the call without altering the fundamental nature of that call. The result is no different from when a customer uses a BellSouth-provided speed-dialing function, which is also an adjunct to basic service¹⁵, to store and dial an interLATA call. Neither of these adjunct-to-basic services affects the fundamental nature of the subsequent call, whether it is intraLATA or interLATA. That choice resides solely with the customer. Furthermore, the fact that the subsequent call may be interLATA does not affect the regulatory classification of the adjunct-to-basic service.

Issue 4: Is BellSouth's use of 411 to obtain access to NDA in violation of FCC 97-51 and therefore an unreasonable practice under Section 201(b) of the Act?

****Position:** No. BellSouth is not prohibited from using 411 for its NDA Service, either under 47 USC §201(b), or under the FCC's Order No. 97-51 in CC Docket No. 92-105 (N11 Order).

¹⁵ *Id* at 359-60.

In its *N11 Order*, the FCC concluded that "a LEC may not itself offer enhanced services using a 411 code . . . unless that LEC offers access to the code on a reasonable and nondiscriminatory basis to competing enhanced service providers." None of the parties who participated in the N11 proceeding asserted, however, that NDA services were enhanced services. Accordingly, the foregoing obligation is not triggered by a LEC's use of 411 dialing to provide NDA service.

When this issue was raised in the FCC's N11 proceeding, the parties addressing the issue all concurred that NDA service was not an enhanced service, but was instead an "adjunct to basic" service.¹⁶ Even MCI agreed that one BOC, US West, had "correctly characteriz[ed] its NDA service as 'adjunct-to-basic.'"¹⁷ Incidentally, BellSouth's architecture for providing NDA is basically the same as that used by US West and thus MCI's characterization applies equally to BellSouth's service offering. For its part in the debate, AT&T also did not contest the argument that NDA service is not an enhanced service and, in fact, has expressly stated that it "does not oppose . . . permit[ting] LECs to offer directory assistance services via 411 that include non-local telephone numbers."¹⁸

In *Order No. 97-51*, the FCC, in *dictum* in a footnote¹⁹, may have suggested, inadvertently or otherwise, for the first time that its prior adjunct-to-basic analysis

¹⁶ See, e.g., Roseville Comments, at 6-7; Southwestern Bell *et al.*, Comments at 2-3; Bell Atlantic Comments at 4; BellSouth Comments at 8-9.

¹⁷ MCI Comments at 6.

¹⁸ *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, AT&T Corp. Comments on Petitions for Reconsideration at 5 (filed Apr. 23, 1997).

¹⁹ To the extent footnote 170 does purport to announce a new rule defining the scope and extent of basic and adjunct directory services, it was promulgated in derogation of the Administrative Procedure Act, 5 U.S.C. § 553. *Montgomery Ward v. F.T.C.*, 691 F.2d 1322, 1329 (9th Cir. 1982) (amendment to rule is proper only when adequate notice is provided to affected parties by agency pursuant to appropriate

applied only to "traditional" ("local") DA services, thus implying that a regulatory classification distinction could somehow be drawn between "traditional" directory assistance service and all other services offered by LECs using 411 dialing. However, there is no relevant precedent nor rational basis for prohibiting the provision of non-local telephone numbers in a DA offering in connection with the 411 code. Indeed, the provision of a telephone number to one subscriber through access to a database of telephone numbers of subscribers anywhere on the public switched telephone network so that the first subscriber may use the network to place a call between the two is indisputably at the heart of DA service.

There is another compelling reason why, once faced with the N11 Order's inconsistency with the well reasoned past policy pronouncements defining the scope of DA as an adjunct to basic service, the FCC will likely correct this oversight and retain the historical approach to such classification. That reason is the express intent of the Telecommunications Act of 1996 to promote competition and parity among alternative providers of service. In this regard, the FCC knows that all independent local exchange companies, competitive local exchange carriers, wireless carriers, internet service providers and interexchange carriers are today able to provide NDA to their customers. In fact, Sprint, MCI and AT&T are all currently offering NDA in the State of Florida. To the extent that the new market entrants are able to provide non-local telephone

rulemaking procedures); Harley v. Lyng, 653 F. Supp. 266, 276 (E.D. Pa 1986) (revision of former regulations invalid when not promulgated in accordance with APA procedures for full notice and comment rule-making notwithstanding agency characterization of revision as interpretive); National Retired Teacher's Association v. U.S. Postal Service, 430 F.Supp. 141, 148 (D.D.C. 1977), affirmed 593 F.2d 1360 (D.C. Cir. 1979) (rule that constitutes a change in prior agency position and has substantial impact on rights and obligations of public is invalid if there has not been compliance with notice and comment requirements of APA even if rule is interpretive).

numbers via DA, but BellSouth is not similarly allowed to do so, such new market entrants could obtain an unfair competitive advantage over BellSouth in the provision of DA. BellSouth's customers would only be able to get local telephone numbers while CLEC customers would be able to get all telephone numbers available to the CLEC nationwide. In view of the increasingly competitive nature of the telecommunications industry, it is inconceivable that the FCC would choose this time to move away from its support of a service that is clearly integral to the provision of telecommunications services, and one that is expected by all customers of telecommunications carriers. Incumbent LECs like BellSouth have an equal right to provide a comprehensive portfolio of DA services to their customers, and the geographical location of the particular number requested does not change this conclusion. There is simply no way to justify or expect such a policy departure from the FCC, particularly since it advocates the virtues of competition, level playing fields, and parity among competing carriers.

CONCLUSION

Based on the foregoing, BellSouth respectfully urges the Florida Public Service Commission to reaffirm its earlier conclusion that the Company's provision of NDA service in Florida is lawful and in the public interest, to find that MCI's challenge to the

Commission's waiver of its Rule 25-4.115 F.A.C. is without merit, and to take all actions that it deems necessary to effectuate the waiver of the rule.

Respectfully submitted this 15th day of June, 1998.

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