BELLSOUTH

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SEP 23 1992

David J. Markey
Vice President-
Federal Regulatory Affairs

1133 21st Street, N.W.
Suite 900
Washington, D.C. 20036
202 463-4101

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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SEP 23 1992

Federal Communications Commission
Office of the Secretary

September 23, 1992

92-105

Mr. Robert L. Pettit
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Pettit:

I am writing in regard to a letter, dated September 16, 1992, which you recently received from Cox Enterprise's attorney, Werner Hartenberger. In this letter, Mr. Hartenberger asks you to clarify whether your earlier letter to me of May 4, 1992 can be interpreted as supporting BellSouth's use of a lottery to allocate N11 codes in the manner described in the attachments to Mr. Hartenberger's September 16th letter. A copy of Mr. Hartenberger's letter, including attachments, is enclosed for your ready reference and convenience.

As is pointed out in these attachments, it is BellSouth's understanding that you and the Commission share the view that there is no regulatory or legal impediment currently prohibiting BellSouth from assigning N11 codes in a reasonable and non-discriminatory manner, including the use of both first-come, first-served and lottery allocation procedures as specifically proposed by BellSouth. BellSouth assumes that the administration of such procedures must also be conducted in a reasonable, non-discriminatory manner.

BellSouth has interpreted your May 4, 1992 letter as supporting and being consistent with the statements published concurrently by the Commission in the NPRM (CC Docket No. 92-105) that "there appears to be no legal or regulatory impediment to assignment of such codes in the manner proposed by BellSouth" (NPRM, para. 3), and "that LECs should be permitted to select any reasonable allocation mechanism." (NPRM, para. 6). Consequently, we read your May 4th letter as being consistent with BellSouth's plan to use a lottery under specified circumstances to allocate such

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codes, and as further confirmation that a first-come, first-served allocation procedure is not the only allocation mechanism that meets the requirements of the Communications Act. Of course, we would like to know if this is not your opinion.

Accordingly, I respectfully request that any letter you might issue in response to Mr. Hartenberger's request specifically address the above points to ensure that BellSouth and other parties do not misinterpret the legal import of your clarification as it relates to BellSouth's allocation proposal.

Since there may be some overlap between the issues raised in connection with this correspondence and the Commission's NPRM on abbreviated dialing arrangements (CC Docket No. 92-105), I am also filing a copy of this correspondence in the record of that docket.

Sincerely,

David J. Markey,
Vice President-Federal Regulatory

cc: Hon. Alfred C. Sikes
Hon. James H. Quello
Hon. Sherrie P. Marshall
Hon. Andrew C. Barrett
Hon. Ervin S. Duggan
Cheryl A. Tritt
Werner K. Hartenberger

DOW LOHNES & ALBERTSON
ATTORNEYS AT LAW
1255 TWENTY-THIRD STREET
WASHINGTON, D.C. 20037

TELEPHONE [illegible]

WERNER K. HARTENBERGER
[illegible]

September 16, 1992

VIA HAND DELIVERY

Robert L. Pettit, Esq.
General Counsel
Federal Communications Commission
1919 M Street, Room 614
Washington, D.C. 20554

Re: BellSouth Corporation
N11 Matter

Dear Mr. Pettit:

As you know, in a letter to David Markey on May 4 of this year you informed BellSouth Corporation that there is "no regulatory or legal impediment prohibiting BellSouth from currently assigning N11 codes in a reasonable, non-discriminatory manner, i.e., such as the use of first-come, first-served procedures." I thought you should know that BellSouth is interpreting your letter and the Commission's Notice of Proposed Rule Making on N11 codes as endorsing the use of a lottery for the assignment of N11 codes. BellSouth has made this representation in writing both to Cox and in its reply comments in the Commission's N11 proceeding. (See attachments.)

BellSouth's interpretation does not appear to be consistent with your letter. As we understand your letter, you informed BellSouth that it could offer N11 codes on any reasonable basis, but did not offer any opinion regarding whether a lottery was reasonable. In fact, the only assignment mechanism that your letter specifically endorsed as reasonable and non-discriminatory was first-come, first-served assignment.

BellSouth's statements to Cox and in its reply comments, along with the discrepancies between BellSouth's claims and your letter, will almost certainly create confusion regarding the meaning of your letter. In addition, it should be expected that BellSouth will communicate and rely on its views regarding the meaning of your letter when dealing with state public service commission regarding its proposed N11 offerings. Absent clarification, other parties may misinterpret your letter. Accordingly, I respectfully request that you issue a letter informing BellSouth that you have become

aware of its characterization of lottery-based assignment as an approved assignment mechanism and that BellSouth's statements do not accurately reflect your correspondence with Mr. Markey. Such a correction would prevent unnecessary confusion and make certain that no one erroneously relies on an interpretation that is not supported by your letter.

Please inform me if any questions should arise in connection with this letter.

Best personal regards.

Sincerely,

Werner K. Hartenberger

Werner K. Hartenberger

Counsel for Cox Enterprises, Inc.

WKH/car
Attachments

cc: Mr. David J. Markey

COX-BELLSOUTH CORRESPONDENCE

Excerpt from Letter Regarding BellSouth N11 Proposal

BELLSOUTH
TELECOMMUNICATIONS

Robert L. Capell III
Assistant Vice President
Data Services

675 West Peachtree Street N.E.
Atlanta, Georgia 30375

June 9, 1992

Mr. James T. McKnight
Vice President of Telecommunications
Cox Newspapers
P.O. Box 105720
Atlanta, Georgia 30348

RE: Request for Three-Digit Local Dialing Arrangement With Network Based Rating, Recording and Billing; ESP Request No. 91-003

Dear Mr. McKnight:

This is BellSouth Telecommunications, Inc.'s response to the questions and issues raised in your letter of April 3, 1992 regarding the above-referenced subject. As I explained in my letter to you of May 11, 1992, this response was delayed so that we could provide you with a reply that took into account the FCC's recent actions concerning our N11 Petition.

The attached staff analysis covers each issue raised in your April 3 letter. Jim, I hope this information provides you with the clarification you were seeking. If you have any further questions regarding the issues discussed in the attachment, please feel free to give me a call. Also, we would greatly appreciate your assistance and support in getting the related state tariff filings approved as quickly as possible.

Sincerely,

Robert L. Capell III

Attachment

cc: S. M. Hendrickson
J. T. Rawls

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO THE QUESTIONS AND ISSUES RAISED IN COX NEWSPAPER'S LETTER OF APRIL 3, 1992 ("COX LETTER") REGARDING THREE-DIGIT DIALING SERVICE.

As a preliminary matter, BellSouth Telecommunications, Inc. (BellSouth) respectfully disagrees with the contention of Cox Newspapers (Cox) that BellSouth must apply the basic common carrier principle of first-come, first-served in a manner that requires BellSouth to offer a three-digit dialing arrangement to Cox as the first party requesting the proposed service before offering that arrangement to any other party (Cox letter n.1). In fact, as explained below, if we were unilaterally to assign a N11 service code to Cox on that basis, BellSouth would run a significant legal risk that the assignment would be viewed as an unreasonable preference and unlawfully discriminatory.

BellSouth's service proposal for the Atlanta area calls for the assignment of three-digit dialing arrangements on a first-come, first-served basis, but only after Georgia PSC approval of the three-digit state tariff offering. However, if total requests for the tariffed service exceed the number of available dialing arrangements during a specified period following tariff approval, all parties requesting service during that period would participate in a lottery to determine who receives a service arrangement.

It is our view that a lottery is a more equitable way to assign these service codes in those locations where actual demand exceeds the limited number of service arrangements available for assignment. Those who obtain such facilities will likely have a competitive advantage over those service providers who are unable to obtain such dialing arrangements. This seems particularly true where, as here, there is an extremely limited number of three-digit service arrangements available for assignment. In such cases, a lottery ensures that all interested customers have an equal chance to obtain service in any particular local calling area on what is clearly a nondiscriminatory basis.

A lottery serves the additional purpose of avoiding potential claims by other prospective customers that Cox would have an unfair and discriminatory advantage under any first-come, first-served assignment method that allowed it to secure a superior claim to use limited public numbering resources based on information gained from BellSouth's services development process, information that was unavailable to other customers and competitors. Even under a first-come, first-served assignment basis, BellSouth does not ordinarily accept customer requests for service before the specific terms and conditions of a proposed service are known or at least set forth in a proposed tariff filing, which is not the case here (See, Memorandum from Thompson Rawls to David Markey, dated April 7, 1992 p. 8, attached to

letter from David Markey to Chairman Sikes, dated April 10, 1992).

BellSouth is lawfully permitted to use any assignment method for service codes, including but not limited to first-come, first-served or a lottery, so long as the assignment procedures are reasonable and nondiscriminatory. Thus, we do not agree with Cox's contention that BellSouth "must" assign three-digit dialing arrangements on a first-come, first-served basis.

The FCC stated in its recently released Notice of Proposed Rulemaking regarding the use of N11 codes (NPRM) that "there appears to be no legal or regulatory impediment to assignment of such codes <u>in the manner proposed by BellSouth</u>." (emphasis added). (NPRM, para. 3.) This statement specifically endorses BellSouth's proposed assignment method as being legally acceptable. Consequently, the FCC has already rejected the contention that one of the three-digit dialing arrangements "must" be allocated to Cox on a first-come, first-served basis. In fact, the FCC reaches the exact opposite conclusion in the NPRM:

> that LECs should not be subject to any additional restrictions on how they allocate these codes, as Section 202(a) of the Communications Act already prohibits carriers from granting undue preferences or engaging in unreasonable discrimination. We tentatively conclude that LECs should be permitted to select any reasonable allocation mechanism. (NPRM, para. 6).

BellSouth's position is also supported by the FCC's General Counsel, who recently clarified in a letter to BellSouth that the use of first-come, first-served procedures for assigning N11 codes is only one of a number of assignment methods permitted under the Communications Act. (<u>See</u>, letter from Robert L. Pettit, FCC General Counsel, to David J. Markey, Vice President, BellSouth dated May 4, 1992, and NPRM, n.1).

In the April 3 letter, Cox reiterates its belief that neither federal nor state ONA procedures should apply to this service request. Furthermore, Cox states that it does not view its request as one for a "new" service that is not already offered by BellSouth to itself and to outside parties. (Cox letter, p. 2-3).

As BellSouth attempted to explain in Mr. Walt Weyand's letter to Cox of March 24, 1992, our nondiscriminatory procedures require that we process all requests from enhanced service providers for new network services and capabilities under our 120 day ONA review process. This is true regardless of whether the

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FCC N11 PROCEEDING

Excerpt from BellSouth Reply Comments

represent the most publicly beneficial long-term use.[13] Nor does BellSouth believe that N11 service codes represent the best long-term solution for satisfying the market need for abbreviated dialing services given the extremely limited number of N11 codes available for such use.

BellSouth supports the acceleration of efforts to reach industry consensus on what is the most desirable and cost effective long-term solution for meeting the information services market need for local abbreviated dialing.[14] BellSouth has already submitted this issue to the IILC for consideration.[15] BellSouth would welcome a statement from the Commission directing the industry to address this issue either in the IILC or other appropriate industry forum.

V. THE COMMISSION SHOULD PROVIDE FURTHER CLARIFICATION ON WHAT CONSTITUTES A REASONABLE AND NONDISCRIMINATORY ALLOCATION OF N11 SERVICE CODES UNDER THE COMMUNICATIONS ACT, WITHOUT PRESCRIBING ANY PARTICULAR ALLOCATION METHOD

Some commenters argue that if the Commission decides to permit or require the assignment of N11 codes for local abbreviated dialing, it should prescribe uniform assignment procedures to promote consistency and to minimize litigation

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[13] For example, BellSouth supports the recent effort initiated within the industry to examine the feasibility of using the 711 code for nationwide access to telecommunications relay services. *See*, Exhibit 3, attached.

[14] BellSouth Comments p. 9.

[15] *Id*.

over assignment issues.[16] Other commenters argue that the Commission should mandate a particular allocation method ranging from first-come, first-served[17] to elaborate allocation methodologies based on total points assigned in accordance with public interest priorities.[18]

BellSouth favors the Commission's tentative conclusion that additional allocation restrictions are unnecessary because Section 202(a) of the Communications Act already prohibits carriers from granting undue preferences or engaging in unreasonable discrimination.[19] However, in view of the concerns and conflicts expressed in the comments on this issue, the Commission should provide the industry with further guidance. In particular, the Commission should give specific examples of allocation methods which are permitted under the Communications Act, although not required.

For example, the Commission has already indicated that there is no legal or regulatory impediment to the assignment of N11 service codes in the manner proposed by BellSouth in the attached petition (*i.e.*, Exhibit 2).[20] While other LECs

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[16] *See*, Comments of U S West p. 21-22 and Sprint p. 7-8.

[17] *See*, Comments of Cox Enterprises, Inc. p. 11-14; MCI p. 2-5; Newspaper Association of America p. 3-4; and Alternative Weekly Newspapers p. 5.

[18] *See*, Comments of LO/AD Communications p. 2-3.

[19] NPRM at para. 16.

[20] NPRM para. 3.

would not be obligated under the Commission's tentative conclusion to use this allocation method, the Commission should use this and other specific examples of allocation methods to provide further guidance to the industry.

Under BellSouth's allocation proposal, N11 codes will be assigned after approval of related state tariffs on a first-come, first-served basis, so long as total service requests received after tariff approval during the service request period (i.e., sixty (60) days) does not exceed available codes.[21] Under this approach, BellSouth will fill service orders on a first in time basis according to the order in which written service requests are received during the designated service request period. The service request period will begin on the third business day after the availability of the service in a local calling area is publicly announced by the company. The service request period will remain open for sixty (60) days and no service orders will be processed and activated during that period.

If total service requests received during the sixty day request period exceed total N11 codes available for assignment, all customers submitting service requests during that sixty day period would automatically participate in a

[21] BellSouth originally proposed a service request period of ninety (90) days, but has subsequently concluded that a shorter sixty day period should suffice to enable customers to determine whether they are interested in obtaining an abbreviated dialing service arrangement under the terms and conditions described in the approved state tariff offering.

lottery to determine which of them receives service. The lottery will be conducted by an independent third party. Assignments will be limited to one code per entity, including entity subsidiaries and affiliates, per local calling area.[22]

Under BellSouth's proposed allocation method, all interested customers have an equal chance of obtaining a N11 service code based upon full knowledge of the relevant terms and conditions of service.[23] While there may still be a "race" to submit written requests for service following approval of related state tariffs and release of the public notice of service availability, this condition is substantially mitigated by the assurance that all who submit requests during the sixty day service request period will have an equal opportunity to obtain service via a lottery in the event total requests exceed supply.

The above allocation method eliminates the argument that BellSouth and other customers (e.g., Cox Enterprises) who participated in the service development process would have an unfair and discriminatory advantage under a first-come, first-served allocation method that allowed them to submit a request for service prior to notice to other

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[22] See generally, Exhibit 2.

[23] Thus, contrary to ITAA's comments, BellSouth and its affiliate companies will have no advantage over other customers in competing for the limited N11 service arrangements. Comments of ITAA p. 3.