

EX PARTE OR LATE FILED

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October 28, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Room 222 - 1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* - CC Docket No. 96-115

Dear Ms. Salas:

On October 15, 1998, Dan Thompson, Sidney White, Terence K. Orman and Ben Almond of BellSouth Corporation met with Bill Kehoe and Douglas Galbi of the Common Carrier Bureau. The purpose of the meeting was to discuss issues raised in a letter to the Commission dated July 16, 1998, by the Association of Directory Publishers ("ADP") and the Association for Local Telecommunications Services ("ALTS") (collectively "Parties").¹ This letter is to provide a written response to the Parties' letter and to discuss specific issues addressed by Messrs. Kehoe and Galbi in the October 15, 1998 meeting.²

The Parties' letter proposed that the Commission should prescribe rules to require local exchange carriers ("LEC") provide independent directory publishers with subscriber list information ("SLI") obtained from competitive local exchange carriers ("CLECs"). As the BellSouth representatives explained in their meeting with Messrs. Kehoe and Galbi, this request is merely a self-serving attempt to obtain information in a competitive industry free of any acquisition costs. Regardless of their motives, however, the authority the Parties cite for such a proposition is misguided and does not support their request.

¹ A copy of the Parties' letter is attached as Exhibit A.

² The BellSouth representatives also discussed a letter to the Commission dated July 15, 1998 by Jenell Trigg of the U.S. Small Business Administration. BellSouth responded directly to Ms. Trigg regarding issues set forth in her letter. A copy of Ms. Trigg's letter and BellSouth's response is attached to this letter as Exhibit B.

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The Parties first claim that LECs are required to provide CLEC SLI to independent publishers pursuant to Section 222(e) of the Telecommunications Act of 1996 ("1996 Act"). Section 222(e) states:

A telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such services on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

Thus, an incumbent LEC must only provide an independent publisher with SLI that the incumbent LEC gathers itself in the provision of telephone exchange service. Clearly, an incumbent LEC is not the provider of telephone exchange service when the customer obtains his telephone exchange service from a CLEC. The Section places responsibility for SLI on all telecommunications carriers, not the incumbent. The Parties, therefore, have no logical basis to claim that § 222(e) requires an incumbent LEC to provide the SLI of a CLEC.

In an attempt to advance this position, however, the Parties claim that BellSouth requires as a condition precedent to entering an interconnection agreement, that a CLEC must enter into an agreement with "BellSouth's directory affiliate ([BellSouth Advertising & Publishing Corporation]. "BAPCO") ...for the provision of Directory Listings and Directory Distribution." The letter shamelessly alleges that "the CLEC is compelled to sign an agreement with BellSouth's directory affiliate or forgo the interconnection agreement." The Parties are well aware that BellSouth cannot and would not withhold interconnection to a CLEC if the CLEC refuses to sign an agreement with BellSouth's directory affiliate. Interconnection agreements are governed by the 1996 Act. A state public service commission must approve the agreement, and if the CLEC does not accept the terms of the LEC it has the statutory right to seek arbitration. The suggestion that BellSouth could force the terms of an interconnection agreement upon a CLEC with a threat of withholding interconnection is completely ridiculous.

What the Parties neglected to explain in their letter is that CLECs desire to have their listings appear in BellSouth's directories. Consequently, any agreement between BAPCO and a CLEC is a mutual agreement benefiting both sides. BAPCO, for example, provides free training to CLECs on listings matters - a subject with which CLECs are not familiar. It is not entered out of compulsion of either party. The Parties are simply trying to do an end run around performing work that they are and should be required to perform themselves. That is, any of the CLECs that enter an agreement with BAPCO would gladly enter an agreement with the independent publishers to include the CLECs' customers in the independent publisher's directories, and are required to do so by law.

Moreover, CLECs with whom BellSouth has entered an interconnection agreement have all negotiated into the interconnection agreement a clause prohibiting BellSouth from revealing their customers listings to any company unless the CLEC gives BellSouth express written consent to disclose such information. The CLECs negotiate this clause presumably to assure that

any disclosure of such information is made only by the CLEC. Accordingly, at the request of the CLECs, BellSouth is contractually prohibited from disclosing CLECs' subscriber listings to the independent publishers.

Realizing that the 1996 Act does not require an incumbent LEC to provide independent publishers with the subscriber listings of CLECs, the Parties offer as an alternative the argument that the Commission has general authority pursuant to 47 U.S.C. § 152(a) to prescribe rules requiring such disclosure. BellSouth disagrees with the Parties' argument. As discussed below, requiring incumbent LECs, such as BellSouth, to disclose CLECs' subscribers listings is simply unnecessary. The directory publishing market is competitive. The information needed to participate in this market is not a "bottleneck" function held by the incumbent LEC. Moreover, BellSouth is contractually prohibited from disclosing such listings. Accordingly, the Parties' request to require incumbent LECs to provide CLECs' SLI to independent publishers is completely unwarranted.

In addition to the issues presented in the Parties' letter, as discussed above, Messrs. Galbi and Kehoe brought up other issues including competition in the publishing market, the profit realized by independent publishers as compared to the cost they incur to obtain SLI, and pricing of SLI in states with tariffs versus states with no tariffs.³

In response to the issue of competition and profit-making ability of independent publishers, the economic boon to independent publishers for obtaining SLI cannot be overstated. Revenue from directories is derived from yellow pages advertising sales. These sales are directed toward entities that subscribe to phone service. Accordingly, yellow pages publishers use the subscriber listings as sales leads. The Parties attempt to paint the directory publishing industry as a non-competitive market controlled by the incumbent LECs and in need of regulatory protection. This, however, is far from the truth. For example, sixty-five companies publish directories in competition with BAPCO's directories in the southeastern United States. In markets served by BAPCO these competitors publish and distribute 250 local directories. That number has grown since 1993 from 187. Those products compete with 310 or 76% of BAPCO's directories. Most of these companies have extensive directory experience. Some of these have substantial financial resources, such as the New York Times Company and the Scripps-Howard Company. Approximately 60% of BAPCO's revenues are under direct competitive threat by other directory publishers and approximately 68% of BAPCO customers have access to directories of competitors.

BAPCO's competitors include directory publishers who have a substantial presence in the business:

³ BellSouth addressed the issue of pricing per the tariff and as compared to contracts in an earlier letter filed with the Commission. BellSouth filed this letter in response to a letter filed by ADP's Counsel, Willkie Farr & Gallagher. A copy of the Willkie Farr & Gallagher letter along with BellSouth's response is attached as Exhibit C.

- (a) SunShine Pages, based in Louisiana, publishes 18 directories, 11 of which are in BellSouth's nine-state region. They are in partnership in Memphis, Tennessee with Scripps-Howard to do a citywide book there. They immediately have access to television stations and newspapers in regions where Scripps has entered the local market. This gives them the potential to bundle products, and to do trade-outs in advertising. Their entry into Memphis in 1997 demonstrated their capability to enter BAPCO markets and have an immediate impact. SunShine is projecting growth in revenues of more than 80%, due to acquisitions and their first paid edition in Memphis, Tennessee;
- (b) Yellow Book USA is the nation's largest and oldest independent publisher. In business since 1930, Yellow Book publishes 250 titles (41 in BAPCO's region) with annual revenues of over \$225 million. Since 1995, they have increased circulation from 3.5 million to 15 million, primarily through acquisition. The recent acquisition of Southern Directory Company in July has had the largest impact on BAPCO's competitive operations. Southern publishes 29 directories in five southern states, all of which compete with BAPCO. In 1997 Yellow Book projected growth of 15-20% through start-ups, acquisitions, and growth in existing books;
- (c) Consolidated Communications Inc. publishes directories in 36 states and was formerly owned by Ameritech;
- (d) Transwestern Publishing was founded in 1980 and was previously owned by U S West. It currently publishes 149 directories and is a multi-million dollar company;
- (e) Data National, a subsidiary of Volt Information Sciences, publishes 117 directories nationwide (33 in the southeast).
- (f) White Directory Publishers has 22 directories (13 in BAPCO's region) with a circulation of over 3 million. In 1999, White will publish prototype directories in Columbia, South Carolina, Charleston, South Carolina, Cocoa Beach, Florida and Melbourne, Florida. White is projecting that revenues will grow to about \$50 million in 1998, a 14% increase over 1997.

Finally, it should be borne in mind that directory publishers are but one component of the larger advertising industry and that directory advertising amounts to only 6% of the total advertising market.

Based on these facts, the Commission should recognize that publishing of SLI is fully competitive. Thus, the need for regulation is completely non-existent. Indeed, under the current

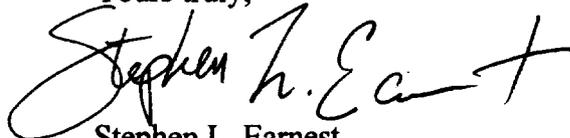
Ms. Magalie Roman Salas, Secretary

October 28, 1998

Page 5

system independent publishers' operations yield handsome profits, a point they have neglected to share with the Commission. Accordingly, the Commission should refrain from any regulation of SLI.

Yours truly,



Stephen L. Earnest

SLE:jws

Attachments

**CC: Kathryn Brown, Chief, Common Carrier Bureau
Magalie Roman Salas, Esq., Secretary, Federal Communications Commission
Lawrence E. Strickling, Deputy Chief, Common Carrier Bureau
Chairman William E. Kennard, Federal Communications Commission
Commissioner Susan Ness, Federal Communications Commission
Commissioner Harold W. Furchtgott-Roth, Federal Communications Commission
Commissioner Michael K. Powell, Federal Communications Commission
Commissioner Gloria Tristani, Federal Communications Commission
Douglas Galbi, Common Carrier Bureau
Bill Kehoe, Common Carrier Bureau**



A





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RICHARD J. METZGER
VICE PRESIDENT &
GENERAL COUNSEL

August 7, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20054

Re: CC Docket No. 96-115

Dear Ms. Salas:

The attached letter dated July 16, 1998, is today being filed as an ex parte communication in the above docket on behalf of both ADP and ALTS.

Sincerely,


Richard J. Metzger

cc: K. Brown
J. Schlichting
J. Atkinson
D. Attwood
D. Galbi
W. Kehoe
D. Konuch
T. Rutherford
K. Schroder

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July 16, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-115

Dear Ms. Salas:

Pursuant to staff requests, the Association of Directory Publishers ("ADP") and the Association for Local Telecommunications Services ("ALTS") hereby explain why (1) ILECs that collect subscriber list information ("SLI" or "listings") from CLECs should provide such SLI to independent directory publishers; and (2) the Commission possesses abundant authority under which to impose such a requirement.

By requiring ILECs to provide independent directory publishers with CLECs' SLI, the Commission would enhance competition in the directory publishing and local exchange industries. Without such a requirement, CLECs and independent publishers will face unnecessary costs, threatening the competitive underpinnings of the Telecommunications Act of 1996.

I. Section 222(e) Requires ILECs To Provide Independent Directory Publishers With SLI Obtained From CLECs.

Section 222(e) of the Communications Act of 1934 ("Section 222(e)") requires a telecommunications carrier that gathers SLI "in its capacity as a provider of [telecommunications] service" to provide such SLI to any person upon request.¹ In the course of providing telecommunications services, ILECs collect SLI from CLECs. BellSouth's interconnection agreements, for example, state that interconnection is conditioned upon the "execution of an agreement between [BellSouth's directory affiliate ("BAPCO")]"

¹ 47 U.S.C. § 222(e) (all references to the "Act" are to the Communications Act of 1934).

and the CLEC for the provision of "Directory Listings and Directory Distribution."² In other words, the CLEC is compelled to sign an agreement with BellSouth's directory affiliate or forgo the interconnection agreement. An ILEC's interconnection agreement is inextricable from the provision of telecommunications service. When an ILEC gathers SLI pursuant to such an agreement, therefore, it does so "in its capacity as a provider" of telecommunications service. Thus, under Section 222(e), any SLI collected from a CLEC by an ILEC must be provided to independent directory publishers.

Section 222(e) also requires ILECs to provide SLI on "nondiscriminatory" rates, terms, and conditions.³ As described above, ILECs' directory publishing affiliates receive CLECs' SLI as a byproduct of interconnecting with the CLEC. By providing CLECs' SLI to their own publishing affiliate but not to independent directory publishers, ILECs discriminate between end users of SLI, in direct violation of Section 222(e).⁴

In the larger context of the pro-competitive goals of the Telecommunications Act of 1996, competition in the directory publishing and local exchange markets will be thwarted unless the Commission requires ILECs to provide independent directory publishers with CLECs' SLI. Independent directories that do not contain the listings of CLEC customers will be unable to compete with ILEC directories that, by virtue of the ILECs' market power in telecommunications services, contain all ILEC and CLEC

² Winstar Agreement § 2(a), filed in ADP Ex Parte Filing of Mar. 4, 1997 (Tab 6); see also ACSI Interconnection Agreement Attachment C-8 (requiring that ACSI "execute a directory listing agreement with BAPCO"), ACSI BAPCO Agreement § 2(a) (requiring ACSI to "provide to BAPCO, or its designee, at ACSI's expense and at no charge, listing information"), filed in ADP Ex Parte Filing of Mar. 4, 1997 (Tab 7).

³ 47 U.S.C. § 222(e).

⁴ See id. See also Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Order and Memorandum Opinion and Order, CC Doc. No. 96-68, ¶ 142 (Aug. 8, 1996) ("Local Competition Second Report") ("Under the general definition of 'nondiscriminatory access,' competing providers must be able to obtain at least the same quality of access to [directory listings] that a LEC itself enjoys.").

listings.⁵ Moreover, CLEC customers whose listings fail to appear in independent directories will be less inclined to continue subscribing to the CLEC.

ILEC refusal to provide CLEC listings to independent publishers imposes unnecessary burdens on publishers and CLECs. Publishers will be forced to identify and obtain listings from every CLEC in their directory coverage area. CLECs will be forced to build an infrastructure and employ personnel to process these requests. To avoid such costs and enhance competition among directory publishers and providers of telecommunications services, the Commission should require ILECs to provide independent publishers with CLECs' SLI.

II. The Commission Possesses Ample Authority To Compel ILECs to Provide Independent Directory Publishers with CLECs' SLI.

By its very terms, Section 222(e) grants the Commission authority to govern ILEC provision of CLEC listings. As stated above, the statute does not distinguish SLI acquired from CLECs as opposed to other sources. ILECs must provide all SLI gathered by virtue of providing telecommunications service to any person who so requests. By definition, this includes CLECs' SLI. The Commission may promulgate any rules necessary to implement this statutory mandate.⁶

Even if the Commission were to ignore this clear grant of authority, it could rely on the equally clear authority established in section 2 of the Act. Under this provision, the Commission has jurisdiction over "all interstate and foreign communication by wire. . . ." Communication by wire in turn includes "all instrumentalities, facilities, apparatus, and services . . . incidental to" the transmission of signals.⁸ ILECs collect and disseminate SLI in conjunction with their provision of telecommunications service. As the interconnection agreements referenced above show, ILECs collect CLECs' SLI as a

⁵ See ADP Ex Parte Filing of Apr. 7, 1998 (providing copies of an affiliated directory publisher's listing compared with an independent's that was not provided competitive LEC SLI).

⁶ See 47 U.S.C. § 154(i).

⁷ 47 U.S.C. § 152(a).

⁸ 47 U.S.C. § 153(51) (emphasis added). See also Beehive Telephone, Inc., Memorandum Opinion and Order, 12 FCC Rcd 17930, ¶ 16 (1997) (service ancillary to actual transmission of signals is within Commission's jurisdiction).

condition precedent to interconnecting with such CLECs. The provision of CLECs' SLI by ILECs therefore is a service incidental to the provision of telecommunications services and falls squarely within the Commission's plenary authority.

Given the Commission's statutory authority over ILEC provision of CLEC listings, it should be noted that the D.C. Circuit has upheld the Commission's authority to impose requirements in the interest of fairness among competitors.⁹ In Mobile Telecommunications, the Court upheld the Commission's authority under Section 4(i) and Section 309(a) of the Act to impose a payment condition on a PCS wireless licensee.¹⁰ The Commission, striving to create a more level playing field among license bidders, reasoned that a failure to impose such conditions "would have a significant adverse impact on the competitive marketplace."¹¹ Just as the Commission sought to foster a competitive wireless market, it should --indeed, under the statute it must-- foster competition in the directory publishing and local exchange markets. To accomplish this goal, the Commission may impose requirements on ILECs and should require ILECs to provide independent directory publishers with CLECs' SLI.

⁹ See Mobile Telecommunications Technologies Corp. v. FCC, 77 F.3d 1399, 1404-07 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 81 (1996) (upholding the Commission's authority to impose payment but remanding for failure to consider all arguments raised).

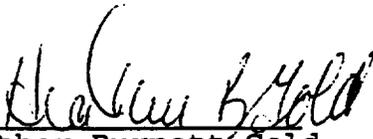
¹⁰ Id.

¹¹ Nationwide Wireless Network Corp., Memorandum Opinion and Order, FCC 98-94, File No. 22888-CD-P/L-94, at ¶ 7 (Rel. June 3, 1998) (reimposing payment following D.C. Circuit remand).

Ms. Magalie Roman Salas
July 16, 1998
Page 5

Please do not hesitate to contact Michael Finn or David Goodfriend at Willkie Farr & Gallagher, (202) 328-8000, should you need further information.

Sincerely,


Heather Burnett Gold
President, ALTS


R. Lawrence Angove
President, ADP

cc: Kathryn Brown
James D. Schlichting
Jay M. Atkinson
Dorothy Attwood
Douglas Galbi
William A. Kehoe, III
David A. Konuch
Tanya Rutherford
Katherine Schroder



OFFICE OF CHIEF COUNSEL FOR ADVOCACY

EX PARTE OR LATE FILED

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

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FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF THE SECRETARY

July 15, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW Suite 222
Washington, DC 20554

DOCKET FILE COPY DUPLICATE

RE: Notice of Ex parte Presentation in Non-Restricted Proceedings
In re Toll Free Service Access Codes (CC Dkt. No. 95-155);
Access Charge Reform (CC Dkt. No. 96-262);
Federal-State Joint Board on Universal Service (CC Dkt. No. 96-45);
Implementation of the Telecommunications Act of 1996:
Telecommunications Carrier's Use of Customer Proprietary Network
Information and Other Customer Information (CC Dkt. No. 96-115); and
Performance Measurements and Reporting Requirements for Operations
Support System, Interconnection, and Operator Services and Directory
Assistance (CC Dkt. No. 98-56, RM-9101).

Dear Ms. Salas:

The Office of Advocacy, U.S. Small Business Administration ("Advocacy"), by its undersigned representative and in accordance with Section 1.1206 of the Commission's rules, hereby respectfully submits an original and five copies of this ex parte notification and written presentation - one copy for each of the aforementioned proceedings.

S. Jenell Trigg and Eric E. Menge, Assistant Chief Counsels for Telecommunications for Advocacy, met with Kathryn C. Brown, Chief of the Common Carrier Bureau and Blaise A. Scinto, Counsel to the Bureau Chief, on Wednesday, July 15, 1998. Advocacy discussed issues consistent with its comments previously on the record in the Access Charge Reform (CC Dkt. No. 96-262); Federal-State Joint Board on Universal Service (CC Dkt. No. 96-45); and Toll Free Access Service Codes (CC Dkt. No. 95-155) proceedings. New issues raised in this meeting are itemized below.



Ms. Magalie Roman Salas
July 15, 1998
Page 2

Subscriber Listings Information (CC Dkt. No. 96-115)

Advocacy respectfully requests that the Commission include in its regulatory flexibility analysis a discussion of the impact of its rules on independent directory publishers (in addition to Incumbent Local Exchange Carriers ("ILEC") and Competitive Local Exchange Carriers ("CLEC")) pursuant to the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). 5 U.S.C. § 601 et seq.

Advocacy also concurs with the position of the Association of Directory Publishers ("ADP")¹ that the FCC should establish national standards to ensure the timely availability of subscriber listing information ("SLI") on an unbundled basis at "reasonable and nondiscriminatory rates, terms and conditions from any provider of local telephone service" for both primary and supplemental listings." S. Conf. Rep. No. 104-230, at 205 (1996).

Advocacy agrees with ADP that the FCC should establish rate guidelines, however, we do not agree that the Commission should set a benchmark rate. Advocacy is concerned that a suggested benchmark of \$.04 per listing for example, is either too high for those carriers whose costs are considerably less (i.e., BellSouth's rate of \$.04 per listing amounts to an unreasonable 1300% profit)² or too low for smaller ILECs whose costs may reflect the absence of computerized or electronic databases. All ILECs should be compensated for their costs plus a reasonable contribution/profit. Therefore, we recommend a benchmark that establishes a maximum level of profit over costs. The difficult issue is, of course, what costs should be compensable.

To properly ascertain costs and determine whether the current rates for SLI are reasonable and nondiscriminatory, and to support any future actions in this proceeding by the Commission, Advocacy encourages the Commission to undertake a complete analysis as to the types and amount of costs incurred by different sized ILECs in the collection and distribution of SLI. These costs should also be compared to the different rate structures for internal/affiliate/subsidiary use, use by non-competitive entities, and use by independent directory publishers. Every effort should be made to acquire this information.

¹ Comments of the Association of Directory Publishers, June 11, 1996.

² In re Petition and Complaint of Florida Independent Directory Publishers to Amend Directory Publishers Database Service Tariff of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company, Florida Public Service Commission, Jan. 13, 1997, at 130 (Testimony of Mr. Janeau).

Ms. Magalie Roman Salas
July 15, 1998
Page 3

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Dkt No. 95-115)

Advocacy respectfully requests that the Commission vacate immediately sua sponte, or alternatively, stay its requirements for computerized safeguard mechanisms (i.e., flags and audit tracking provisions) that were established in its Second Report and Order,³ and subsequently reissue these requirements as a Further Notice of Proposed Rulemaking to include a sufficient Initial Regulatory Flexibility Analysis ("IRFA").

"The Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action" 47 CFR § 1.108. However, "[i]t is Commission practice that the filing of a petition for reconsideration tolls the running of the thirty day period." Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978) (subsequent history omitted). Given the large number of Petitions for Reconsideration timely filed (most addressing these very issues), the Commission has the authority to vacate this Order in part sua sponte. Alternatively, a stay of the rules would serve the same purpose of eliminating the burden on small entities and would provide additional time to collect sufficient record evidence.

Briefly, the grounds for repeal or stay are the Commission's violations of the Administrative Procedure Act and the Regulatory Flexibility Act, as amended by SBREFA. The Commission's change in its conclusion to not extend Computer III safeguards to all telecommunications carriers is not supported by record evidence; a proper cost/benefit analysis has not been done; small entities did not have proper notice of the extension of the audit and flag computerized safeguards in the NPRM/IRFA; small entities did not have the opportunity to comment on the significant economic impact of such safeguards (including increased personnel costs); and the Final Regulatory Flexibility Analysis ("FRFA") is grossly deficient given the impermissible absence of public notice to small entities. Furthermore, there are additional violations of the RFA in the Commission's analysis of the rules' impact on small entities and "Recordkeeping, Reporting, and other Compliance" requirements.

Advocacy does not believe that an Order on Reconsideration will sufficiently cure these violations, especially the RFA violations. See Southern Offshore Fishing Ass'n v.

³ In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 96-115, FCC 98-27 (rel. Feb. 26, 1998).

Ms. Magalie Roman Salas
July 15, 1998
Page 4

Daley, 995 F. Supp. 1411 (M.D. Fla. 1998) (holding that a FRFA prepared after insufficient notice to small entities in the NPRM failed to satisfy APA standards and RFA requirements and thus, was arbitrary and capricious); see also Northwest Mining Ass'n v. Babbitt, No. CIV.A. 97-1013 JLG, 1998 WL 254097 (D.D.C. May 13, 1998) (remanding the rule solely for procedural violations of the RFA).

Performance Measurements and Reporting Requirements for Operation Support Systems (CC Dkt. No. 98-56)

Advocacy discussed our concern that the Commission not have "Big Guy Myopia,"⁴ which we define as the tendency to establish policies and rules for the entire industry based on the attributes and problems of the large entities - without taking into account the ability of the little guys to comply with the rule - or the need to impose rules at all on the little guys in the first place. The OSS proceeding is a prime example of the potential for BGM.

The Commission is currently reviewing the industry comments filed in response to its NPRM that proposes methodology to analyze the support functions of ILECs when processing orders for new entrants.⁵ Advocacy supports efficient order processing by all ILECs, as a means to ensure that effective competition will develop, however Advocacy encourages the Commission to make every effort to distinguish the application of the Petition's requirements for extensive upgrades to operations systems to small carriers and carriers that serve small communities. It is undisputed that vigorous competition is not expected in the near future to rural areas, nor is it likely that there will be a flood of new customers that could not be handled efficiently and promptly by other means. The Commission should not impose blanket requirements on all ILECs without first identifying if there is a need for such measures, and completing a cost/benefit analysis, and a regulatory flexibility analysis for small ILECs.

Year 2000 Challenges

Advocacy acknowledges and applauds the comprehensive efforts of the Commission to ensure that the nation's telecommunications services are well prepared to transition into the next century. However, the greatest assistance to small (and large)

⁴ See Commissioner Michael K. Powell, Communications Policy Leadership for the Next Century, 50 Fed. Comm. L.J., 529, 537 (1998).

⁵ In re Performance Measurements and Reporting Requirements for Operations Support System, Interconnection, and Operator Services and Directory Assistance, Notice of Proposed Rulemaking, CC Dkt. 98-56, FCC 98-72 (rel. Apr. 17, 1998).

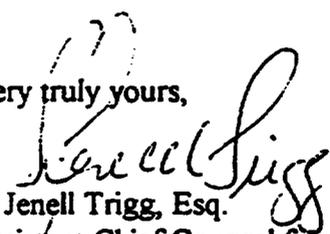
Ms. Magalie Roman Salas
July 15, 1998
Page 5

carriers and collateral industries such as equipment and software manufacturers may be for the Commission to recognize and address fully the cumulative effect of various regulations that impose major changes on telecommunications networks, equipment, and resources. These regulatory impositions directly affect the ability for small telecommunications providers to meet Y2K requirements in a timely matter.⁶ Here is a brief list of some of proceedings that involve major changes to network systems, hardware and/or software, in addition to a strain on personnel and economic resources:

1. Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons With Disabilities
2. Universal Service
3. Performance Measures and Reporting Requirements for Operations Support Systems
4. Customer Proprietary Network Information

If you have any questions regarding this filing, please contact me at 202-205-6950.

Very truly yours,


S. Jenell Trigg, Esq.
Assistant Chief Counsel for
Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 Third Street, SW
Washington, DC 20416

attachment: Small Businesses as Consumers Chart
Presentation to Kathryn C. Brown Summary

cc: The Honorable William E. Kennard, Chairman
Ms. Kathryn C. Brown, Chief, CCB
Ms. Blaise Scinto, Counsel to the Bureau Chief, CCB
Ms. Catherine J.K. Sandoval, Director, OCBO

⁶ One of the priorities of the U.S. Small Business Administration is to ensure that all small companies are well informed about the Y2K problem and have the available resources to meet the challenge. For more information about the SBA's efforts, please see our home page: <http://www.sba.gov>.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Presentation to
Kathryn C. Brown, Chief, Common Carrier Bureau
Federal Communications Commission
July 15, 1998

I. THE FCC'S DUTY TO ADDRESS SMALL BUSINESS ISSUES COMES UNDER THREE STATUTORY PROVISIONS

- * The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). 5 U.S.C. § 601 et seq.
- * The Telecommunications Act of 1996, Section 257 - Market Entry Barriers. 47 U.S.C. § 257.
- * The Communications Act of 1934's duty to serve in the public interest. 47 U.S.C. § 151 et seq.

II. BRIEF OVERVIEW OF REGULATORY FLEXIBILITY ACT (RFA)

- * Purpose is to minimize, if not eliminate, significant economic impact on a substantial number of small entities.
- * Notice of impact, discussion of significant alternatives, and costs to small businesses is paramount at NPRM stage.
- * Final analysis of significant alternatives must include legal, policy, and factual justification of alternatives (those consistent with stated objectives) that were rejected.
- * Small Entities include small businesses (as defined under the Small Business Act, 5 U.S.C. § 632), small governmental jurisdictions, and non-profit organizations.
- * A business' dominance in its field of operation is evaluated on a "national basis." 13 CFR § 121.102. Therefore, small ILECs are small entities under the RFA.

Other Important Requirements of RFA/SBREFA

- * Outreach to small entities beyond publication in Federal Register. 5 U.S.C. § 609.
- * Small Entity Compliance Guides in plain English for each rule (or group of related rules). § 212 of SBREFA (Codified at 5 U.S.C. § 601 Note).

III. OVERALL SUMMARY OF ADVOCACY'S CONCERNS

- * "Big Guy Myopia"¹ tendency to establish policies and rules for entire industry with only the larger carriers in mind or to address problems manifested only in large carriers.
- * Neglect to address impact of rules/policies on small business consumers.
- * Preparation of the RFA analyses after the development of policy and rules - impermissibly post hoc and too late to make adjustments to address small business issues.

MAJOR SUBSTANTIVE ISSUES INCLUDE:

- | | |
|--|--------|
| * Universal Service and Access Charge Reform | * CPNI |
| * Toll Free Access Codes | * OSS |
| * Subscriber Listings Information | * Y2K |

IV. RECOMMENDATIONS

- * Encourage increased communication between Advocacy and CCB.
- * Development of RFA analyses during deliberations - and not post hoc.
- * Increased outreach to small entities - better access to key personnel including CCB front office, creation of task forces, and Bureau Chief/staff appearance at telecommunications roundtables for small businesses.

¹ See Commissioner Michael K. Powell, Communications Policy Leadership for the Next Century, 50 Fed. Comm. L.J., 529 (1998).



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416



BY ANY MEASURE - SMALL BUSINESSES ARE IMPORTANT CONSUMERS OF TELECOMMUNICATIONS SERVICES!

The Telecommunications Act of 1996 mandates that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3).

Given the tremendous growth in telecommunications technology and services - small businesses, which are the majority of businesses in the U.S., are a major consumer group. Multiple sources confirm that the majority of small businesses have more than one telephone line.

Q: How many telephone lines does the average small businesses have?

A: 

Source: *Who Will Connect Small Businesses To The Information Superhighway?*. National Federation of Independent Businesses Foundation. December 1994. at 7 (46.9% of small businesses have 2-3 lines and 18.4% have 4-6 lines. Overall, 72.7% of small businesses have more than one line.)

A: 

Source: *America's Small Business Speaks Out*. California Small Business Association National Business Telephone User Poll. April 12, 1997. at 4 (8 lines: 4 for voice services, one dedicated line each for a fax and modem, one cellular/car telephone line, and almost one line for 800 service. Moreover, just under 4-in-10 small business have 11 or more lines for business use.)

A: 

Source: PNR Associates Study. FCC Press Release. *Commission Reforms Interstate Access Charge Systems*. CC Dkt. No. 96-262. May 7, 1997 (4 lines).

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October 6, 1998

S. Jenell Trigg
Assistant Chief Counsel for Telecommunications
U.S. Small Business Administration
Suite 7800
409 Third Street, SW
Washington, DC 20416

Dear Ms. Trigg:

In your July 15, 1998 meeting with Kathryn C. Brown, Chief of the Common Carrier Bureau, and Blaise A. Scinto, Counsel of the Bureau Chief, you raised issues regarding subscriber listing information ("SLI") which are of concern to BellSouth Corporation and its affiliates. Accordingly, BellSouth feels an informed response to these issues is appropriate.

Specifically, you support the position of the Association of Directory Publishers ("ADP") that the Commission should prescribe a national set of standards for the provision of SLI by local exchange carriers ("LEC"). It is your contention that these standards should not, however, include a benchmark rate. You theorize that a national rate could be too high in some areas and too low in others. Instead you advocate that a regulated rate be established based on the LECs' cost to provide the service. To determine the regulated rate acceptable for each LEC, you request the Commission to undertake the monumental regulatory effort of analyzing each LECs' costs and establish an individual rate for each LEC to charge to provide SLI service.

BellSouth respectfully disagrees with these positions. First, national standards for the provision of SLI services are not warranted and would provide no benefit to the industry or to competitive providers. Second, the Telecommunications Act of 1996 ("1996 Act") does not either support or authorize a mandated price for such services based on cost. Finally, Congress enacted the 1996 Act as a means to move from a regulated environment to a competitive market environment. Ironically, your requests to the Commission have the effect of moving an industry which is already in a competitive market to a regulated industry. Accordingly, the Commission should not implement such requests.

SLI services are not basic telecommunications services. While the LECs may have established procedures to gather SLI through processing service orders, they certainly do not have any form of "bottleneck" control over that information. Any person may obtain this

information independent of the LECs. Indeed, one only needs to visit major search engines on the Internet to see an abundance of available information very similar to subscriber listings. Considering the availability of information and the number of providers of this information, any belief that a monopoly exists in this market is simply erroneous. Accordingly, your suggestion that "national standards" should be prescribed by the Commission to ensure SLI is available under "reasonable and nondiscriminatory rates, terms, and conditions" is counterintuitive and not called for by the 1996 Act. Market forces currently ensure that SLI can be obtained under such rates, terms and conditions, and obviate the need for a national regulatory regime.¹

Regulatory restraint is consistent with the policy direction espoused by individual commissioners. For example, during his confirmation hearings, Chairman Kennard stated that the industry should be moving away from "government micromanagement" to "common sense pro-consumer deregulation."² Moreover, Commissioner Furchtgott-Roth has noted that, "... regulation is merely designed, to the extent possible, to replicate a competitive marketplace, but any form of regulation is an imperfect surrogate for full-fledged competition."³ Indeed, where the Commission has found a market to be competitive, it has ordered deregulation.⁴ Consequently, given the competition that exists in the SLI market, BellSouth contends that your suggestion that a national standard for the provision of SLI be established is misguided.

¹ Your letter cites a Florida Public Service Commission ("FPSC") proceeding regarding the rates BellSouth charges for one of its SLI services. The letter states that the rate is unreasonable. With all due respect, your opinion is based on one single statement excerpted from a lengthy proceeding. Based on the full record before the FPSC in that proceeding, the FPSC approved BellSouth's rates established in its tariff. Indeed, in an order issued on May 9, 1997, the FPSC stated that:

We do not agree with FIDP [Florida Independent Directory Publishers] that incremental cost pricing is appropriate for the requested services. These are non-basic services. Price protection is not necessary for them, as it is for basic services. Also, we find that BellSouth's services do not constitute a bottleneck function for FIDP, since other sources exist for the required information. Furthermore we find that incremental pricing is not consistent with the market value of new connections information. ... We find that BellSouth's proposed market based rates are reasonable for the service offerings requested by FIDP.

BellSouth requests that you defer to the wisdom of the FPSC who conducted an exhaustive fact finding proceeding to reach its conclusion.

² Statement of William E. Kennard, Confirmation Hearing before the Commerce, Science and Transportation Committee (October 1, 1997).

³ Statement of Harold Furchtgott-Roth attached In the Matter of 1998 Biennial Regulatory Review – Review of Accounting and Cost Allocation Requirements and United States Telephone Association Petition for Rulemaking, CC Docket No. 98-81 and ASD File No. 98-64, *Notice of Proposed Rulemaking*, FCC 98-108 (released June 17, 1998).

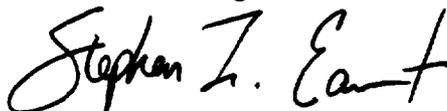
⁴ In the Matter of Policy and Rules Concerning the Interstate, Interexchange Market place, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket 96-61, *Second Report and Order*, 11 FCC Rcd 20730 (1996), *stayed on other grounds pending review sub nom, MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C. Cir., Feb. 19, 1997), *Order on Reconsideration*, 12 FCC Rcd 15014 (1997).

In addition to the national standard argument, your letter recommends that the price for this service be regulated based on the LEC's cost for providing the service. While such rates, terms, and conditions are required by the 1996 Act, a statutory requirement that rates be "reasonable and nondiscriminatory" does not mean that they must be based on cost (especially incremental cost). Where Congress intended in the 1996 Act that rates be based on cost, it set forth its intentions explicitly.⁵ By contrast, Section 222(e) does not use the term "cost" in describing the obligation of a carrier to a competing directory publisher. Instead, the carrier's obligation is to provide subscriber list information "under nondiscriminatory and reasonable rates, terms and conditions." The suggestion that the Commission establish "a benchmark that establishes a maximum level of profit over costs" is not authorized under Section 222(e).

Not only does the statute not authorize such a regulatory price regime, but, as discussed above, the market, rather than a regulatory body, should set the price for the SLI services. In your letter you recommend that the Commission determine the price for such services based on their costs. Complying with such an analysis, however, is a time consuming and very expensive process. Such a requirement would only add to the cost of providing the service. Moreover, it is completely contrary to the de-regulatory intent of the 1996 Act and unnecessary for a service readily available in the competitive marketplace.

I hope that this letter provides you with a pro-competitive, deregulatory perspective on these issues. Should you have any questions regarding BellSouth's positions, please feel free to contact me.

With kindest regards,



Stephen L. Earnest

⁵ See, e.g., 47 U.S.C. § 252(d)(1): Rates for interconnection and unbundled network elements shall be based on cost and may include a reasonable profit.



c



WILLKIE FARR & GALLAGHER

Washington
New York
London
Paris

May 20, 1998

EX PARTE RECEIVED

MAY 20 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

Re: Ex Parte Filing - CC Docket No. 96-115

Dear Ms. Salas:

The Association of Directory Publishers ("ADP") hereby brings to the Commission's attention the following materials demonstrating that BellSouth supports incremental cost pricing (plus a 1,300% profit) for basic subscriber list information ("SLI"). ADP also includes a Prehearing Statement of the Louisiana PSC Staff recommending rejection of BellSouth's tariff for updates because such tariff was not based on cost.

A: BellSouth Has Stated That Incremental Cost is the Correct Starting Point For Pricing Subscriber List Information.

BellSouth offers SLI via tariff in Florida, Louisiana, Mississippi, and Kentucky. As shown below, BellSouth uses incremental cost pricing (pus an unreasonable 1,300% profit) for basic SLI in those four states.

Shortly after BellSouth filed its prospective SLI tariff (the "DPDS tariff") in Florida, the Florida PSC filed a data request asking: (1) the methodology which BellSouth used to calculate its prices; (2) whether such methodology was appropriate; and (3) what specific costs went into the tariff. See Exhibit A. BellSouth responded by informing the PSC that "[i]ncremental cost methodology was used to develop costs for DADS [Directory Assistance] and DPDS." See Exhibit B at 2. According to BellSouth, "[p]rices for discretionary services should be set at a level which at least covers the direct costs incurred, therefore incremental cost methodology provides the proper test for pricing decisions." *Id.* (emphasis added).

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In its attached cost study, BellSouth reiterated that point: "[t]his cost study is performed to identify the incremental cost of Directory Assistance Database Service (DADS) and Directory Publishers Database Service (DPDS)." Id. at 3 (emphasis added). BellSouth explained that the "cost of both services includes, where appropriate, the labor cost for system development and maintenance, computer processing cost for to produce the listing data, and material/packaging [and] delivery cost[s] for the magnetic and paper media." Id. at 5. BellSouth also provided information as to the methods employed to estimate (1) the number of programmer hours for program development, (2) the computer processing unit hours for extracts, and (3) material costs for tapes and paper output along with delivery. Id. at 3. These estimates yielded an incremental cost of 0.003¢ per basic listing. Id. at 5.

Similar information was provided concerning the pricing of BellSouth's update offering. According to BellSouth, the "costs associated with providing [] Daily Updates are auditing costs, program maintenance, data processing, tape packaging and delivery and gross receipts tax." Id. at 21.

B. SLI Prices Must Be Cost Based; BellSouth's New Update Offerings Are Not Cost-Based.

ADP has noted previously that BellSouth is offering new update services in Florida that are not cost-based (daily updates are \$1.50 and new connects \$2.00 per listing) and therefore fail to conform to Section 222(e). Recently, BellSouth sought to offer these same new update services in Louisiana. On May 11, 1998, the Louisiana PSC Staff stated that BellSouth's new SLI updates tariff "should be rejected because the prices are not cost based." See Exhibit C (emphasis added). According to the Staff:

Section 222(e) of the Act, 47 U.S.C. § 222(e), mandates that local exchange carriers such as BellSouth provide their subscriber list information to telephone directory publishers at "reasonable rates," terms and conditions. The Federal Communications Commission has consistently held that a reasonable rate is one based on cost. On the issue of cost, the Staff

adopts the position of the Intervenors in recommending to the Commission that the DPDS Tariff should be rejected because the prices are "overpriced, anti-competitive and unreasonable."

Id. Given the above, it is clear that the Commission must issue rules stating that SLI prices must be cost based.

C. BellSouth's Discriminates Among Publishers By Charging Different Rates in Different States.

As shown in Exhibit D, BellSouth discriminates in the pricing of its Weekly Business Activity Report ("WBAR").¹ In those states where it sells SLI under tariff -- Florida, Louisiana, Mississippi, and Kentucky -- BellSouth charges .006 cents per listing. In five other states -- Alabama, Georgia, North Carolina, South Carolina, and Tennessee -- BellSouth charges .09 cents per listing plus a processing fee of \$100 per NXX. See Exhibit D. In short, BellSouth discriminates based upon the State for which the WBAR request is made. Such pricing violates Section 222(e)'s prohibition on discriminatory rates and must be forbidden by the Commission in its Report and Order in this docket.

¹ The WBAR is a report containing every listing in the NXX. By comparing the WBAR to the previous WBAR or base file, a publisher may discern what changes, if any, have occurred during the week, i.e., new listings, change of address, etc.

Ms. Magalie Roman Salas
May 20, 1998
Page 4

Pursuant to the Commission's rules, two copies of this document are being filed with your office. Should you or the Commission staff require further information concerning the attached documents, please feel free to contact the undersigned at (202) 429-4786.

Sincerely,



Michael F. Finn

Enclosure

cc: Jim Schlichting
Richard Welch
Bill Kehoe
Pat Donovan
Jay Atkinson
Doug Galbi
Dave Konuch
Tanya Rutherford
Dorothy Attwood

BellSouth Corporation
Legal Department
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August 28, 1998

Stephen L. Earnest
Attorney

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Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Room 222 - 1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* - CC Docket No. 96-115

Dear Ms. Salas:

In a letter to the Commission dated May 20, 1998, the Association of Directory Publishers ("ADP") states that it "brings to the Commission's attention" certain materials regarding the rates BellSouth charges for subscriber list information. In an apparent attempt to obfuscate the issues, however, the letter provides an incomplete account of the facts regarding these materials and the rates for the services.

BellSouth provides Directory Publishers Database Service ("DPDS") (referred to as subscriber list information, "SLI", in the ADP letter) for customers who wish to purchase such services for the purpose of publishing a directory. The customer can purchase the initial service, which is a listing of all subscribers in the central office, by NPA-NXX. Additionally, at its option, the customer can purchase updates to the initial service in a variety of ways including a Weekly Business Activity Report ("WBAR")¹, daily updates, sort extracts, and new connect reports. The charges for the initial service and any updates are market based, which is appropriate considering the value of the information being provided. Moreover, DPDS is a non-basic service over which BellSouth does not control a "bottleneck" function. Indeed, any member of the ADP, independent of BellSouth, could obtain this information.

When setting the price for any service, the provider must be assured that the price exceeds the incremental cost to provide the service. Accordingly, a cost study is warranted to achieve this goal. Contrary to ADP's belief, this does not mean that the service must be priced at that cost. BellSouth is entitled to make a profit on this service. It is merely charging a price set by the market. In fact, members of the ADP use this service to sell yellow pages advertising for their directories. Thus, the information has a value to ADP's members well beyond BellSouth's incremental costs. BellSouth should not be forced to provide the DPDS service only at a price that excludes any contribution to overhead costs, much less an economic profit, while the ADP

¹ A WBAR is a listing all disconnections, changes, transfers, and new business connections that occurred in the central office for the week.

members could use the service to obtain economic profits. Moreover, BST provides the same information to BellSouth Advertising & Publishing Company ("BAPCO"), the entity that publishes BellSouth's directories. BAPCO purchases this service at a price that exceeds the price BST charges other entities. Thus, BellSouth does not place competing directory publishers at a competitive disadvantage.

In its letter, ADP relies on a cost report filed with the Florida Public Service Commission during the application and review of BellSouth's tariff for DPDS in Florida, and a report issued by the commission staff of the Louisiana Public Service Commission ("LPSC"), to contend that the Commission should force BellSouth to charge customers only the incremental costs it incurs to provide DPDS. The letter cites selected portions of these documents and then makes the specious conclusion that "the Commission must issue rules stating that SLI prices must be cost based." These documents, however, provide only part of the story regarding the proceedings in which these items were filed. ADP has conveniently omitted significant facts that place these issues in proper focus.

For example, in the Florida proceeding in which BellSouth filed the cost study, the FPSC approved BellSouth's rates established in its tariff for DPDS services. Indeed, in an order issued on May 9, 1997 regarding DPDS rates for new connection reports and update services,² the FPSC stated that:

We do not agree with FIDP [Florida Independent Directory Publishers] that incremental cost pricing is appropriate for the requested services. These are non-basic services. Price protection is not necessary for them, as it is for basic services. Also, we find that BellSouth's services do not constitute a bottleneck function for FIDP, since other sources exist for the required information. Furthermore we find that incremental pricing is not consistent with the market value of new connections information. ... We find that BellSouth's proposed market based rates are reasonable for the service offerings requested by FIDP.³

The FPSC went on to address 47 U.S.C. § 222(e) and stated that the section requires "BellSouth to provide subscriber list information to any directory publisher upon request for the purpose of publishing directories. Accordingly, we find that our decisions herein concerning

² ADP makes a specific complaint regarding the prices for new connection services in Section B of its letter. BellSouth notes that even though it has gone to the trouble to offer new connection services to ADP members, there has been very little demand for such services. Accordingly, ADP's complaint seems disingenuous considering that very few, if any, of its members appear to be taking advantage of this service.

³ In Re: Petition and complaint of Florida Independent Directory Publishers to amend Directory Publishers Database Service Tariff of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone Company, Docket No. 931138-TL, Order No. PSC-97-0535-FOF-TL, May 9, 1997, at 6.

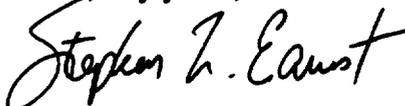
new connections listings comply with 47 U.S.C. § 222(e)."⁴ Thus, while ADP may prefer that the services should be priced at cost, this view is not shared by the FPSC.

The pending Louisiana docket referred to by ADP concerns BST's efforts to introduce a tariffed update product for the independent directory publishers. In its letter to the Commission, ADP has quoted statements by the LPSC Staff (which consists of one LPSC attorney in that case) in its pre-hearing brief. The Staff, however, did not have the benefit of the hearing when it filed those comments. Moreover, the Staff will soon be filing a post-hearing brief. Aside from the further opportunity for the LPSC staff to comment, this matter is assigned to an administrative law judge, who will issue a final recommendation to the LPSC after her review of the post-hearing briefs. Only after that process is complete will the LPSC render a decision in this matter. In short, to the extent ADP's reference to the initial staff comments is meant to imply that the matter is resolved in Louisiana and that the LPSC agrees with ADP, that implication is misleading. This matter will not be resolved fully by the LPSC until, at the earliest, September or October.

Finally, the letter charges that "BellSouth discriminates in the pricing of its Weekly Business Activity Report (WBAR)" in the states where BellSouth sells DPDS services under tariff versus those states where the services are not under tariff. This simply is not true. ADP is trying to compare apples with oranges in the prices it quotes in its letter. As discussed earlier the WBAR is a listing of activity (disconnecting, changes, transfers, and new connections) that occurs in a central office (NPA-NXX) during a week. In states in which BellSouth has a tariff for DPDS services, the tariffed charges for the WBAR are \$.006 per listing, for all listings in the NPA-NXX, i.e., up to 10,000 listings. In states where DPDS is not tariffed, the charges for the WBAR are \$.09 per item of activity that occurred during the week. In most cases the total cost for the WBAR is the same, or comparable, even though the pricing methodology differs. Thus, BellSouth does not discriminate among any customer for the price it charges for the WBAR.

The ADP's letter singling out BellSouth is puzzling in that BellSouth follows the same practices as the rest of the industry in pricing its DPDS services. This practice is not only followed by the rest of the industry, but, as stated above, has been approved by the FPSC. The Commission should follow the FPSC's lead, which has had the benefit of public hearings on this matter, and dismiss the ADP's letter for the self-serving anomaly that it is.

Sincerely yours,



Stephen L. Earnest
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SLE:jws

⁴ *Id.* at 6.

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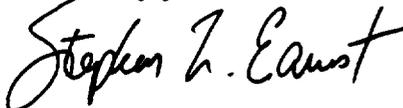
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SLE:jws

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WILLKIE FARR & GALLAGHER

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A: BellSouth Has Stated That Incremental Cost is the Correct Starting Point For Pricing Subscriber List Information.

BellSouth offers SLI via tariff in Florida, Louisiana, Mississippi, and Kentucky. As shown below, BellSouth uses incremental cost pricing (plus an unreasonable 1,300% profit) for basic SLI in those four states.

Shortly after BellSouth filed its prospective SLI tariff (the "DPDS tariff") in Florida, the Florida PSC filed a data request asking: (1) the methodology which BellSouth used to calculate its prices; (2) whether such methodology was appropriate; and (3) what specific costs went into the tariff. See Exhibit A. BellSouth responded by informing the PSC that "[i]ncremental cost methodology was used to develop costs for DADS [Directory Assistance] and DPDS." See Exhibit B at 2. According to BellSouth, "[p]rices for discretionary services should be set at a level which at least covers the direct costs incurred, therefore incremental cost methodology provides the proper test for pricing decisions." *Id.* (emphasis added).

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In its attached cost study, BellSouth reiterated that point: "[t]his cost study is performed to identify the incremental cost of Directory Assistance Database Service (DADS) and Directory Publishers Database Service (DPDS)." Id. at 3 (emphasis added). BellSouth explained that the "cost of both services includes, where appropriate, the labor cost for system development and maintenance, computer processing cost for to produce the listing data, and material/packaging [and] delivery cost[s] for the magnetic and paper media." Id. at 5. BellSouth also provided information as to the methods employed to estimate (1) the number of programmer hours for program development, (2) the computer processing unit hours for extracts, and (3) material costs for tapes and paper output along with delivery. Id. at 3. These estimates yielded an incremental cost of 0.003¢ per basic listing. Id. at 5.

Similar information was provided concerning the pricing of BellSouth's update offering. According to BellSouth, the "costs associated with providing [] Daily Updates are auditing costs, program maintenance, data processing, tape packaging and delivery and gross receipts tax." Id. at 21.

B. SLI Prices Must Be Cost Based; BellSouth's New Update Offerings Are Not Cost-Based.

ADP has noted previously that BellSouth is offering new update services in Florida that are not cost-based (daily updates are \$1.50 and new connects \$2.00 per listing) and therefore fail to conform to Section 222(e). Recently, BellSouth sought to offer these same new update services in Louisiana. On May 11, 1998, the Louisiana PSC Staff stated that BellSouth's new SLI updates tariff "should be rejected because the prices are not cost based." See Exhibit C (emphasis added). According to the Staff:

Section 222(e) of the Act, 47 U.S.C. § 222(e), mandates that local exchange carriers such as BellSouth provide their subscriber list information to telephone directory publishers at "reasonable rates," terms and conditions. The Federal Communications Commission has consistently held that a reasonable rate is one based on cost. On the issue of cost, the Staff

adopts the position of the Intervenors in recommending to the Commission that the DPDS Tariff should be rejected because the prices are "overpriced, anti-competitive and unreasonable."

Id. Given the above, it is clear that the Commission must issue rules stating that SLI prices must be cost based.

C. BellSouth's Discriminates Among Publishers By Charging Different Rates in Different States.

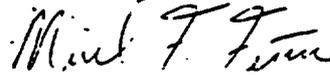
As shown in Exhibit D, BellSouth discriminates in the pricing of its Weekly Business Activity Report ("WBAR").¹ In those states where it sells SLI under tariff -- Florida, Louisiana, Mississippi, and Kentucky -- BellSouth charges .006 cents per listing. In five other states -- Alabama, Georgia, North Carolina, South Carolina, and Tennessee -- BellSouth charges .09 cents per listing plus a processing fee of \$100 per NXX. See Exhibit D. In short, BellSouth discriminates based upon the State for which the WBAR request is made. Such pricing violates Section 222(e)'s prohibition on discriminatory rates and must be forbidden by the Commission in its Report and Order in this docket.

¹ The WBAR is a report containing every listing in the NXX. By comparing the WBAR to the previous WBAR or base file, a publisher may discern what changes, if any, have occurred during the week, i.e., new listings, change of address, etc.

M. Roman Magalie Roman Salas
May 20, 1998
Page 4

Pursuant to the Commission's rules, two copies of this document are being filed with your office. Should you or the Commission staff require further information concerning the attached documents, please feel free to contact the undersigned at (202) 429-4786.

Sincerely,



Michael F. Finn

Enclosure

cc: Jim Schlichting
Richard Welch
Bill Kehoe
Pat Donovan
Jay Atkinson
Doug Galbi
Dave Konuch
Tanya Rutherford
Dorothy Attwood