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August 24, 2001

RECEIVED

AUG 24 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
445 Twelfth Street, SW
Room TW-A325
Washington, DC 20554

Re: Petition of US West Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance, CC Dkt. 97-172

Dear Ms. Salas,

On August 24, BellSouth sent the attached letter to Michele Carey, Chief of the Policy and Program Planning Division. The letter provides additional information regarding BellSouth's pending Petition for Limited Reconsideration filed in the above captioned proceeding.

This notice is being filed pursuant to Sec. 1.1206(b)(2) of the Commission's rules. If you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Mary L. Henze

Mary L. Henze

Attachment

cc: M. Carey

No. of Copies rec'd 0+1
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August 24, 2001

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AUG 24 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Michelle Carey
Division Chief
Policy & Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Room 5-C122
Washington, D.C. 20554

Re: BellSouth Written *Ex Parte*
Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance
(CC Docket No. 97-172)

Dear Ms. Carey:

Pursuant to your request, BellSouth respectfully submits this written *ex parte* to provide additional information regarding BellSouth's pending Petition for Limited Reconsideration[1] filed in the above-captioned proceeding.

On April 18, 2001 and May 16, 2001, BellSouth met with the Common Carrier Bureau staff [2] to discuss the Company's request for partial reconsideration of an order in which the Commission concluded that the provision of nonlocal Directory Assistance ("DA") service constitutes a permissible incidental interLATA service under Section 271(g)(4) of the 1996 Telecommunications Act ("1996 Act"). *See Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, *Memorandum Opinion and Order*, 14 FCC Rcd 16252 (1999) ("*NDA Order*"). During

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[1] BellSouth Petition for Limited Reconsideration, CC Docket No. 97-172 (filed Oct. 27, 1999) ("BellSouth Petition").

[2] *See* Letter from Mary L. Henze, BellSouth, Executive Director, Federal Regulatory Affairs, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 97-172 (filed April 19, 2001); Letter from Mary L. Henze, BellSouth, Executive Director, Federal Regulatory Affairs, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 97-172 (filed May 17, 2001).

these meetings and in its petition, BellSouth urged the Commission to reconsider its conclusion that Section 271(g)(4) requires a Bell Operating Company ("BOC") to "own" the information storage facilities used to provide DA service. Specifically, BellSouth requested that the Commission find that Section 271(g)(4) permits BOCs to provide nonlocal DA through less restrictive means than full and exclusive ownership of the storage facilities. For example, BellSouth recommends that shared ownership, leasing, and/or contracting with third parties for access be permissible methods by which carriers may use storage facilities to provide nonlocal DA. An overly restrictive interpretation of Section 271(g)(4) precludes the development of new and innovative services for the public and unfairly imposes significant costs on a particular class of carriers, the BOCs. Accordingly, the Commission should reconsider its narrow interpretation of Section 271(g)(4) and instead adopt an interpretation that provides broader flexibility in the ways by which carriers may use storage facilities to provide nonlocal DA.

I. Background

In its *NDA Order*, the Commission concluded that the centralized provision of nonlocal[3] directory assistance service by U S WEST to its in-region subscribers constituted the provision of in-region, interLATA service as defined in Section 271(a) of the 1996 Act. *NDA Order*, 14 FCC Rcd at 16254, ¶ 2. Specifically, the Commission found that U S WEST's use of official services trunks or leased lines that cross LATA boundaries to transport directory assistance calls from a traffic operator position system ("TOPS") switch to centralized operator positions or to retrieve directory listing information from centralized databases caused U S WEST's service to fall squarely within the definition of interLATA service. *Id.* at 16263, ¶ 18. The Commission also concluded that nonlocal directory assistance was not a previously authorized activity under Section 271(f). *Id.* at 16264, ¶ 21.

The Commission next considered whether U S WEST's provision of its nationwide DA service was an incidental interLATA activity permitted pursuant to Section 271(g)(4).[4] The Commission observed that U S WEST's DA service had a bifurcated structure. *Id.* at 16265, ¶ 23. Callers requesting listing information for subscribers within U S WEST's region were routed

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[3] The *NDA Order* distinguishes between "local" and "nonlocal" DA. Directory assistance service is considered "local" whenever a customer requests the telephone number of a subscriber located within his or her LATA or area code. *NDA Order*, 14 FCC Rcd at 16254-16255, ¶ 5. Directory assistance is "nonlocal" whenever a customer requests the telephone number of a subscriber located outside his or her home LATA or area code. *Id.* at 16255, ¶ 6.

[4] Section 271(g)(4) authorizes "the interLATA provision by a [BOC] or its affiliate . . . of a service that permits a customer that is located in one LATA to retrieve information from, or file information for storage in, information storage facilities of such company that are located in another LATA."

to operators who retrieved listing information from a database housed on facilities owned by U S WEST. In contrast, callers requesting listing information for subscribers outside of U S WEST's region were routed to operators who retrieved the requested information from storage facilities owned by a third party. Relying on the instruction of Section 271(h)[5] that the provisions of Section 271(g) are to be construed narrowly, the Commission concluded that the clause "information storage facilities of such company" contained in Section 271(g)(4) refers only to facilities actually owned by the carrier. Specifically, the Commission stated "that section 271(g)(4), by its express terms, authorizes BOC provision of the capability for customers to access only the BOC's *own* centralized database." *NDA Order*, 14 FCC Rcd at 16265, ¶ 23 (emphasis included in original). According to the Commission, a "limitation on the incidental interLATA services offered pursuant to Section 271(g)(4) is that a BOC must *own* the information storage facilities." *Id.* at 16268, ¶ 27 (emphasis added).

BellSouth filed its petition on October 27, 1999 seeking partial reconsideration of the *NDA Order* to the extent it requires a BOC to have full and exclusive ownership of the information storage facilities in order to fall within the scope of Section 271(g)(4). BellSouth demonstrated that requiring BOCs to "own" the information storage facilities in order to comply with Section 271(g)(4) was contrary to the plain language of the statute and imposed a limiting condition not contemplated by Congress. BellSouth further demonstrated how the Commission's overly narrow interpretation of the 1996 Act threatens to harm competition and consumers by singling out the BOCs for disparate treatment and saddling them with increased costs to which no other nonlocal DA service provider is subject. Accordingly, BellSouth urged the Commission to acknowledge that information storage facilities may be those of a carrier even in circumstances in which the carrier has property or contractual rights to facilities that are less than full ownership of those facilities.

II. Legal Basis

There are compelling legal grounds to support a reversal of the Commission's interpretation of Section 271(g)(4). Indeed, the Commission's requirement that a BOC must own the storage facilities in order to comply with Section 271(g)(4) is contrary to the plain language of the statute. Section 271(g)(4) authorizes "the interLATA provision by [a BOC] or its affiliate . . . of a service that permits a customer that is located in one LATA to retrieve information from, or file information for storage in, information storage facilities of such carrier that are located in another LATA." Interpreting this provision, the Commission concluded that "section 271(g)(4), *by its express terms*, authorizes BOC provision of the capability for customers to access only the BOC's *own* centralized information storage facilities." *NDA Order*, 14 FCC Rcd at 16265, ¶ 23 (first emphasis added; second emphasis in original). The

[5] 47 U.S.C. § 271(h).

Commission also viewed this interpretation to be consistent with the directive of Section 271(h) that the provisions of Section 271(g) are to be narrowly construed. Neither of these rationales reflects proper statutory construction.

The Commission's conclusion that Section 271(g)(4) "by its express terms" requires a BOC to own the information storage facilities is patently erroneous. Indeed, the language of Section 271(g)(4) includes no reference whatsoever to any form of the word "own." Clearly, the "express terms" of that section do not provide the meaning the Commission have given them. Notwithstanding the absence of such an express ownership requirement, the Commission infers such a requirement from the phrase "such company." *NDA Order*, 14 FCC Rcd at 16265, ¶ 23. However, all that clause does is identify the entity to whom the information storage facilities must be attributable under Section 271(g)(4). That clause does nothing to qualify or quantify the degree of interest a company must have in those facilities for them to be attributed to that company for purposes of Section 271(g)(4). For example, there is nothing in the use of "such company" that provides any basis for excluding information storage facilities leased by a company from being "facilities of such company." The clause "such company" is simply devoid of any connotation of an ownership requirement. Accordingly, the plain language of Section 271(g)(4) provides an insufficient basis for the Commission's ownership requirement.

Moreover, contrary to the Commission's conclusion, the directive of Section 271(h) that the provisions of Section 271(g)(4) be narrowly construed does not support the Commission's interpretation of Section 271(g)(4). First, in construing statutes, the Commission must construe the terms as written, not substitute terms with more restrictive meanings. However, that is, in effect, what the Commission has done by imposing an ownership requirement, even though the clause "facilities of such company" is not so limited.

Indeed, had Congress intended the clause to have such a restrictive meaning, it would have (and could have easily) used the very term the Commission, by its reading, has substituted into the provision. Had Congress intended there to be an ownership requirement, it could have easily written that into the Act by referring to "information storage facilities *owned by* such company." However, Congress did not draft the statute in such a manner. Rather, Congress used the less restrictive clause "information storage facilities of such company." The Commission cannot now rely on the directive of Section 271(h) to limit Section 271(g)(4) in a manner Congress did not intend.

An analysis of other sections of the 1996 Act supports BellSouth's contention that the Commission misinterpreted Congress's intent in Section 271(g)(4). In other provisions of the 1996 Act, where Congress meant to use the term "own" or some derivative, it expressly did so – a fact strongly suggesting that Congress did not intend the phrase "such company" to require full

and exclusive ownership of the storage facilities.[6] For example, Section 271(c)(1)(A) includes the express language "their *own* telephone exchange service facilities." In addition, in the pole attachment provisions, Congress explicitly uses the term "owns." Specifically, Section 224(a)(1) states as follows: "The term 'utility' means any person who is a local exchange carrier or electric, gas, water, steam, or other public utility, and who *owns* or controls poles, ducts, conduits, or rights-of-way . . . ."[7] Thus, where Congress meant to require ownership in the 1996 Act, it explicitly stated so. Had Congress intended carriers to own the storage facilities in order to comply with Section 271(g)(4), it would have expressly stated so.

Moreover, the Commission has recognized that absolute title to property or facilities is not the only means of ownership. In fact, the Commission has determined that the leasing of unbundled network elements by competitive carriers constitutes a form of ownership. In the *Universal Service* proceeding, the Commission noted that Congress's use of the term "own facilities" in Section 214(e)(1)(A) "does not refer to facilities 'owned by' a carrier." *Federal-State Joint Board on Universal* Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 8866, ¶ 159 (1997) ("*Universal Service Order*"). The Commission reached this determination based on its finding that, "unlike the term 'owned by,' the term 'own facilities' reasonably could refer to property that a carrier considers its own, such as unbundled network elements, but to which the carrier does not hold absolute title." *Id.* The Commission further pointed out that:

> The courts have recognized many times that the word "own" – as well as its numerous derivations – is a "generic term" that "varies in its significance according to its use" and "designate[s] a great variety of interests in property." . . . The word "owner" is a broad and flexible word, applying not only to legal title holders, but to others enjoying the beneficial use of property. Indeed, property may have more than one "owner" at the same time, and such "ownership" does not merely involve title interest to that property.

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[6] *See, e.g., Brown v. Gardner*, 513 U.S. 115 (1994) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted) ("Where Congress includes particular language in one section of a statute but omits it in a another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655, 666 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1032 (1995) ("The fact that Congress omitted equivalent language . . . cannot be deemed unintentional or immaterial.").

[7] 47 U.S.C. § 224(a)(1).

Id. at 8865, ¶ 158 (citations omitted). Thus, the Commission's broader interpretation of ownership in other contexts strongly supports a less restrictive reading of the statute in this instance.

In sum, rather than adopting a meaning of "information storage facilities of such company" clearly not intended by Congress, the Commission should give this clause a more common sense reading. The Commission should conclude that "information storage facilities of such company," in the context of a service provided pursuant to Section 271(g)(4), refers to information storage facilities the costs of which the BOC has incorporated into its costing and pricing structure for the service, regardless of the commercial arrangements under which the BOC acquires access to, use of, or ownership of such facilities. This more practical reading of "information storage facilities of such company" leads to a result that does not turn arbitrarily on whether the company actually owns the facilities.

Indeed, other less intrusive and economically sound alternatives exist to outright exclusive ownership of the storage facilities. One, for example, would be the sharing of DA storage facilities. Each participant company could contribute capital to and own a percentage of such facilities, could directly or indirectly contribute to the facilities' ongoing maintenance, and could comply with the Commission's nondiscrimination requirements relating to the provision of certain DA listing information to unaffiliated third parties. In such a scenario, each participant company would be free to price its nonlocal service at competitive rates, and the consumer benefits of such an arrangement would be apparent.

Even if the Commission insists on some sort of "ownership" interest requirement for BOCs, the Commission should recognize that less than total, exclusive ownership can satisfy that requirement. Indeed, elsewhere in the 1996 Act, Congress has specifically determined that a greater than 10 percent interest is sufficient for attribution of ownership for purposes of establishing an entity as an affiliate of another company.[8] If ownership of an entity can be attributed to a company that holds greater than a 10 percent interest in that entity (making that entity an "affiliate of such company"), a company's similar ownership level in information storage facilities should be sufficient to make those facilities the "information storage facilities of such company."

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[8] Section 153(1) of the 1996 Act states: "The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent." 47 U.S.C. §153(1).

III. Policy Basis

In addition to the legal grounds discussed above, public policy warrants a change in the Commission's restrictive ownership requirement. Significant public interest benefits could prevail under a more flexible framework. For example, new DA service entrants could more easily enter the market via shared facilities which, in turn, could lead to the introduction of even more competition in the market for nonlocal DA services. The economic benefits of shared DA storage facilities also would be enjoyed by DA customers of BellSouth and others through lower prices than might otherwise exist under an unnecessary and redundant wholly-owned storage facility requirement. The Commission must not ignore these public interest and pro-competitive benefits that could accrue if the Commission allows BellSouth and other companies to share storage facilities for nonlocal DA service.

In its previous meetings with the staff, BellSouth explained that action by the Commission is necessary because of the increased customer demand for expanded nonlocal DA listings. Potential consumer benefits of a less restrictive ownership requirement include customer ease and convenience. For example, allowing customers to obtain local, nationwide, and international DA service from a single source rather than having to use multiple providers creates the one-stop-shopping framework that the Commission has repeatedly advocated. Moreover, as we move toward a more global economy, the need to access worldwide information with ease and speed has become more important for businesses and consumers. Modification of the Commission's rules as requested by BellSouth would enable more carriers to respond to customer demand thereby enhancing competition.

Moreover, a less restrictive ownership requirement is necessary to enable BOCs and other carriers to provide expanded DA services such as international DA because the framework established by the Commission for the provision of nonlocal DA simply will not work for the provision of international DA. Total and exclusive ownership of a single storage facility housing all international telephone numbers is impossible. There are significant operational and regulatory barriers to establishing a single international DA database or storage facility that would comply with the Commission's ownership requirement. *See* Attachment A (Kelsey Group Presentation). No such facility currently exists and the probability of the creation of one in the future is highly unlikely for a number of reasons. First, there is no single carrier, DA provider, or clearinghouse from which a carrier can purchase the over one billion global listings or even a majority of those listings. Second, most, if not all, foreign countries have strict privacy laws that preclude carriers from other countries from purchasing the foreign listings. Third, the DA system outside the U.S. is fragmented, with each country defining its own rules and regulations regarding access to DA services and data. Thus, it is currently impossible for BellSouth, or any carrier, to populate a storage facility with extensive international listings.

The provision of international DA today by interexchange carriers ("IXCs"), such as AT&T, WorldCom, and Sprint, reflect these marketplace realities. Indeed, none of these IXCs

offer international DA through a single database or storage facility. Specifically, when a customer calls to request an international listing, the IXC operator either launches a query to a database aggregator or places a voice call to a foreign operator. The foreign database aggregator interfaces with various foreign DA databases. The information obtained from the foreign database is reformatted and delivered to the IXC operator, who provides the international listing to the caller.

Given the current regulatory impediments and state of technology, BellSouth proposes a similar arrangement in order to provide international DA.[9] *See* Attachment B (Network Diagram). BellSouth would load onto its database storage facility those foreign listings it is able to acquire. Due to the obstacles detailed above, the only such listings that BellSouth has been able to obtain to date are Canadian listings. For those foreign listings not housed on our database storage facility database, the BellSouth operator would launch a query to the international DA database aggregator. The information obtained from the foreign database would be delivered to the BellSouth operator, who would provide the international listing to the caller.

International DA is just one example of an expanded nonlocal DA service that customers are demanding. This service cannot be provided by BOCs due to the Commission's current ownership restrictions. There is no reason to arbitrarily deny the public the benefits of receiving expanded DA service from multiple competitive providers, including the BOCs. Thus, in order to promote the public interest by fostering innovation and competition in the DA services market, the Commission should adopt a more flexible ownership framework under Section 271(g)(4) as requested herein.

IV. Conclusion

In light of the foregoing, the Commission should reconsider its interpretation that total and exclusive ownership of information storage facilities is required in order to comply with Section 271(g)(4). A less narrow reading of Section 271(g)(4) is not only consistent with the plain language of the statute but also would serve the public interest by fostering competition and

[9] As technology continues to advance, there may be new and different ways to access international DA listings in the future. For example, carriers may some day be able to access international listings via the Internet in lieu of or in addition to the current method of relying on foreign database aggregators.

providing customers with expanded services. Accordingly, BellSouth urges the Commission to find that shared ownership, leasing, and/or contracting with third parties for access are permissible methods by which carriers may use storage facilities to provide nonlocal DA.

Respectfully submitted,

Angela N. Brown

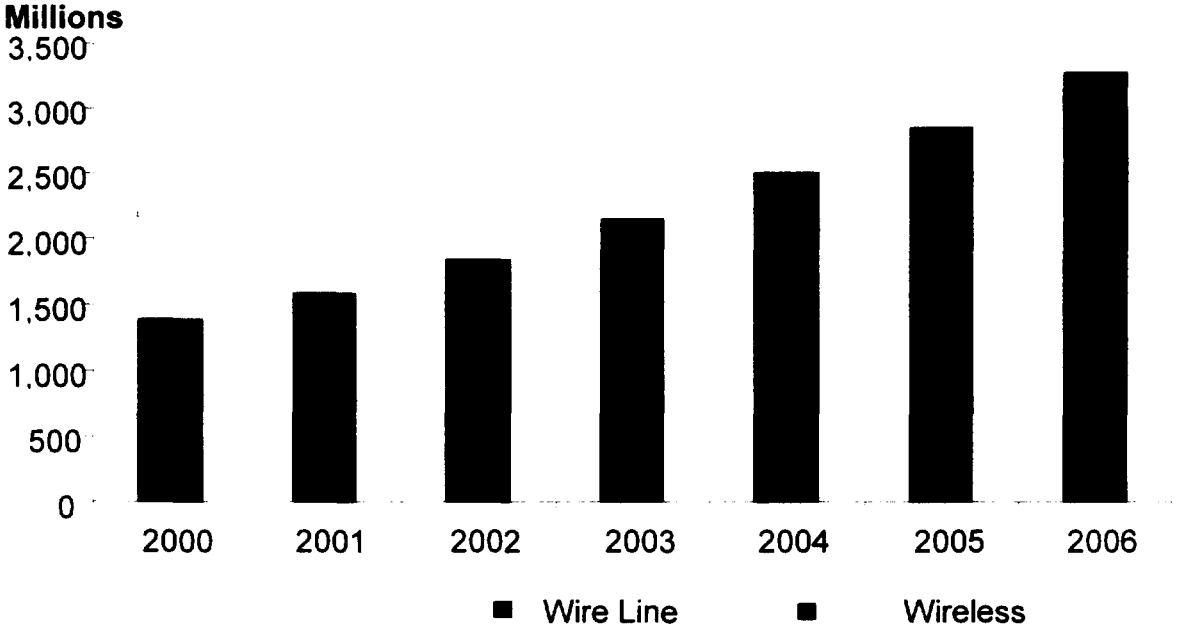
Attachments

ATTACHMENT A

International Directory Assistance Database Issues

- **The theoretical global DA database is huge and growing rapidly.**
  - Today there are over 1 Billion wire line phones and an additional 607 Million wireless phones worldwide. This number will grow to 1.6 Billion wire line phones and nearly 1.6 Billion wireless phones.

World Wide Phone Line Growth



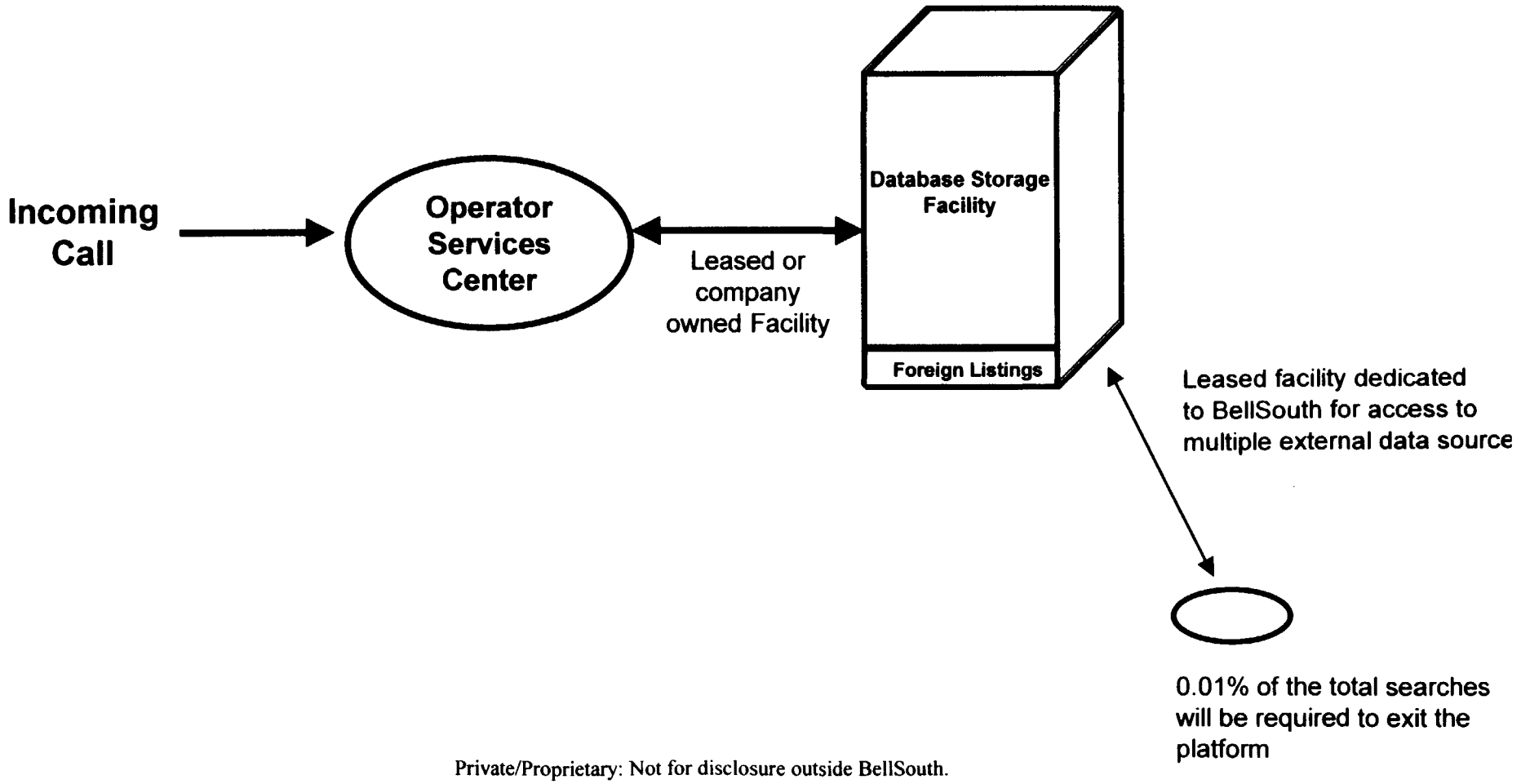
Source The Kelsey Group, 2001

- **There is no source of an international DA database. It is likely that there never will be due to:**
  - The sheer size of such a database
  - Individual country regulation (privacy issues, especially in Europe)
  - Inconsistent data formats and quality
  - The existence of better alternatives (gateways)
- **AT&T, MCI WorldCom and Sprint do not maintain International databases for International DA calls. Most international DA calls in the US are operator-to-operator calls.**

- **The E115 Gateway system established in Europe has provided an inexpensive (avg. US$ 0.65 vs. US$6.00 to $9.50 for an operator to operator call) and accurate (current data is dipped directly, so it is accurate to within 24 hours) alternative to Operator-to-Operator Calls.**
- **LSSi building relationships to expand gateway access to 23 countries including the US.**
- **A significant number of countries, particularly in newly privatized situations, have no source of a national database**
    - *e.g.*, Brazil – Due to the privatization of the Phone Company and the subsequent entry of competitive telcos, there are now 38 phone companies in Brazil. All of these companies would need to cooperate in some way to build a national telephone database. Viewing each other as keen competitors has created a fundamental unwillingness to either sell listings or share them. At US$ 1.50 per listing – the price at which the Brazilian telephone regulator requires carriers to sell listings – it is cost prohibitive to purchase all the necessary listings for a national database and still create a viable business model of any kind. Add to this the fact that, to quote one Brazilian database expert, "...(*The)* current database is almost totally wretched, incorrect, not updated and useless". There are competitive telcos companies that operate without their own internal databases, further exasperating the data quality situation.

Non-Local DA

ATTACHMENT B



Private/Proprietary: Not for disclosure outside BellSouth.