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Filed Electronically

October 10, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Communication
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911
Emergency Calling Systems, CC Docket No. 94-102

Dear Ms. Dortch:

The attached written *ex parte* presentation concerning the above-referenced proceeding was sent to Barry Ohlson of the Wireless Telecommunications Bureau by the undersigned on October 10, 2002. In accordance with § 1.1206(b)(1) of the Commission's rules, this notice and a copy of the referenced letter are being filed with the Secretary's office for inclusion in the public record. Should you have any questions, please contact me at (202) 589-3760.

Sincerely,

A handwritten signature in black ink that reads "John T. Scott, III".

John T. Scott, III

Attachment

cc: James D. Schlichting
Blaise Scinto
Joel Taubenblatt
Pat Forster

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Mr. Barry Ohlson
Wireless Telecommunications Bureau
Federal Communications Commission
455 Twelfth Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 94-102

Dear Mr. Ohlson:

This letter will respond to your inquiry regarding BellSouth's request to Verizon Wireless ("VZW") that VZW enter into a "first office application" agreement for Phase II E911 systems in Spartanburg and Greenville, South Carolina ("FOA Agreement").¹ BellSouth has made this agreement a condition of its willingness to provide Phase II service to the PSAP for those communities.

The FOA Agreement is entirely unnecessary and is one-sided in BellSouth's favor. Worse, it is premised on a fundamental misconception BellSouth has about wireless carriers' and its own E911 obligations. This misconception is not only impeding Phase II service in South Carolina, but is preventing dozens of other PSAPs served by BellSouth from becoming capable of receiving and using Phase II location data. Over a year after ILEC-caused delays were brought to the FCC's attention, and six months after BellSouth committed to the Commission that it was ready to upgrade its network for Phase II, BellSouth continues to block Phase II deployment and jeopardize dozens of PSAP Phase II requests. BellSouth's position means that PSAPs cannot obtain the location data via the ALI database query, and thereby may invalidate the PSAPs' requests for Phase II service under the FCC's rules. It is thus important that the FCC not focus merely on the South Carolina agreement, which by its own terms will be of very short duration, but on the serious obstacle that BellSouth's misconception creates for achieving the FCC's goals for widespread availability of Phase II service.

¹ "Wireless E-11 Phase 2 Interface First Office Application for Wireless Service Providers in Spartanburg / Greenville Area." BellSouth has, as discussed below, made minor changes to the original version of this agreement, and apparently notified the PSAP of these changes, but did not notify VZW. This letter addresses the current version of the FOA Agreement.

The FOA Agreement for Spartanburg/Greenville

VZW provides cellular service to Spartanburg and has received a request from the PSAP to deploy Phase II.² The PSAP must, however, obtain Phase II service through BellSouth, and BellSouth has requested that VZW as well as Sprint PCS, another wireless carrier in this market, sign the FOA Agreement before BellSouth will test service on the PSAP's behalf. BellSouth's unjustified requirement has succeeded in delaying the provision of E911 Phase II in South Carolina.

1. There is no need for any new agreement whatsoever. VZW and Sprint PCS already provide Phase II E911 to many PSAPs served by other ILECs. These other ILECs worked with VZW to test and turn live their ALI capabilities, without such an agreement. Further, MPC vendors have been connected to BellSouth's ALI databases for several years in order to provide Phase I E911, and already have entered into contracts under which BellSouth is paid connection charges. BellSouth has not explained to VZW why an additional FOA Agreement is necessary for Phase II E911.

2. The FOA Agreement is based on the invalid premise that BellSouth is providing "services" to VZW. The fact that BellSouth has agreed to temporarily remove the charges for these services (even though it originally demanded such charges) is inconsequential, because the agreement would have VZW concede that it is obtaining "services" as a "customer" of BellSouth. Having established that relationship, BellSouth would be positioned to seek payments from VZW later or refuse to allow Phase II E911 to proceed.

3. The FOA Agreement makes clear that BellSouth seeks to preserve its right to charge wireless carriers for these fictitious services once testing is completed, in the face of the FCC's contrary determination. Thus Section 6 declares that there will be no charges "for purposes of this Agreement *only*" (emphasis added). There can be no other purpose in this provision than to position BellSouth to demand payments from VZW later as the condition for allowing Phase II to proceed. Notably, BellSouth refuses to commit not to charge wireless carriers once testing is completed. BellSouth attempts to establish a contractual relationship where none is necessary in order to be able to demand payments from wireless carriers to pay for its own ALI database upgrade costs. The

² VZW serves these markets through a hybrid of Motorola and Nortel cell site and switching equipment. Even though the switch is provided by Nortel, and thus has been upgraded, the cell site equipment that must still be upgraded is furnished by Motorola. The Commission set a March 1, 2003 deadline for VZW to complete upgrades in Motorola markets. Nonetheless, VZW is ready and willing to begin testing the network to the extent possible this fall.

Commission, however, has explicitly determined that such costs (both for Phase I and Phase II) are not the wireless carriers' responsibility.³

4. BellSouth demands a unilateral right to terminate the Phase II FOA. One BellSouth-requested provision should be of particular concern to the FCC. Section 1(a) states that the agreement only lasts until "BellSouth terminates, with or without cause, at any time," subject only to BellSouth's giving 30 days notice. The provision exposes BellSouth's intent to escape from a no-compensation agreement as quickly as possible so it can demand payment; otherwise, the provision makes no sense. The Commission should be particularly concerned about a LEC's explicit reservation of the unilateral right to terminate a Phase II service agreement. LECs should be working to implement their obligations, not working to escape them.

5. Other provisions demanded by BellSouth are one-sided and unacceptable. The latest version of the FOA Agreement leaves unchanged various boilerplate provisions concerning liability (Article 8), intellectual property rights and indemnification (Article 10), and proprietary and confidential information (Article 11) that reference the "services" BellSouth purports to be providing, but fail to document precisely what "services" are being provisioned to VZW. For example, Section 8.3.3 exonerates BellSouth from liability "for any damages whatsoever . . . arising out of or connected with the services provided." Apart from the invalid premise underlying the Agreement, these and other provisions attempt to immunize BellSouth from its own misconduct and grant it broad indemnification rights. They alone make the agreement unacceptable to VZW.

VZW has no objection to entering into a simple testing agreement with BellSouth that merely declares that the parties are to cooperate in testing Phase II upgrades in the systems serving Spartanburg/Greenville, although it does not see why such an agreement is necessary; other LECs have not required one. VZW would be glad to review such an agreement should BellSouth propose one. But it cannot and will not accede to an agreement that is clearly designed to create a fictitious service relationship so that BellSouth can unlawfully shift its costs onto VZW.

Generic Wireless Interface Agreement

The Spartanburg/Greenville FOA Agreement is emblematic of BellSouth's larger goal of forcing VZW to sign service agreements for other Phase II deployments in which VZW will be obligated to pay recurring charges for an unlimited time. Even though

³ See Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Marlys Davis, E911 Program Manager, Department of Information and Administrative Services, King County, Washington, dated May 7, 2001, aff'd on recon, FCC 02-146, CC Docket 94-102, (rel. July 24, 2002) ("*King County Recon Order*").

BellSouth had requests from PSAPs dating back well into 2001, it took no action until mid-2002, when it represented at the meetings conducted by Dale Hatfield to explore the obstacles to Phase II deployment that it was finally ready to move forward with Phase II. (Alone among ILECs, BellSouth had asserted that Section 271 of the Communications Act somehow impaired its authority to complete Phase II service, a position it abandoned after the Hatfield Inquiry began.) But it has yet to complete Phase II service to the requesting PSAPs because of its demand that wireless carriers sign a form agreement in which they must pay BellSouth for its own Phase II ALI upgrade work, the generic "Wireless E-911 Phase 2 Interface Agreement for Wireless Carriers."⁴ BellSouth's position is wrong and, worse, has jeopardized Phase II completion throughout its territory.

1. BellSouth has blocked the ability of public safety agencies to obtain Phase II service, making them non-compliant with the PSAP readiness requirements of the FCC's rules. VZW has 45 pending PSAP Phase II requests in BellSouth's territory. VZW has completed its network deployment in many of those communities and is ready to complete Phase II, but cannot do so, because BellSouth will not complete delivery of Phase II data. None of those PSAPs are able to request and receive Phase II data without the ALI database functionality. Many PSAP requests are now well over six months old. BellSouth's position has effectively rendered invalid those requests,⁵ setting back rather than facilitating Phase II progress.

2. Like the FOA Agreement in South Carolina, the Interface Agreement is unnecessary. VZW's MPC already has Phase I-based connectivity agreements with BellSouth, and VZW already pays for any necessary trunks or other connections. New agreements with the MPC vendors for Phase II connectivity are being negotiated with BellSouth. No additional, separate agreement is needed. BellSouth has yet to explain to VZW why it believes it needs some additional agreement (other than to collect money from VZW that it is not entitled to collect).

⁴ BellSouth's intent to provide Phase II E911 service was announced to Wireless Service Providers in its July 2, 2002 Carrier Notification number SN91083177. BellSouth announced it would begin offering Wireless 911, Phase 2, service on August 1, 2002 and required that Wireless Service Providers contact their BellSouth Interconnection Account Manager to obtain and sign the required Interface Agreement, which would be available on July 5, 2002. BellSouth revised the agreement in September, and this past week posted still another version of the agreement.

⁵ Section 20.18(j) of the Commission's Rules and Commission decisions make clear that a PSAP which requests Phase II service is representing that it will be capable of receiving and utilizing Phase II data within the prescribed six-month period. 47 C.F.R.. 20.18(j). *See also Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems – Petition of City of Richardson, Texas, Order*, 16 FCC Rcd 18982 (2001) ("*Richardson Order*"). Sprint PCS, for example, has stated that many of its pending Phase II PSAP requests are invalid because the PSAPs failed to become Phase II capable within the six month period contemplated by Section 20.18(j). *See Sprint Quarterly E911 Implementation Report*, filed August 1, 2002.

3. The factual premise of the Interface Agreement is wrong because there are no “services” or “devices” being provided to VZW. Upgrades to BellSouth’s ALI database (which include developing and installing software that runs on the ALI database to provide the “E2” interface standard) are solely within BellSouth’s capability and responsibility. BellSouth has attempted to justify its cost-shifting by mischaracterizing facts. In its August 28, 2002, response to the FCC Staff’s request for information as to its readiness for Phase II, BellSouth stated:

The costs associated with the interface device and associated software is recovered from the wireless carriers through the Wireless Carrier Interface Agreement. These charges are associated with the interface device that is necessary for the wireless carriers to deliver the Phase II data into the ALI database. The costs are limited to those interface devices, also known as E2, the carrier specifically needs which enables the carrier to meet its’ [sic] mandate. The interface devices utilize software that includes a pANI table and an E2 table that alerts the wireless carrier to deliver the XY to the ALI database. These tables are populated by the wireless carrier for their own use and are specifically designed to let each wireless carrier know when to deliver the XY to the ALI database.

However, the E2 interface is not a device of any sort. This passage implies that there is a physical interface device, distinguishable from the ALI database itself, which is the financial responsibility of wireless carriers.⁶ To the contrary, the software that runs on the ALI database itself establishes the E2 interface, and is also known as a “data protocol” for communication between the ALI and the MPC. This software enables the PSAPs to request the wireless location data in the first instance and is deployed for the PSAP to be able to receive and utilize the Phase II data.

Similarly, wireless MPC vendors have developed and installed software interfaces for communicating the location data via the data protocol required for E2 or modified PAM. MPC providers also make arrangements and incur costs for connectivity to the LEC ALI databases. These costs flow directly back to wireless carriers in the form of charges from the MPC provider to the wireless carrier, and supplement the wireless carrier’s own costs to develop the Phase II location technology and deploy costly network infrastructure and GPS handsets. Wireless carriers do not also bear the costs associated with LEC upgrades undertaken as part of the service they provide to the PSAPs – again,

⁶ In addition, the two *Ex Parte* notices of meetings between BellSouth and the Bureau in August and September have not provided a decipherable explanation of the rationale supporting BellSouth’s charges. Upon direct questioning by Sprint PCS and VZW to BellSouth during a meeting on August 8, 2002 with the South Carolina Wireless 911 Board, BellSouth did not provide an explanation of its decision to impose costs upon wireless carriers for ALI database upgrades.

the very service that allows the PSAPs to request and receive the wireless location data in the first instance.

4. BellSouth's position that wireless carriers must pay for BellSouth's ALI upgrades conflicts with a final Commission order. The Commission has declared that ALI database upgrades are the LECs' responsibility for both Phases I and II.⁷ This determination makes sense because the LECs are in the best position to deploy those upgrades to the nation's PSAPs most efficiently and at lowest cost. The Commission has also recognized that, to the extent LECs seek reimbursement for those costs, they should seek such payment from PSAPs because the PSAPs are obtaining ALI database services from the LECs, just as they have in connection with wireline 911 service. Moreover, the upgrades at issue here are precisely those necessary for the ALI database to "query the Mobile Positioning Center (MPC) at the appropriate time to *acquire* the Phase II latitude/longitude data" – a function the Commission, contrary to BellSouth's assertion, appropriately determined was "necessary to receive the Phase II data."⁸ The Commission expressly determined the PSAP must request such capabilities from the LEC to ensure that the PSAP will have "the facilities and equipment necessary to receive and utilize the Phase II data elements."⁹ There can be no question that the FCC has clearly spoken on this point and that BellSouth's position is in conflict with the FCC's decision.

5. Even were BellSouth entitled to charge wireless carriers for ALI costs (which the FCC has made clear it is not), BellSouth's recent ex parte filing with the FCC undercuts any semblance that it is merely seeking to recover the costs for its ALI upgrade.¹⁰ BellSouth reveals that its charges to wireless carriers include not only ALI database vendor costs, but also more than \$600,000 in direct and overhead costs for BellSouth's own "product team," its "billing vendor" (thus, in BellSouth's view, VZW is supposed to pay the costs of being billed), and, amazingly, BellSouth's "Account Executive," who "will assist with contract negotiation and implementation meetings" with the wireless carrier.

6. BellSouth's calculations of its "costs" have varied so greatly as to be hopelessly unreliable. BellSouth's first proposal would have imposed a \$0.63 charge for every "dip" into its ALI database to defray ALI upgrade costs. This transaction-based regime, including the specific fee amount, had no apparent basis in BellSouth's actual ALI database upgrade costs, even if BellSouth had some basis to recover such costs from

⁷ *King County Recon Order, supra n. 3.*

⁸ *Richardson Order, supra n. 5, at ¶17 (emphasis added).*

⁹ *See id.* ¶¶ 16-17.

¹⁰ Letter from Kathleen B. Levitz, BellSouth, to Marlene H. Dortch, FCC, in Docket No. 94-102, filed September 30, 2002.

Mr. Barry Ohlson
October 10, 2002
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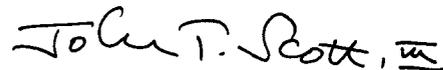
wireless carriers (which it does not). BellSouth's next version of the agreement deleted the \$0.63 charge for the interim test period, but still declared that VZW would have to "purchase services" from BellSouth, with the price to be set later. This situation lasted for weeks, until recently when BellSouth came up with a new charge of \$0.11 "per call" – a radical reduction that should give the FCC pause about the validity of BellSouth's new "cost showing." The basic point, in any event, is that no charge is warranted because VZW is not buying any services from BellSouth.

7. The agreement's terms are themselves unacceptable. As with the FOA Agreement, the Wireless Interface Agreement contains the same boilerplate, one-sided provisions that VZW could not agree to even if BellSouth were, finally, to concede that it should not demand payment for its own costs from VZW.

In sum: There is nothing that prevents BellSouth from today upgrading its ALI databases and completing Phase II service to its PSAP customer. Other ILECs have not taken BellSouth's position, and have not conditioned deploying Phase II capability on such illegal "service" agreements. BellSouth stands alone in its refusal to acknowledge the Commission's clear direction that LEC upgrade costs are not the wireless carriers' obligation to pay. Instead it is seeking to impose not only those costs but other unlawful charges on wireless carriers – and, worse, blocking Phase II deployment until it gets its way.

The FCC should make it clear to BellSouth that it should provide Phase II service to PSAPs throughout its territory, now, and that it may not demand that wireless carriers enter into fictitious service agreements so that BellSouth can profit from the FCC's Phase II E911 mandate. Without clear direction to BellSouth, PSAP readiness for Phase II in its territory will continue to be impeded.

Sincerely,

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a horizontal line under the name.

John T. Scott, III