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February 13, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written *Ex Parte;* Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended; CC Docket No. 99-273

Dear Ms. Dortch:

BellSouth respectfully submits this written *ex parte* regarding the pending Petition for Clarification, or in the Alternative, Reconsideration filed jointly by BellSouth and SBC in the above-captioned proceeding.[1] This letter is a follow-up to our January 14, 2004 meeting and provides additional information on the impact of the Commission's *First Report and Order*[2] on the marketplace for directory assistance listings.

In their joint petition, BellSouth and SBC asked the Commission to clarify that Section 251(b)(3) of the Act does not preclude local exchange carriers ("LECs") from imposing reasonable restrictions on the use of directory assistance ("DA") listings by DA providers, including their agents. The Petitioners pointed out that conflicting language in the Commission's *Directory Listing Order* could be interpreted as prohibiting LECs from continuing to apply the well-recognized restrictions included in long-standing tariffs and negotiated interconnection agreements. Examples of these reasonable restrictions include prohibitions on bulk resale of the underlying DA listings data as well as prohibitions on the use of DA listings for directory publication, sales solicitation, and telemarketing. The Telecommunications Act of 1996 ("1996 Act") and the Commission's subsequent orders addressing access to DA support a finding that the Commission did not intend LECs to remove these long-standing restrictions from their tariffs and interconnection agreements. Accordingly, the Commission should promptly clarify that use

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[1] Petition for Clarification or, in the Alternative, Reconsideration, filed by SBC and BellSouth, CC Docket No. 99-273 (filed Mar. 23, 2001).

[2] *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended,* CC Docket No. 99-273, *First Report and Order*, 16 FCC Rcd 2736 (2001) ("*Directory Listing Order*").

restrictions currently either in interconnection agreements or valid tariffs approved by state commissions are permissible under the Act and may continue to be applied.

As BellSouth predicted nearly three years ago, internal inconsistencies in the *Directory Listing Order* have resulted in conflicting interpretations. In Paragraph 28, the Commission states as follows:

> section 251(b)(3)'s requirement of nondiscriminatory access to a LEC's DA database does not contemplate continuing veto power by the providing LEC over the uses to which DA information is put. Once carriers or their agents obtain access to the DA database, they may use the information as they wish, as long as they comply with applicable provisions of the Act and our rules. This latitude in the use of DA information includes permitting a carrier's DA agent to use the information as it sees fit.[3]

However, in that same paragraph, the Commission goes on to say that restrictions are permissible. In fact, the Commission expressly acknowledges that DA agents may be subject to restrictions regarding the use of DA listings. Specifically, the Commission concludes that the latitude afforded to DA agents "does not mean that a DA provider is effectively without limitation in its use of the database information it has obtained in its agency capacity."[4] According to the Commission, "[DA] providers continue to be governed by their agreements with their carrier-principal and by the state-law principles that govern the construction of those agreements."[5]

Since the release of the *Directory Listing Order* in 2001, carriers and DA providers have been relying on certain phrases in that order (*e.g.*, "they may use the information as they wish"[6]) as justification for using DA listings in any manner they see fit. BellSouth has objected to some of these uses as unlawful. Below are examples of real-world problems facing BellSouth due to the confusion created by the *Directory Listing Order*. These problems fall into three primary categories, each addressed more fully below: (1) resale of DA listings to directory publishers; (2) bulk resale/multiple use; and (3) use of DA listings for non-DA purposes.

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[3] *Id.* at 2749, ¶ 28 (emphasis added).

[4] *Id.*

[5] *Id.*

[6] *Id.*

1. Resale of DA Listings to Directory Publishers

Some DA providers that purchase DA listings from BellSouth pursuant to Section 251(b)(3) are seeking to resell BellSouth's DA listings to directory publishers. These DA providers claim that the *Directory Listing Order* allows them to use the DA listings "as they wish,"[7] which, according to their interpretation, includes reselling to directory publishers.

BellSouth disagrees. The statute expressly prohibits such a use. Section 222(e), which governs the use of subscriber list information, specifically gives "directory publishers a right to obtain subscriber list information 'for the purpose of publishing directories in any format.'"[8] As the Commission has clearly stated, "[n]either the statutory language nor our implementing rules allow requesting LECs to use listing information obtained pursuant to section 251(b)(3) to publish telephone directories."[9] The Commission recently reiterated this prohibition when it stated that "requesting providers may not publish telephone directories of listing information obtained pursuant to section 51.217."[10]

Clearly, DA providers are erroneously mixing statutory provisions – Sections 222(e) and 251(b)(3). These two provisions are entirely different sections of the Act with different purposes. Moreover, as the Commission has acknowledged, directory publishing and directory assistance are distinct and different offerings under the Act.[11] In addition, BellSouth maintains two separate listings products for directory publishing and directory assistance. While the data used for directory publishing includes subscribers' names, addresses, and telephone numbers, it excludes any subscriber listings for those carrier customers that have not authorized BellSouth to

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[7] *Id.*

[8] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended,* CC Docket Nos. 96-115, 96-98, 99-273, *Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273*, 14 FCC Rcd 15550, 15610, ¶ 111 (1999) ("*Third Report and Order*"); *see* 47 U.S.C. § 222(e).

[9] *Third Report and Order*, 14 FCC Rcd at 15615, ¶ 124.

[10] Letter from Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, to Eric James Glazier, Cellular Directory Information, Inc., DA 02-2199, at 2 (dated Sept. 2, 2002).

[11] For example, due to the statutory differences between directory assistance and directory publishing, the Commission declined to set a rate that would be applicable to both access to directory assistance and directory publishing databases. *Directory Listing Order*, 16 FCC Rcd at 2752-53, ¶ 37.

release their subscriber listings. In contrast, the directory assistance listings product includes information for all subscribers, including those that elect to be non-published or non-listed. [12]

The Commission should not allow carriers and DA providers to confuse the right to listings for directory publishing with access to the directory assistance database by relying on sound bites from the *Directory Listing Order*. BellSouth therefore urges the Commission to clarify that LECs may prohibit DA providers and their agents from using DA listings obtained pursuant to Section 251(b)(3) for directory publishing purposes. Any other conclusion would be contrary to the Act and the Commission's previous rulings regarding Sections 222(e) and 251(b)(3).

2. Bulk Resale/Multiple Use

A second problem BellSouth is facing as a result of the *Directory Listing Order* is bulk resale and multiple use. Since the order's release in 2001, BellSouth has experienced a revenue decline in its DA listings market of approximately 32 percent. BellSouth attributes an overwhelming percentage of this lost business to the Commission's *Directory Listing Order*, because BellSouth's DA listings are being resold at prices with which BellSouth cannot compete.[13]

The following are some real world examples of what is occurring in the marketplace as a result of the order's conflicting language. First, BellSouth is aware of situations in which interexchange carriers, CLECs, and third-party DA providers have approached BellSouth's DA provider customers seeking to resell to them DA listings data originally acquired from BellSouth. A second scenario involves DA providers purchasing DA listings once and using these listings to serve multiple carriers. Third, several marketing and other non-telecommunications companies are publicizing in their marketing materials the fact that their DA information is compiled from BOC sources. BellSouth, however, does not provide its DA listings to these specific companies. Therefore, they are obtaining BellSouth's DA listings from other sources on a resold basis.

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[12] Non-published subscriber information, which includes subscriber name, address (to the extent provided by the subscriber), and an encrypted telephone number is included in DA data available to DA providers. Encryption is a process that replaces the digits of a telephone number with a series of numbers or letters. BellSouth uses encryption to protect the confidentiality of non-published telephone numbers included in its DA subscriber lists. Non-listed information (*i.e.*, subscriber name, address (to the extent provided by the subscriber) and telephone number) is information that the customer has requested not be included in published directories and, in some states, not be made available to the general public. Non-listed information is included in DA data available to DA providers.

[13] BellSouth's current tariffed rate is $.04 per listing plus a $150 per month per state recurring fee. BellSouth is aware of pricing of $.01 or less per listing for its resold listings.

BellSouth submits that such resale is not a "use," and LECs should be allowed to prohibit this action. The entity seeking to resell the data is not using the data to provide a DA service to its end user customers as envisioned by the Commission. Rather the reseller is simply seeking to create a secondary DA listings market. A carrier's purchase and use of DA listings information for itself and, of course, for DA purposes, is permissible and consistent with what the Commission intended. Reselling the data to another entity is entirely different and, as explained below, does not comport with the rationale behind the nondiscriminatory access requirement.

BellSouth also objects to allowing a DA provider serving as an agent to obtain DA listings on behalf of a single carrier-principal and subsequently use that same DA information to serve multiple carrier-principals. This outcome – referred to as multiple use – plainly conflicts with existing agency law. The DA agent's right to possess the DA data is derived solely from its agency status; therefore, the agent's use of that data is limited to acting on behalf of a specific carrier-principal. The DA agent has no independent right to use the data for its own purposes, such as serving the customers of other carriers. Thus, the Commission should not allow DA providers serving as agents to misuse their agency status by using DA information obtained under one carrier-principal arrangement to serve other carriers.

The limitations sought above are no different than the lawful use restrictions on software licensing. Under most circumstances, a company may not purchase software and load it onto all of its employees' computers at no extra charge. The company usually pays a fee for multiple uses or a fee based upon the number of employees that will use the software. In much the same manner, a LEC should be permitted to restrict the multiple use of its DA listings.

The goal of nondiscriminatory access to DA is to ensure that end users, no matter what LEC provides their service, will have access to DA listings.[14] As a result, the Commission required LECs to provide DA providers that qualify under Section 251(b)(3) with nondiscriminatory access to the LECs' local DA databases. The Commission, however, did not intend to allow DA providers to misappropriate LEC DA listings in order to create a resale market for these listings.

Moreover, BellSouth submits that there is nothing prohibiting a carrier, DA provider, or any other entity from physically taking BellSouth's directory publications and compiling the information in a manner to create listings information that it could sell to others.[15] However, the

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[14] The Commission concluded that nondiscriminatory access to directory listings "means that, if a competing provider offers directory assistance, any customer of that competing provider should be able to access any listed number on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider, or the identity of the telephone service provider for the customer whose directory listing is requested." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, et al.*, CC Docket No. 96-98, *et al.*, *Second Report and Order and Memorandum Opinion and Order*, 11 FCC Rcd 19392, 19457-58, ¶ 135 (1996).

[15] The Supreme Court has held that there is no valid copyright in the information typically collected and published in white pages listings. *Feist Publications, Inc. v. Rural Telephone*

DA listings contained in our DA database are not published resources. This information is not available to entities outside of BellSouth, except for limited purposes as required by the 1996 Act. Open access to BellSouth's proprietary DA databases to allow competitive carriers or other entities to create a resale market for DA listings was not the intent of the Act. Accordingly, BellSouth requests that the Commission determine that LEC-imposed restrictions on bulk resale and multiple use are permissible.

3. Use of DA Listings for Non-DA Purposes

The third area of ambiguity over the use of DA listings is the use of these listings for non-DA purposes such as direct marketing, telemarketing, and sales solicitation. Although the Commission expressly concluded that states are authorized to prohibit the sale of customer information to telemarketers,[16] the order is unclear as to whether LECs may adopt restrictions on the use of DA listings for these non-DA purposes. Accordingly, to eliminate any uncertainty, the Commission should clarify that LECs may prohibit the use of DA listings for non-DA purposes such as direct marketing, telemarketing, and sales solicitation.

The Commission cannot ignore the privacy expectations of customers regarding the use of DA information. Customers have legitimate interests in protecting their privacy, and carriers are obligated to comply with customers' requests to safeguard such privacy. In fact, a large number of BellSouth's customers pay to have their numbers non-published in phone books or not provided to customers using 411 or other DA services. BellSouth does not dispute state authority to impose use restrictions and acknowledges that states play an important role in protecting consumers.

Customers reasonably expect that the telephone company will not make DA information available to others to do whatever they please. However, the current language in the *Directory Listing Order* appears to prevent the LEC from taking reasonable steps to safeguard this agreement with customers. Moreover, a LEC's duty to provide nondiscriminatory access to its DA listings does not trump customers' rights. Customers cannot be deemed to have acquiesced to the use of their DA information for non-DA purposes simply because Section 251(b)(3) requires LECs to offer DA listings to competing DA providers on a nondiscriminatory basis.

The inability to control or police the dissemination of BellSouth's DA listings since the release of the Commission's order has had an impact upon its customers. For example, a BellSouth customer paying for a non-published number received a telemarketing call from one of BellSouth's DA listings customers. When the BellSouth customer inquired how the company had obtained his telephone number, he was advised that his number was on a list purchased from BellSouth. Of concern is not only the fact that the customer's information was being used for

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Service Co., 499 U.S. 340 (1991). Thus, a DA provider or any other entity may extract, modify, enhance, and republish information from a published BellSouth white pages directory.

[16] *Directory Listing Order*, 16 FCC Rcd at 2749, ¶ 29.

marketing purposes but also the fact that the non-published number was somehow unencrypted or matched to the name and address information contained in BellSouth's DA database. This customer ultimately terminated his relationship with BellSouth.

In another example, BellSouth was contacted in 2003 by the Federal Trade Commission ("FTC"), which was investigating an unauthorized Internet billing and collection scheme. The FTC inquired about a specific company that aggregated DA listings from several sources, which included LEC subscriber data. Using the customer's telephone number, the scammers apparently matched the number to the subscriber information and were thereby able to bill the user without his knowledge. More than 1200 consumers filed complaints with the FTC. BellSouth does not provide DA listings to the company in question. Nevertheless, that company obtained BellSouth subscriber data from another source, most likely through the resale market.

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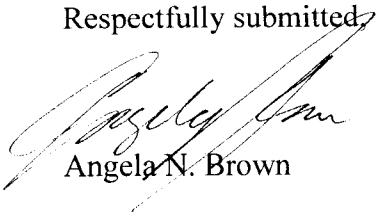
The above examples illustrate the problems and difficulties that BellSouth is encountering due to the Commission's *Directory Listing Order*. The internal inconsistencies in the order have led to conflicting interpretations by LECs and DA providers. Therefore, the Commission's guidance is necessary.

In sum, BellSouth urges the Commission to clarify promptly that Section 251(b)(3) does not preclude a LEC from imposing reasonable restrictions on the use of DA listings. Prohibitions against bulk resale and the use of DA listings for telemarketing were present in state tariffs for years prior to the release of the *Directory Listing Order*. In addition, negotiated interconnection agreements contained similar restrictions. There were no objections to these restrictions in state-approved tariffs and interconnection agreements prior to the release of the *Directory Listing Order*. The record does not support a finding that the Commission intended LECs to remove use restrictions that have been included in tariffs and interconnection agreements for years. Accordingly, the Commission should clarify that use restrictions currently either in interconnection agreements or valid tariffs approved by state commissions are permissible under the Act and may continue to be applied. Prompt action is necessary to eliminate the growing confusion in the marketplace caused by the order's conflicting language.

Respectfully submitted,



Angela N. Brown

Attachment
cc: Scott Bergmann
Michelle Carey
Rodney McDonald

DECLARATION OF SHERRI JOHNSON

1. My name is Sherri Johnson. I am employed as a Senior Product Manager for BellSouth Operator Services in Atlanta, Georgia.

2. My responsibilities include project planning, product management, market planning, and regulatory compliance for all Directory Assistance ("DA") listings products. I have been employed by BellSouth since January 2001 and held the position of Marketing Communications Manager before assuming my current responsibilities.

3. The purpose of this declaration is to describe the impact of the Commission's *Directory Listing Order*[1] on the marketplace and specifically the impact upon BellSouth.

4. BellSouth provides nondiscriminatory access to its DA database to competing DA providers that qualify under Section 251(b)(3). Since the release of the *Directory Listing Order* in 2001, carriers and DA providers have been relying on certain phrases in that order (*e.g.*, "they may use the information as they wish"[2]) as justification for using DA listings in any manner they see fit. BellSouth has objected to some of these uses as unlawful. BellSouth has encountered a number of problems that fall into three primary categories: (1) the resale of DA listings to directory publishers; (2) bulk resale/multiple use; and (3) use of DA listings for non-DA purposes.

5. <u>Resale of DA Listings for Directory Publishing.</u> Some DA providers that purchase DA listings from BellSouth pursuant to Section 251(b)(3) are seeking to resell

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[1] *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, *First Report and Order*, 16 FCC Rcd 2736 (2001) ("*Directory Listing Order*").

[2] *Id.* at 2749, ¶ 28.

BellSouth's DA listings to directory publishers. These DA providers claim that the *Directory Listing Order* allows them to use the DA listings "as they wish,"[3] which, according to their interpretation, includes reselling to directory publishers. BellSouth disagrees based upon the clear statutory language and the Commission's interpretations of Section 222(e) of the Act.

6. Bulk Resale/Multiple Use. A second problem facing BellSouth as a result of the *Directory Listing Order* is bulk resale and multiple use. Since the order's release in 2001, BellSouth has experienced a revenue decline in its DA listings market of approximately 32 percent. BellSouth attributes an overwhelming percentage of this lost business to the Commission's *Directory Listing Order*, because the BellSouth DA listings are being resold at prices with which BellSouth cannot compete.

7. The following are real world examples of what is occurring in the marketplace as a result of the order's conflicting language. First, BellSouth is aware of situations in which interexchange carriers, CLECs, and third-party DA providers have approached BellSouth's DA provider customers seeking to resell to them DA listings data originally acquired from BellSouth. A second scenario involves DA providers purchasing DA listings once and using these listings to serve multiple carriers. Third, several marketing and other non-telecommunications companies are publicizing in their marketing materials the fact that their DA information is compiled from BOC sources. BellSouth, however, does not provide its DA listings to these specific companies. Therefore, they are obtaining BellSouth's DA listings from other sources on a resold basis.

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[3] *Id.*

8. Use of DA Listings for Non-DA Purposes. The third area of ambiguity over the use of DA listings is the use of these listings for non-DA purposes such as direct marketing, telemarketing, and sales solicitation. The inability to control or police the dissemination of BellSouth's DA listings since the release of the Commission's order has had an impact upon customers. In one example, a BellSouth customer paying for a non-published number received a telemarketing call from one of BellSouth's DA listings customers. When the BellSouth customer inquired how the company had obtained his telephone number, he was advised that his number was on a list purchased from BellSouth. Of concern is not only the fact that the customer's information was being used for marketing purposes but also the fact that the non-published number was somehow unencrypted[4] or matched to the name and address information contained in BellSouth's DA database. This customer ultimately terminated his relationship with BellSouth.

9. In another example, BellSouth was contacted in 2003 by the Federal Trade Commission ("FTC"), which was investigating an unauthorized Internet billing and collection scheme. The FTC inquired about a specific company that aggregated DA listings from several sources, which included LEC subscriber data. Using the customer's telephone number, the scammers apparently matched the number to the subscriber information and were thereby able to bill the user without his knowledge. More than 1200 consumers filed complaints with the FTC. BellSouth does not provide DA listings

[4] Encryption is a process that replaces the digits of a telephone number with a series of numbers or letters. BellSouth uses encryption to protect the confidentiality of non-published telephone numbers included in its DA subscriber lists.

to the company in question. Nevertheless, that company obtained BellSouth subscriber data from another source, most likely through the resale market.

10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 13, 2004

Sherri Johnson

Sherri Johnson