



Public Service Commission

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DATE: NOVEMBER 19, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BEDELL, WATTS) CB
DIVISION OF COMMUNICATIONS (AUDU) A W

RE: DOCKET NO. 971560-TL - PETITION BY BELLSOUTH TELECOMMUNICATIONS, INC. FOR WAIVER OF RULE 25-4.115, F.A.C., DIRECTORY ASSISTANCE, AND FOR AUTHORIZATION TO PROVIDE NATIONAL DIRECTORY ASSISTANCE (NDA) IN FLORIDA.

AGENDA: DECEMBER 1, 1998 - REGULAR AGENDA - INFORMAL HEARING DECISION (SECTION 120.57(2), F.S.) - PARTIES MAY PARTICIPATE FOR THE LIMITED PURPOSE OF EXPLAINING THEIR OWN POSITIONS

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\971560H.RCM

CASE BACKGROUND

On November 26, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a petition with this Commission requesting a waiver of Rule 25-4.115, Florida Administrative Code. In its petition, BellSouth indicates that Rule 25-4.115 prohibits BellSouth in its present capacity as a local exchange company from providing directory assistance (DA) listings for subscribers whose telephone numbers are outside the Home Numbering Plan Area (HNPA) of the caller. BellSouth proposes to provide National Directory Assistance (NDA) to its Florida customers.

Pursuant to Section 120.542(6), Florida Statutes, notice of BellSouth's petition for waiver was submitted to the Secretary of State on December 10, 1997, for publication in the Florida Administrative Weekly on December 19, 1997. No comments were submitted during the comment period, which ended on January 2, 1998.

On March 5, 1998, in Proposed Agency Action Order No. PSC-98-0362-FOF-TL, the Commission granted BellSouth authority to provide

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National Directory Assistance through a waiver of Rule 25-4.115, Florida Administrative Code. On March 26, 1998, MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., (MCI) filed a protest of the Commission's Proposed Agency Action and requested that a hearing be held. Accordingly, this matter was set for a hearing.

In a meeting with staff held on April 20, 1998, the parties agreed that the issues in this proceeding could be resolved by an informal hearing pursuant to Section 120.57(2), Florida Statutes. The parties further agreed to address their positions to the Commission at the agenda conference at which the Commission would consider staff's recommendation. This recommendation addresses the issues set forth.

DISCUSSION OF ISSUES

ISSUE 1: Is the provision of NDA service a permissible activity for BellSouth under the MFJ and Section 271(f) of the Telecommunications Act?

RECOMMENDATION: No. Section 271(f) only permits the grandfathering of certain activities under specific waivers from the MFJ. BellSouth does not hold a waiver under the MFJ for the provision of NDA service. Without a waiver, the provision of NDA service is not a permissible activity under the MFJ or Section 271(f) of the Act. (WATTS, BEDELL, AUDU)

POSITION OF PARTIES:

BELLSOUTH: Yes. The provision of DA service on a centralized basis using the 411 dialing code and employing BellSouth's official services network is, and has always been, a permitted service under the Communications Act and the MFJ. Therefore, BellSouth is permitted to provide NDA service as a natural extension of its existing and permissible DA service.

MCI: No. BOC Provision of National Directory Assistance is not an activity previously authorized under the MFJ.

AT&T: No. BellSouth's proposed NDA service is an attempt to provide interLATA services that would have been barred by the MFJ, and that are now barred by Section 271, without first having received FCC authority to do so.

STAFF ANALYSIS: Section 271(f) provides:

EXCEPTION FOR PREVIOUSLY AUTHORIZED
ACTIVITIES.--Neither subsection (a) nor
section 273 shall prohibit a Bell operating
company or affiliate from engaging, at any
time after the date of enactment of the
Telecommunications Act of 1996 in any
activity to the extent authorized by, and
subject to the United States District Court
for the District of Columbia pursuant to
section VII or VIII(C) of the AT&T Consent
Decree if such order was entered on or before
such date of enactment, to the extent such
order is not reversed or vacated on appeal.
Nothing in this subsection shall be construed
to limit, or to impose terms or conditions on,
an activity in which a Bell operating company
is otherwise authorized to engage under any
other provision of this section.

BellSouth's arguments

In its brief, BellSouth argues that its NDA service offering is not an interLATA service as defined by the Act even if it is provided over BellSouth's facilities that traverse LATA boundaries. BellSouth contends that the service, just like historical DA, remains an official service permitted by the MFJ and grandfathered under Section 271(f) of the Act. (BellSouth, BR at 2) BellSouth further argues that the Bell Operating Companies (BOCs) have long been permitted to provide DA service on a centralized basis using their official service networks. BellSouth also argues that DA has been found to be neither a prohibited interLATA service under the MFJ, nor an enhanced service under the FCC's rules, and concludes that the addition of extra-territorial listings to DA service should not make it a prohibited service. (BellSouth, BR at 3)

BellSouth argues that the NDA service only offers a bigger range of telephone listings than local DA; thus, it is indistinguishable from historical DA service. BellSouth states that it already provides both local and national DA listings, using a single telephone number through its NDA service. Upon dialing 411 or 1+ 411, customers are prompted by an automated announcement which asks, "What State?", then "What City?" and then "What listing?" If the caller requests a listing within his/her HNPA or LATA, the call is routed to a DA operator with the appropriate listing database. Due to BellSouth's centralization of databases and operator positions, it is possible for the caller, the operator, and the databases to be in separate LATAs. (BellSouth, BR at 3-4) If the customer requests a listing outside his or her HNPA or LATA, the routing is the same and it is possible that all participants and facilities are located in separate LATAs. BellSouth asserts that the service is the same as historical DA, except for the broader base of telephone listings. (BellSouth, BR at 4)

BellSouth disagrees with MCI's assertion that its proposed provision of NDA service violates Section 271 and argues that it is not prohibited under any applicable law from providing NDA service in the manner described. BellSouth argues that to determine whether NDA service is a permissible service based on a caller's subsequent use of information obtained from the DA service is absurd and concludes that whatever the caller does with the information afterward has no bearing on the classification of DA. (BellSouth, BR at 4-5) BellSouth argues that the Act simply does not provide any basis for distinguishing between a DA offering that is inclusive of national listings and one that is not. BellSouth further argues that the only reference to DA service in Section 271 appears in the enumeration of checklist items in Section 271(c)(2)(B). BellSouth contends that this reference only requires BOCs to provide other telecommunications carriers non

discriminatory access to directory assistance services. (BellSouth, BR at 6)

MCI's arguments

In its brief, MCI argues that BellSouth would have required a waiver of the MFJ to provide interLATA DA before the MFJ was vacated, and since the 1996 Act replaces the MFJ, interLATA DA is an interLATA service for the purposes of Section 271. MCI further argues that activities that comprise the business of providing long distance service, e.g., interLATA 800 DA, are interLATA telecommunications services whether or not they involve interLATA transmissions. MCI asserts that BellSouth's NDA service is an integral part of long distance service, and therefore, BellSouth is prohibited from providing this service to in-region customers prior to obtaining Section 271 approval. (MCI, BR at 3-4)

MCI contends that NDA service will involve interLATA transmission and argues that the interLATA transmissions previously authorized by the MFJ were only for local DA service. MCI contends that allowing the centralization of such DA service did not in any way enlarge the scope of the service offering. MCI argues that only the telephone numbers of subscribers in the same LATA as the caller could be provided in response to a DA request. MCI claims that the limited scope MFJ authorization only permits BellSouth to provide "exchange telecommunications and exchange access" functions (which include DA service) on a centralized basis. According to MCI the centralized provision of DA service authorized by the MFJ was related to the BOCs' exchange telecommunications functions, namely local DA service. (MCI, BR at 4) MCI argues that the provision of subscribers' listings from other LATAs was not previously authorized under the MFJ, and it is not within the exceptions allowed in Section 271(f) of the Act.

MCI argues that 411 dialed DA service was authorized under the MFJ as permissible "official service" to enable the BOCs to provide DA to their customers on a centralized basis without a waiver. MCI asserts that US West was denied a broader MFJ waiver for in-bound DA calls from other LATAs because IXCs can provide interLATA DA by using US West's directory information, pursuant to its access tariffs. (MCI, BR at 5) MCI concludes that this MFJ precedent shows that the provision of NDA service cannot be considered an "exchange telecommunications" official service exempt from the interLATA prohibition. (MCI, BR at 6)

AT&T's arguments

In its brief, AT&T argues that since BellSouth's NDA would have violated the MFJ, it is therefore permissible only if it meets the terms of Section 271 of the Act. AT&T asserts that Section

271(a) states that a BOC may not provide interLATA service, yet BellSouth will be engaging in transporting DA calls across LATA lines with its NDA. AT&T further contends that the NDA service will provide interLATA transport; thus, the NDA will violate Section 271 and would not have been permitted under the MFJ. (AT&T, BR at 3)

AT&T explains that the MFJ permitted activity such as an official service when it was conducted in connection with the provision of intraLATA DA service; that is, the provision of a directory listing to a caller located in the same LATA as the listing provided. AT&T states that this authorization did not extend to listings served outside the LATA of the caller. (AT&T, BR at 4) AT&T argues that the Decree Court held that national 800 DA service is an interexchange, interLATA service because it performs interexchange functions. (AT&T, BR at 4) AT&T asserts that the only difference between BellSouth's NDA offering and the national 800 DA service is that the NDA service has a broader scope. (AT&T, BR at 4) AT&T asserts that the Decree Court denied US West's waiver to permit the provision of DA services which would allow the caller to receive listings outside his or her NPA or LATA. (AT&T, BR at 5) The Department of Justice recognized such calls as interLATA and opposed the request:

The Department would thus oppose waivers to allow the BOCs to provide directory assistance directly over their own facilities (as opposed to providing the service to interexchange carriers pursuant to exchange access tariffs) where the number sought is outside the NPA (and the LATA) of the person making the calls, except to the extent that such service was provided to independent telephone companies prior to divestiture. (AT&T, BR at 5)

AT&T argues that the Decree Court permitted the BOCs to provide interexchange transport in the context of official services. AT&T contends that this exception was limited to four service categories that collectively constitute the internal communications between personnel or equipment of a BOC, or communications between BOCs and their customers. AT&T further argues that the Decree Court "... noted that the exception for local directory assistance service and other official services would not offend the theory of the Decree because the BOCs would not thereby be placed in competition with the IXCs." (AT&T, BR at 6) AT&T asserts that any call BellSouth would handle over its in-region NDA service is a call that previously would have been carried by an IXC. Thus, AT&T disagrees with BellSouth's assertion that its NDA service is no different from the local DA service that it was permitted to offer on a centralized basis at divestiture.

(AT&T, BR at 6-7) AT&T argues that the Courts have consistently interpreted the official service exception rather narrowly; thus BellSouth's attempt to describe its NDA service as an official service and therefore permissible under Section 271(f) is a stretch of the permissible official services exception. (AT&T, BR at 7-8)

AT&T argues that Section 271 of the Act codifies the MFJ's interexchange restriction, and contends that the only statutory exceptions to the MFJ's ban are the out-of-region services in Section 271(a)(2) and the incidental services in Section 271(a)(3) and (g), or any activity permitted under the MFJ by waiver of Section 271(f). AT&T asserts that "... a reading of the plain language of the statute confirms that Section 271 is congruent with the MFJ (except where that section explicitly permits certain BOC interLATA services)." (AT&T, BR at 8)

Analysis

All parties agree that Section 271(f) allows the grandfathering of activities under existing waivers of the MFJ. Staff agrees that only those waivers acted on before the date of enactment of the Telecommunications Act of 1996 are included in the grandfathered waivers. Therefore, in order for NDA to be a permissible activity under Section 271(f), it must have been permitted prior to the enactment of the 1996 Act. Thus, we look to the MFJ to determine whether NDA is a permissible activity.

As to interLATA services, the MFJ prohibited the BOCs from providing any interLATA services unless specifically authorized by the MFJ or a waiver thereunder. United States v. Western Electric Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (subsequent history omitted). Under the MFJ, BOCs were permitted to use interLATA "official services networks" to perform on a centralized basis network functions associated with their provision of exchange and exchange access services, including trunk and switch monitoring and control, call routing, directory assistance, repair calls, and internal business communications. See United States v. Western Electric, 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983). National directory assistance was not contemplated under the MFJ as a waived "official service." The centralized provision of DA service authorized by the MFJ was related to the BOCs' exchange telecommunications functions, namely local DA service.

Staff does not believe that national directory assistance is indistinguishable from historical directory assistance service. The two types of DA are distinguishable. Local DA has historically been provided by the local exchange carrier, and national DA has historically been provided by interexchange carriers and other telecommunications service providers using the LECs' access tariffs.

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Therefore, based on the above arguments, staff believes that NDA is not a permissible activity for BellSouth under the MFJ and Section 271(f) of the Telecommunications Act. If the Commission agrees with staff's recommendation on Issue 1, Issues 2, 3 and 4 become moot.

ISSUE 2: Is the provision of NDA service an incidental interLATA service as defined in Section 271(g) of the Act, which BellSouth may offer pursuant to Section 251(b)(3)?

RECOMMENDATION: No. The provision of NDA service is not an incidental interLATA service as defined in Section 271(g) of the Act. (AUDU, BEDELL, WATTS)

POSITION OF PARTIES:

BELLSOUTH: No. NDA service is not an interLATA service, incidental or otherwise. Therefore, the service is not subject to any of the provisions of Section 271(g) of the Act.

MCI: No. National Directory Assistance is not an incidental InterLATA service.

AT&T: No. BellSouth's proposed NDA service is not an incidental service as defined in Section 271 (g).

STAFF ANALYSIS: Section 271(g)(4) provides:

DEFINITION OF INCIDENTAL INTERLATA SERVICES.--

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate-

...
(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA.

BellSouth's arguments

In its brief, BellSouth argues that its NDA service is not an incidental interLATA service, since Section 271(g) is only triggered when the activity in question is considered an interLATA service. BellSouth contends that of the incidental services in Section 271(g), Section 271(g)(4) is the closest to its NDA service. BellSouth argues, however, that since DA service is neither an enhanced nor an information service, NDA service is therefore not an incidental interLATA service. (BellSouth, BR at 6-7)

MCI's arguments

In its brief, MCI states that while BellSouth or its affiliate is authorized to provide incidental service without awaiting

Section 271 approval, BellSouth's NDA service does not meet the definition of incidental interLATA service under Section 271(g). According to MCI, BellSouth's "unseparated" provision of NDA service in Florida constitutes the provision of interLATA service and therefore violates both Sections 271 and 272 of the Act. MCI contends that, at best, Section 271(g)(4) only contemplates "electronic retrieval of information stored in a central computer." The scope of Section 271(g)(4) does not include services that use intervening operators. (MCI, BR at 7) MCI claims that permitting BellSouth to provide NDA service pursuant to Section 271(g)(4) will present significant potential for unreasonable and discriminatory practices on the part of BellSouth. (MCI, BR at 8)

AT&T's arguments

In its brief, AT&T states that the plain meaning of "incidental interLATA services" requires the service in question to be incidental to a service which the BOC is permitted to offer. AT&T argues that the only logical service to which NDA service will be incidental is interLATA toll, and BellSouth is prohibited from providing interLATA toll service for now. (AT&T, BR at 10-11)

Analysis

All parties agree that NDA service is not an incidental service pursuant to Section 271(g). In order to be an incidental service under 271(g)(4), the BellSouth customer must be retrieving the desired number from BellSouth information storage facilities located outside the customer's LATA.

If the customer requests a listing in the customer's local or HNPA serving area of the originating line, the call will be routed to the same DA operator center that currently provides service on such DA listing requests. However, if the customer requests a listing that is outside the customer's local and HNPA serving area of the originating line, the call will be routed to BellSouth's NDA operator center. At the NDA operator center, an operator will query BellSouth's database if the desired listing is in the nine-state BellSouth region. For requested listings which are outside the BellSouth region, BellSouth's NDA operator will query a third-party database. (Petition at 4-5) Thus, BellSouth's NDA service utilizes live operators and thus is not an incidental service.

Staff believes that Section 271(g)(4) contemplates electronic retrieval of stored information at a centralized computer. Since the NDA service requires operator intervention, NDA service does not meet the definition of incidental service pursuant to Section 271(g)(4).

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Based on the above arguments, staff recommends that BellSouth's NDA service is not an incidental interLATA service pursuant to Section 271(g)(4).

ISSUE 3: Is the provision of NDA service an adjunct-to-basic service, and therefore a permissible activity for BellSouth?

RECOMMENDATION: No. NDA service is not an adjunct-to-basic service; therefore, it is not a permissible activity for BellSouth. (AUDU, BEDELL, WATTS)

POSITION OF PARTIES:

BELLSOUTH: Yes. NDA service is an adjunct-to-basic service no different from BellSouth's existing DA offerings. The FCC has concluded that adjunct-to-basic services are to be treated as telecommunications services for purposes of the Act.

MCI: No. NDA is an adjunct-to-basic interLATA service, not basic local exchange service. Therefore it is not a permissible activity for BellSouth.

AT&T: No. BellSouth's proposed NDA service is not a adjunct-to-basic service that is a permissible activity.

STAFF ANALYSIS:

BellSouth's arguments

It is BellSouth's position that NDA is an adjunct-to-basic service. Adjunct-to-basic services are services that facilitate the use of the basic network without changing the nature of the basic telephone service. In its brief, BellSouth explains that the FCC adopted a regulatory classification of adjunct-to-basic services in order to capture those services that, while they meet the literal definition of enhanced services, are basic in purpose and use. BellSouth contends that the FCC found directory assistance to be the best example of an adjunct-to-basic service. (BellSouth, BR at 7) BellSouth contends that the FCC's assessment of DA as the best example of adjunct-to-basic service does not hinge on any geographic characteristics of the service or on the identity of the service provider. BellSouth explains that in its analysis, the FCC compared DA with "Dial-it" service, an interstate, interLATA information retrieval service of AT&T. BellSouth claims that the inclusion of other carriers' subscriber listings in a DA service does not have a bearing on the regulatory classification of the DA service. (BellSouth, BR at 8)

According to BellSouth, a customer's subsequent placement of an interLATA call to a telephone number received from DA service does not render the DA service impermissible interLATA service, nor does it alter the DA service classification as an adjunct to basic service. BellSouth insists that this is no different than a customer using the BellSouth speed-dialing function (an adjunct-to-

basic service) to store and dial an interLATA call later. BellSouth concludes that neither of these adjunct-to-basic services affect the fundamental nature of the subsequent call, be it intraLATA or interLATA. (BellSouth, BR at 9)

MCI's arguments

In its brief, MCI argues that NDA service enables subscribers to make interLATA calls, which do not relate to the operations of their local exchange services. (MCI, BR at 8) Therefore, NDA service is an adjunct-to-basic "interLATA" service, not to local exchange service. MCI contends that local DA is an adjunct-to-basic local service based on the traditional use of a number obtained from the DA service.

MCI argues that because the IXCs depend on the LECs to provide them DA listings for the completion of toll DA, the NDA service will enable BellSouth to compete with the IXCs in providing toll DA. Therefore, the NDA service constitutes an interLATA service subject to Section 271 of the Act. (MCI, BR at 10) MCI contends that how a caller uses a particular number obtained from the NDA service should not influence the regulatory treatment of NDA service. Instead, the categorization of the caller's request for directory assistance as either local or toll DA based on the location of the caller and the number requested should determine the regulatory treatment. (MCI, BR at 10-11)

AT&T's arguments

In its brief, AT&T argues that the FCC's "adjunct-to-basic" label was intended to allow the BOCs to continue to provide, without structural separation, a certain class of services integral to the provision of the basic services that had historically been within the purview of the BOCs, such as local exchange service and intraLATA toll. Hence, AT&T argues, BellSouth's position that NDA service is "adjunct-to-basic" is wrong. According to AT&T, BellSouth has historically been allowed to provide, and has always provided, local and HNPA DA under this adjunct-to-basic label; however, the scope of the offering has been limited by LATA boundaries. AT&T contends that the NDA service (which includes interLATA DA) fundamentally changes the nature of the service and removes it from the FCC's adjunct-to-basic label. Hence, BellSouth's NDA service is not an adjunct-to-basic service. AT&T concludes that the NDA service is an entirely new service that is already being provided by the IXCs and is not adjunct-to-basic to any service that BellSouth is currently allowed to provide. (AT&T, BR at 13)

Analysis

In its N11 Order, the FCC clarified the labeling of DA as adjunct-to-basic. (Order No. FCC 97-51) The FCC stated at Footnote #170 that:

By 'traditional' directory assistance services we refer to operator provision of local telephone numbers. The Commission has determined that traditional directory assistance services are 'adjunct' to basic services, ...

Staff agrees that NDA listings have generally been within the purview of the IXCs and other Information Service Providers. This conclusion is further supported by the fact that BellSouth's NDA service requires routing outside the caller's LATA in order to provide a broader set of listings than available with traditional DA.

Accordingly, staff concludes that BellSouth's NDA is not an adjunct-to-basic service that BellSouth is currently allowed to provide.

ISSUE 4: Is BellSouth's use of 411 to obtain access to NDA in violation of Order No. FCC 97-51 and therefore an unreasonable practice under Section 201 (b) of the Act?

RECOMMENDATION: No. BellSouth is not precluded by Order No. FCC 97-51 and the Act from offering NDA using the 411 access code. BellSouth's proposal for NDA using the 411 access code would only constitute an unjust and unreasonable practice pursuant to Section 201(b) of the Act, if BellSouth fails to make NDA available through resale or unbundled network elements. In light of staff's recommendations in Issues 1, 2, and 3, however, BellSouth may not offer NDA by means of 411 or by any other means at this time. (AUDU, BEDELL)

POSITION OF PARTIES:

BELLSOUTH: No. BellSouth is not prohibited from using 411 for its NDA Service, either under 47 U.S.C. §201(b), or under the FCC's Order No. 97-51 in CC Docket No. 92-105 (N11 Order).

MCI: Yes. BellSouth's use of 411 is in violation of Order No. FCC 97-51 and is an unreasonable, anti-competitive practice.

AT&T: Yes. BellSouth's provision of NDA through the use of 411 would be an unreasonable practice under Section 201(b) of the Act.

STAFF ANALYSIS: Section 201(b) provides:

All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful...

BellSouth's arguments

It is BellSouth's position that NDA service is not an enhanced service. Therefore, according to BellSouth, using 411 for access to NDA does not trigger the rulings of the FCC's order on N11 (FCC Order 97-51). In its brief, BellSouth argues that the FCC N11 order prohibits a LEC from offering enhanced services using 411 unless it provides reasonable and nondiscriminatory 411 code access to competing providers. However, BellSouth notes, NDA was identified as an adjunct-to-basic service not as an enhanced service in the N11 proceeding. For this reason, BellSouth argues the FCC N11 order does not control use of the 411 code to access NDA. (BR 10)

ISSUE 4: Is BellSouth's use of 411 to obtain access to NDA in violation of Order No. FCC 97-51 and therefore an unreasonable practice under Section 201 (b) of the Act?

RECOMMENDATION: No. BellSouth is not precluded by Order No. FCC 97-51 and the Act from offering NDA using the 411 access code. BellSouth's proposal for NDA using the 411 access code would only constitute an unjust and unreasonable practice pursuant to Section 201(b) of the Act, if BellSouth fails to make NDA available through resale or unbundled network elements. In light of staff's recommendations in Issues 1, 2, and 3, however, BellSouth may not offer NDA by means of 411 or by any other means at this time. (AUDU, BEDELL)

POSITION OF PARTIES:

BELLSOUTH: No. BellSouth is not prohibited from using 411 for its NDA Service, either under 47 U.S.C. §201(b), or under the FCC's Order No. 97-51 in CC Docket No. 92-105 (N11 Order).

MCI: Yes. BellSouth's use of 411 is in violation of Order No. FCC 97-51 and is an unreasonable, anti-competitive practice.

AT&T: Yes. BellSouth's provision of NDA through the use of 411 would be an unreasonable practice under Section 201(b) of the Act.

STAFF ANALYSIS: Section 201(b) provides:

All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful...

BellSouth's arguments

It is BellSouth's position that NDA service is not an enhanced service. Therefore, according to BellSouth, using 411 for access to NDA does not trigger the rulings of the FCC's order on N11 (FCC Order 97-51). In its brief, BellSouth argues that the FCC N11 order prohibits a LEC from offering enhanced services using 411 unless it provides reasonable and nondiscriminatory 411 code access to competing providers. However, BellSouth notes, NDA was identified as an adjunct-to-basic service not as an enhanced service in the N11 proceeding. For this reason, BellSouth argues the FCC N11 order does not control use of the 411 code to access NDA. (BR 10)

BellSouth claims that all new market entrants are able to provide non-local telephone service via DA. BellSouth argues that it should have an equal right to provide a comprehensive portfolio of DA services to its customers. Otherwise, BellSouth claims, the intent of the Act will not be met with regard to competition, level playing fields, and parity. BellSouth's competitors will have an unfair advantage. (BR 11,12)

MCI's arguments

It is MCI's position that BellSouth's proposed NDA service violates the FCC's N11 order and constitutes an unreasonable practice pursuant to Sections 201(b) and 251(b) of the Act. MCI argues that the N11 order determined that the 411 access code should only be used for local DA. MCI argues that allowing NDA access via 411 constitutes an unreasonable practice pursuant to Section 201(b) of the Act, because other IXCs cannot offer NDA service with the simplicity and ubiquity of an N11 code. Further, MCI argues, BellSouth's proposal will enable BellSouth to exploit its market dominance. (BR 12)

It is also MCI's position that NDA is an interLATA service that is fully competitive, and that by this filing, BellSouth is trying to enter the interLATA market prior to receiving the appropriate 271 approval. (BR 13) According to MCI, approving BellSouth's request will shift competition and extend BellSouth's local service monopoly power into the interLATA market. (BR 15)

AT&T's arguments

It is AT&T's position that BellSouth's provision of NDA using 411 would be an unreasonable practice under Section 201(b) of the Act. AT&T argues that NDA is a competitive service provided by numerous IXCs. AT&T also asserts that the FCC determined in the N11 order that ILECs will gain significant competitive advantage if they are the only carriers to provide N11 services. (BR 15)

AT&T also argues alternatively that should BellSouth be permitted to offer its NDA service without Section 271 approval, BellSouth would still be subject to the requirements of Sections 251(b)(3) and 251(c)(3) of the Act which require BellSouth to unbundle this service and provide access to the elements on a nondiscriminatory basis. (BR 16)

Analysis

In FCC Order 97-51, the FCC did not specifically address NDA. In paragraph 47 of the Order, the FCC stated that: "... , 411 has long been assigned for access to local DA services, ... we find continued use of 411 to call local DA services justified by public

convenience and necessity." Accordingly, the FCC concluded that: "..., a LEC may not itself offer enhanced services using a 411 code, or any other N11 code, unless that LEC offers access to the code on a reasonable, nondiscriminatory basis to competing enhanced service providers in the local service area..." In this same Order, the FCC determined that 411 DA service is classified as adjunct-to-basic service. (97-51 ¶22). The FCC clarifies adjunct-to-basic service as a service that might fall within the literal reading of enhanced services but is clearly basic in purpose and use. (97-51, Footnote #75) Therefore, staff believes that BellSouth's provision of NDA through 411 does not violate FCC 97-51 since the FCC did not specifically address the service in question. Paragraph 47 of FCC Order 97-51 establishes only that the 411 access code may be used for local directory assistance.

Until BellSouth receives authority under Section 271 of the Act to provide interexchange services, it may well be at a competitive disadvantage. Alternative local exchange companies do not operate under the limitations on RBOCs created by the Act. Therefore, we are not persuaded by BellSouth's argument that "everyone else is doing it." Until BellSouth receives Section 271 approval, there will be limitations on BellSouth's services. The fact that NDA service is fully competitive among interexchange companies is unpersuasive with regard to BellSouth's request to provide NDA using the 411 access code. We also believe that exclusive use of the 411 access code by BellSouth for NDA could give BellSouth a significant competitive advantage, if unavailable through resale or unbundled network elements.

Staff believes that BellSouth is not precluded by Order No. FCC 97-51 from offering NDA using the 411 access code. BellSouth's proposal for NDA using the 411 access code would only constitute an unjust and unreasonable practice pursuant to Section 201(b) of the Act, if BellSouth fails to make NDA available through resale or unbundled network elements.

In light of staff's recommendations in Issues 1, 2, and 3, however, BellSouth may not offer NDA by means of 411 or by any other means at this time.

DOCKET NO. 971560-11
DATE: NOVEMBER 19, 1998

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Yes, this docket should be closed upon the issuance of the final order.