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MEMORANDUM

FEBRUARY 5, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF COMMUNICATIONS (AUDU) *A RT*
DIVISION OF LEGAL SERVICES (PELLEGRINI) *Q MB*

RE: DOCKET ~~XXXXXXXXXX~~ - BELLSOUTH'S PETITION TO WAIVE RULE
25-4.115, FLORIDA ADMINISTRATIVE CODE

AGENDA: FEBRUARY 17, 1998 - REGULAR AGENDA - PROPOSED AGENCY
ACTION - INTERESTED PARTIES MAY PARTICIPATE

CRITICAL DATES: FEBRUARY 26, 1998

SPECIAL INSTRUCTIONS: I:\PSC\CMU\WP\971560.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, Florida Administrative Code, 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.

In Order No. PSC-96-1434-FOF-TP, issued November 25, 1996, in Docket No. 960876-TP, the Commission granted BellSouth's petition for waiver of Rule 25-4.115, Florida Administrative Code, with respect to interexchange routing of DA calls within the Southeast LATA following the 305 NPA split.

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

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Administrative Weekly on December 19, 1998. No comments were submitted during the comment period, which ended on January 2, 1998.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's petition for waiver of Rule 25-4.115, Florida Administrative Code, allowing BellSouth to provide National Directory Assistance?

RECOMMENDATION: Yes. The Commission should grant BellSouth's petition for waiver of Rule 25-4.115, Florida Administrative Code, allowing BellSouth to provide National Directory Assistance. (AUDU, PELLEGRINI)

STAFF ANALYSIS:

Rule Waiver

With the amendments made to the Administrative Procedures Act by the 1996 Legislature, agencies are required to consider requests for variances or waivers from their rules according to the requirements set forth in Section 120.542, Florida Statutes. BellSouth seeks a waiver of Rule 25-4.115, Florida Administrative Code. The rule prohibits BellSouth as a local exchange carrier from providing directory assistance outside of the caller's HNPA.

Section 120.542, Florida Statutes, provides that:

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation....

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles

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of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Rule 25-4.115, Florida Administrative Code, Directory Assistance, provides, in pertinent part, that:

(2) Charges for calls within a local calling area or within a customer's Home Numbering Plan Area (HNPA) shall be at rates prescribed in the general service tariff of the local exchange company originating the call and shall be subject to the following:

* * *

(b) The same charge shall apply for calls within a local calling area and calls within an HNPA.

(3) Charges for intrastate calls to directory assistance outside of the caller's HNPA shall be at rates prescribed in the general services tariff of the interexchange companies
....

The underlying statutes in this case are Sections 364.03 and 364.04, Florida Statutes. Section 364.03, Florida Statutes, is inapplicable to BellSouth as a price regulated local exchange carrier. Section 364.051, Florida Statutes. Section 364.04, Florida Statutes, in pertinent part, provides that:

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(1) Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges of that company for service to be performed within the state.

(2) The schedule, as printed and open to public inspection, shall plainly state the places between which telecommunications service will be rendered and shall also state separately all charges and all privileges or facilities granted or allowed and any rules or regulations or forms of contract which may in anywise change, affect, or determine any of the aggregate of the rates, tolls, rentals, or charges for the service rendered.

BellSouth states that it has developed an NDA service that it wishes to provide to its customers in Florida on a HNPA basis as it does elsewhere in its region. With NDA services, BellSouth's customers would be able to obtain telephone numbers in unknown or distant area codes with a single call to either 411 or HNPA-555-1212. The legal hardship asserted by BellSouth, which prompts this rule waiver request, is that Rule 25-4.115, Florida Administrative Code, limits BellSouth to providing DA services within the caller's local calling area or HNPA; only interexchange carriers are permitted to provide DA services elsewhere. BellSouth states that waiving Rule 25-4.115, Florida Administrative Code, would enable it to provide DA services outside of the NPA of the originating line, thereby promoting competition and benefitting Florida telecommunications customers.

Staff believes that waiving Rule 25-4.115, Florida Administrative Code, in this instance would not disserve the purpose of the applicable underlying statute, Section 364.04, Florida Statutes. That purpose is to assure public access to the tariffs of telecommunications companies. The NDA service that BellSouth is prepared to launch must be tarified. BellSouth

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cannot, however, launch the service unless the provision of the rule limiting DA services outside of the NPA of the originating line to interexchange carriers is waived. Granting the requested waiver would be in harmony, moreover, with the Legislature's finding, expressed in Section 364.01, Florida Statutes, that the competitive provision of telecommunications service is in the public interest and will provide consumers with choices arising from new services.

No comments were filed in response to the notice of this rule waiver petition, which was published in the Florida Administrative Weekly.

National Directory Assistance

In its petition, BellSouth argues that the provision of NDA service by a BOC is not prohibited under any applicable law, not even by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). BellSouth further argues that NDA is an "adjunct-to-basic" service as determined by the FCC, and not an "enhanced" service. BellSouth contends that adjunct-to-basic services facilitate the use of the basic network without changing the nature of the basic telephone service. BellSouth concludes that "[N]othing in the statutory construction of the Act supports a reading that Section 271 applies to NDA service."

BellSouth argues that a customer seeking a number for which the customer does not know the area code, must make two DA calls: one call to find the area code and the second for the specific number the customer desires. If the desired telephone number is outside the caller's HNPA, the caller often has to reach an IXC operator in order to obtain this telephone listing. In this scenario, the customer incurs two DA charges, one from BellSouth as the customer gets the area code and another from the IXC as the customer dials 1-NPA-555-1212 for the desired telephone number. With the proposed NDA service, BellSouth's Florida customers will obtain telephone numbers of unknown or distant area codes by dialing either 411 or HNPA-555-1212. Upon dialing 411 or HNPA-555-1212, customers will be prompted by an automated announcement which asks, "What State?", then "What City?" and then "What listing?" If the customer requests a listing in BellSouth'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

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DA listing requests. The applicable rates and charges for this call will be the same as applied today. If the customer requests a listing that is outside BellSouth'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, BellSouth's database will be queried if the listing is in the nine-state BellSouth region. For requested listings which are outside the BellSouth region, a third-party database will be queried by BellSouth's NDA operator. BellSouth argues that this NDA call will cost less than what the IXCs currently charge to provide such requested listings. With either a traditional DA or NDA call, customers will be entitled to request two listings per call.

In its petition, BellSouth argues that customers dialing 411 or 1-HNPA-555-1212 and requesting listings within their local or HNPA serving area will continue to receive service at the current rates and call allowance levels for traditional DA service. Calls for listings outside the HNPA will be treated differently, and will not count toward the call allowance for traditional DA service, but will cost less than the IXCs charge for a 1-NPA-555-1212 call inquiry. BellSouth argues that the NDA service is the most cost effective option for customers.

BellSouth further argues that by granting relief from Rule 25-4.115, the Commission will be promoting competition. BellSouth contends that such relief will allow another telecommunications provider other than an IXC to provide directory listings outside the NPA of the originating line, thus promoting competition and conferring a beneficial advantage on Florida customers.

Staff agrees with BellSouth that Rule 25-4.115, F.A.C., prohibits it from providing DA service outside the HNPA of the caller. In its response to staff's data request, BellSouth argues that it has long been permitted to provide DA services on a centralized basis using its internal "official service" networks, which have interLATA components. BellSouth further argues that NDA is simply DA service, and that DA service falls within the "official services" category of services that were preserved for the BOCs at divestiture. BellSouth argues that it is the expanded range of telephone numbers available through the NDA services that differentiates it from traditional DA service. Thus, BellSouth contends that NDA is functionally indistinguishable from the traditional DA service the company has always offered. BellSouth argues that NDA is permitted under the Modified Final Judgment

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(MFJ), and was saved by the grandfathering provisions of Section 271 (f); thus, nothing in the reading of Section 271 applies to NDA service.

Staff also agrees with BellSouth that Section 271(c)(2)(B) requires the BOCs to provide other telecommunications providers non-discriminatory access to their DA service. BellSouth further argues in its response to staff's data request 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 further contends that NDA will be offered through its LEC tariffs and thus will be available for resale at appropriate discounts. BellSouth argues that "[C]ongress imposed no qualifications or limitations on either the 'directory assistance services' or the 'telephone numbers' to which this obligation attaches, nor sought to distinguish between types of directory assistance services or geographic scope of telephone numbers provided." BellSouth concludes that NDA is not an "incidental" interLATA service, since the Act provides no basis for distinguishing between a DA offering that is inclusive of national listings and one that is not. BellSouth concludes that the Act does not prohibit BOCs from providing NDA service with their existing DA offerings.

In the NATA/Centrex Order (FCC 85-248), the FCC determined that adjunct-to-basic services are telecommunications services or features that facilitate the provision of basic services without altering their fundamental character. In BellSouth's comments to the FCC in CC Docket No. 97-172, Petition of US West Communications, Inc. for Declaratory Ruling Regarding the Provision of National Directory Assistance, BellSouth argues that NDA service is neither an enhanced service nor an information service. It is, instead, an adjunct-to-basic service which is not different from the BOCs' existing DA offerings. BellSouth asserts that in CC Docket No. 96-149, FCC 96-489, at ¶107, the FCC concluded that adjunct-to-basic services are to be treated as telecommunications services for the purposes of the Act. BellSouth further asserts that the FCC adopted this regulatory classification in order to capture these services that while meeting the literal definition of enhanced services, were otherwise "'basic' in purpose and use." BellSouth contends that services in this category are those that "facilitate the use of the basic network without changing the

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nature of basic telephone service." BellSouth asserts that the FCC found that the significance of this determination "is perhaps most clear in the case of directory assistance." Thus, BellSouth argues that nothing in the FCC's assessment of DA as the "most clear" example of adjunct-to-basic service hinges on any geographic characteristics of the service or on the identity of the service provider.

The FCC determined that adjunct-to-basic services are telecommunications services. The 1996 Telecommunications Act, however, requires the BOCs to obtain Section 271 authority prior to originating any interLATA telecommunications services. In provisioning the NDA service, BellSouth states that "[T]he originating points of such calls would be at the requesting customer's location; the terminating points of such calls would be at a BellSouth Traffic Operator's Position Switch location within BellSouth's HNPA serving area for the originating line." With this set up, staff believes that in using the NDA service, the caller is still dialing an intra-HNPA call just as traditional DA; however, any query outside the HNPA will be performed by BellSouth over its official network. Thus, staff agrees with BellSouth's characterization of NDA service as simply DA service, since the bigger geographic reach appears to be the only differentiating factor between NDA service and traditional DA.

While staff agrees with BellSouth that NDA is an adjunct-to-basic service, staff believes an argument can be made that NDA is an "incidental" service. Per Section 271(b)(3) of the Act, BellSouth is permitted to provide incidental interLATA services (as defined in subsection (g)). Section 271(g)(4) defines incidental services to include "... a service that permits a customer that is located in one LATA to retrieve stored information from, or file information from storage in, information storage facilities of such companies that are located in another LATA." Given the nature of NDA service, it is possible that the above definition of incidental service might be applicable.

Staff believes that whether the proposed NDA service is viewed as "adjunct-to-basic" or an "incidental" service, the originating call will always be an intraLATA call terminating within the HNPA. Staff further believes that by granting this relief, the Commission's decision will be consistent with its earlier decision in Order No. PSC-96-1434-FOF-TP, where the Commission granted a rule waiver for Rule 25-4.115 F.A.C., to BellSouth to provide

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intraLATA inter-NPA DA service in conjunction with the 305 and 954 NPAs split. Staff also believes that the proposed NDA service will provide customers with an option as regards DA service. Staff agrees with BellSouth that granting this relief will allow another telecommunications provider other than IXCs to provide DA service. This appears to support the provisions of Chapter 364, Florida Statutes, whereby the Commission is called upon to promulgate rules and policies that will promote competition in Florida. Staff believes that customers will benefit from the convenience of a single call to either 411 or HNPA-555-1212 compared to two separate calls -- first to the LEC, then to an IXC. Staff believes that with appropriate pricing, NDA service will be cost effective and may be a cheaper service for Florida customers.

Based on the above, staff recommends that the Commission grant BellSouth's petition to waive Rule 25-4.115, Florida Administrative Code, allowing BellSouth to offer its proposed NDA service. Staff notes, however, that BellSouth has yet to file its proposed NDA tariff.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, this docket should be closed unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Commission's Proposed Agency Action Order. (PELLEGRINI)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, this docket should be closed unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Commission's Proposed Agency Action Order.