



Public Service Commission

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DATE: SEPTEMBER 23, 1999

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

FROM: DIVISION OF COMMUNICATIONS (FAVORS) *CRF*
DIVISION OF LEGAL SERVICES (CLEMONS) *AME CB*

RE: DOCKET NO. 990930-TL - PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. FOR EMERGENCY RELIEF TO COMPEL SPRINT-FLORIDA, INCORPORATED TO PROVIDE DIRECTORY LISTINGS OF SPRINT'S CUSTOMERS IN FLORIDA

DOCKET NO. 991037-TP - PETITION OF ORLANDO TELEPHONE COMPANY TO COMPEL SPRINT-FLORIDA, INCORPORATED AND BELLSOUTH TELECOMMUNICATIONS, INC. TO ACCEPT ITS WHITE PAGE DIRECTORY LISTING AND DIRECTORY ASSISTANCE INFORMATION ORDERS

AGENDA: 10/5/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE - PROCEDURAL MATTER

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990930.RCM

CASE BACKGROUND

On July 16, 1999, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Emergency Relief against Sprint-Florida, Inc. (Sprint) to compel Sprint to provide BellSouth with the directory listings of Sprint's customers in Florida. Consequently, Docket No. 990930-TL was established, and the matter was set for hearing. On August 5, 1999, Sprint filed a Motion to Dismiss BellSouth's Petition for failure to state a cause of action. On August 17, 1999, BellSouth filed its Response to Sprint-Florida, Inc.'s Motion to Dismiss. On September 3, 1999, Sprint filed its Answer of Sprint-Florida, Incorporated to BellSouth's Petition.

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FPSC-RECORDS/REPORTING

On August 4, 1999, Orlando Telephone Company, Inc. (OTC) filed a Petition against both BellSouth and Sprint regarding the companies' "method of providing directory assistance and white page directory listing information." As a result, Docket No. 991037-TP was established. On September 2, 1999, BellSouth filed its Answer and Response to Petition of Orlando Telephone Company. To date, Sprint has not filed a response to OTC's Petition.

Staff's recommendation addresses Sprint's Motion to Dismiss BellSouth's Petition in Docket No. 990930-TL and what emergency relief, if any, should be provided pending the outcome of the hearing. Because Docket No. 990930-TC and Docket No. 991037-TP both involve the same directory assistance listings issue, this recommendation also addresses consolidation of these two dockets.

Docket No. 990930-TL has been set for hearing on April 17, 2000. Docket No. 991037-TP has not been set for hearing pending the Commission's vote on staff's recommendations herein.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Sprint's Motion to Dismiss BellSouth's Petition for Emergency Relief in Docket No. 990930-TL for failure to state a cause of action?

RECOMMENDATION: No. Staff believes that BellSouth's Petition for Emergency Relief, when viewed in the light most favorable to BellSouth, states a cause of action cognizable under Chapter 364, Florida Statutes. Therefore, the Motion to Dismiss should be denied. **(CLEMONS)**

STAFF ANALYSIS: BellSouth's Petition should be viewed in the light most favorable to BellSouth, in order to determine whether its request is cognizable under the provisions of Chapter 364, Florida Statutes. As stated by the Court in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Furthermore, the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

BellSouth's Petition for Emergency Relief

As stated previously, on July 16, 1999, BellSouth filed a Petition for Emergency Relief against Sprint. In its Petition, BellSouth requests that the Commission compel Sprint to "provide BellSouth with the directory listings of Sprint's customers in Florida." BellSouth alleges that by letter dated December 10, 1998, pursuant to FCC Order No. 98-271 and 47 CFR Sec. 51.217, it advised Sprint that it "would begin providing Sprint's directory listings to third parties, including Alternative Local Exchange Companies (ALECs)." BellSouth also states that by letter dated December 23, 1998, Sprint advised that it was not necessary for third parties to have access to its listings from BellSouth. By letter dated May 28, 1999, BellSouth then advised Sprint that Commission Order No. PSC-98-1484-FOF-TP, issued November 5, 1998, required it to "make all directory listings contained in BellSouth's database, including those of other local exchange companies, available to requesting ALECs and that this would occur effective June 9, 1999." According to BellSouth, by letter dated June 3, 1999, Sprint advised that "unless BellSouth compensated Sprint for Sprint's directory listings provided to third parties, Sprint would require BellSouth to remove all Sprint listings from BellSouth's databases immediately." BellSouth further states that on June 17, 1999, Sprint ceased sending new and updated directory listing information to BellSouth, causing BellSouth to remove the existing Sprint directory listing information from its databases "in light of the strong possibility that the information was no longer accurate."

Sprint's Motion to Dismiss

On August 5, 1999, Sprint filed a Motion to Dismiss BellSouth's Petition for failure to state a cause of action. In its Motion, Sprint argues that even if all the factual allegations made by BellSouth were deemed true, "on its face the Petition does not describe actions or omissions by Sprint which are in violation of any cited FPSC rule or order." While Sprint admits that it is no longer sending directory assistance listings to BellSouth, it asserts that the only rule cited by BellSouth, Rule 25-4.040(5), Florida Administrative Code, imposes no obligation "on a supplier of numbers . . . to provide listings so that the LEC serving the LEC's territory can discharge its obligations." Sprint further states that the rule "speaks only to (1) BellSouth's own obligation to provide directory assistance in the area where BellSouth furnishes service and (2) to the internal obligation of BellSouth to insure that its own listings are updated within 48 hours from within the BellSouth service ordering completion process."

BellSouth's Response

On August 17, 1999, BellSouth filed its Response to the Motion to Dismiss. According to BellSouth, Sprint misinterprets its claims. It states that BellSouth has an obligation under FCC Order 98-271 and 47 C.F.R. §51.217 to permit any competing provider of local exchange service to have access to its Directory Assistance database, including the listings provided to BellSouth by Sprint. Sprint, on the other hand, has an obligation to provide its directory listings, including EAS listings, to BellSouth pursuant to its contract with BellSouth and pursuant to Rule 25-4.040(5). BellSouth, therefore, maintains that its Petition "states a cause of action and that the Commission has the authority under state law and the Commission's rules, to grant the relief requested."

Staff's Analysis

Section 251(b)(3) of the Communications Act of 1934, as amended in 1996 (the Act), imposes the duty upon all local exchange carriers to provide to competing providers "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." Likewise, a portion of the FCC rule implementing this provision, 47 C.F.R. §51.217(c)(3), provides:

(i) Access to directory assistance. A LEC shall permit competing providers to have access to its directory assistance services so that any customer of a competing provider can obtain directory listings, except as provided in paragraph (c)(3)(iii) of this section, on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider, or the identity of the provider for the customer whose listing is requested.

Section 271 of the Act prohibits Bell operating companies from originating interLATA traffic until they meet certain requirements. Of relevance here, Section 271(c)(2)(B)(vii)(II) requires nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers." FCC Memorandum Opinion and Order No. 98-271, issued October 13, 1998 in FCC Docket No. 98-121, addresses BellSouth's application for authorization under Section 271 to provide interLATA services in Louisiana. The Order denies BellSouth's application on the basis that BellSouth failed to satisfy many of the statutory requirements of Section 271. With regard to the requirement that BellSouth

provide nondiscriminatory access to directory assistance, the Order states that "BellSouth does not demonstrate that it provides other carriers with the same access to these services that it provides to itself." The Order further states:

248. Access to BellSouth's Directory Assistance Databases . . . [A] competing carrier may wish to supply its own operator services and directory assistance. When this is the case, BellSouth must either provide access to BellSouth's directory database on a "read only" or "per dip" basis, or provide the entire database of subscriber listings to be incorporated into the competing carrier's directory assistance database.

* * *

249. BellSouth fails . . . to demonstrate . . . that it provide[s] the subscriber listing information in its directory assistance database in a way that allows competing carriers to incorporate that information into their own databases. To comply with this requirement, a LEC, including a BOC, must provide a requesting carrier with all the subscriber listings in its operator services and directory assistance databases except listings for unlisted numbers.

250. BellSouth concedes that the database provided to competing carriers does not contain all the listings that are in BellSouth's own directory assistance and operator services databases. It contends that it is precluded from providing the excluded listings because it has contracts with certain independent companies and competitive LECs that prevent it from including those carriers' subscribers' listings in the database. BellSouth claims that it is actively pursuing "contract modifications to permit it to provide all listings," and that it will provide competing carriers or independent companies' listings in the database if such companies are willing to waive the restrictive parts of their agreements. It claims that, as

a result of these negotiations, most agreements now permit such listings. Although we are encouraged by BellSouth's progress in renegotiating its agreements, we find that, based on BellSouth's own admission, BellSouth fails to demonstrate that it complies with section 51.217(c)(3)(i) of the Commission's rules.

While BellSouth maintains that it has an obligation under both 47 C.F.R. §51.217 and FCC 98-271 to provide all directory assistance listings in its database, including Sprint's listings, to third parties, Sprint takes a different view in its December 23, 1998 letter:

Sprint does not agree with BellSouth's interpretation of the FCC's Second Louisiana Order, FCC 98-271 and does not agree to allow BellSouth to provide Sprint listings to third parties. The portion of the Order cited by BellSouth is taken out of context and provides no support for the proposition that BellSouth may unilaterally change its agreement with Sprint. . . **[I]t is clear that the FCC never ordered BellSouth to provide the listings, but rather stated that it was BellSouth's obligation to provide the listings if BellSouth wanted to meet the guidelines under Sections 271.** [Emphasis added].

By Order No. PSC-98-1484-FOF-TP, issued November 5, 1998, in Docket No. 980281-TP, this Commission addressed the complaint of MCI Metro Access Transmission Services, Inc. (MCI) against BellSouth for breach of the parties' interconnection agreement. MCI argued that BellSouth was not providing access to all of BellSouth's directory assistance database listing information in compliance with the parties' agreement. BellSouth argued that it could not provide access to all the listings in its directory assistance database because it had to honor its agreements with several ALECs, including Sprint, not to disclose their particular listings to third party companies without their authorization. This Commission concluded that the provision of the complete directory assistance database listings did not require BellSouth to divulge any specific LEC's directory listings, and therefore, would not violate the non-disclosure agreements. Accordingly, BellSouth was ordered to provide "all listings included in [its]

Directory Assistance database, excluding the identity of subscribers' local service providers."

Following the issuance of Order No. PSC-98-1484-FOF-TP, Sprint, in a letter to BellSouth dated June 3, 1999, conceded that BellSouth did indeed have an obligation under the orders to provide its entire directory assistance listings database to requesting third parties. Sprint still maintained, however, that those orders did not require the provision without compensation to Sprint:

Sprint agrees that BellSouth has an obligation to release listings in its directory databases to third parties. However, nowhere in the FCC rules or the Florida Order or FCC Docket No. 98-121 does it say that BellSouth shall provide those listings to third parties, with no compensation to Sprint as the owner of the listings.

In its Motion to Dismiss, Sprint now argues that even if BellSouth has an obligation to provide BellSouth's listings database to third parties, no obligation has been imposed upon Sprint to provide Sprint's listings to BellSouth. Sprint states that the only Commission rule cited by BellSouth, Rule 25-4.040(5), Florida Administrative Code, has never been interpreted to "impose an obligation on a supplier of numbers (i.e., a LEC outside of BellSouth's service territory) to provide listings so that the LEC serving the LEC's territory can discharge its obligations." BellSouth maintains that Sprint does indeed have an obligation pursuant to the contract between the parties and Rule 25-4.040(5).

Rule 25-4.040(5), Florida Administrative Code, provides, in pertinent part:

Directory Assistance operators shall maintain records of all telephone numbers (except for non-published telephone numbers) in the area for which they have the responsibility of furnishing service. . . All new or changed listings shall be provided to directory assistance operators within 48 hours after connection of service, excluding Saturdays, Sundays and holidays.

Staff believes that the objective of Rule 25-4.040(5) is the same as that of Section 251(b)(3) of the Act, 47 C.F.R. §51.217(c)(3)(I), FCC Order 98-271 and PSC-98-1484-FOF-TP, which is

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that all customers should have access to all listings through directory assistance, notwithstanding their local service provider. Therefore, staff believes that the rule should not be read narrowly to impose no obligation upon Sprint to supply its listings to other LECs, including BellSouth. Staff believes that Sprint already has this obligation under 47 C.F.R. §51.217(c)(3)(i) because the rule applies to all LECs.

Sprint is correct in that there has been no interpretation of Rule 25-4.040(5) to date; however, staff believes that a broad reading of the rule is appropriate. The phrase, "In the area for which they have the responsibility of furnishing service", should be interpreted to mean that a LEC has a responsibility, not just for the directory assistance listings of its customers in its territory, but for all customers of the entire local service area (especially when expanded calling scopes are involved). This interpretation would mandate the sharing of directory assistance listings between LECs in the same local service area for the benefit of the customer. If the rule was interpreted any other way, it would lead to absurd results. On the one hand, BellSouth would be obligated to provide its listings to third party requestors so that all customers would have access to listings through directory assistance, notwithstanding their local service provider, but on the other hand, Sprint would not be required to give its listings to BellSouth in the first place, defeating entirely the purpose of the rule.

If the Commission adopts Sprint's view and interprets Rule 25-4.040(5) to impose no obligation upon Sprint to provide its directory assistance listings to BellSouth, a customer calling BellSouth's directory assistance in Orlando, for example, would not be able to obtain the listing of a Sprint customer living in Altamonte Springs, absent a private agreement between the parties, even though both customers are within the same local service area. Sprint has conceded that BellSouth does indeed have an obligation to provide its entire directory assistance listings database to third party requestors pursuant to Section 251(b)(3) of the Act, 47 C.F.R. §51.217(c)(3)(i), FCC Order 98-271 and PSC-98-1484-FOF-TP, but the objective of these regulatory requirements -- customer access to directory assistance listings, notwithstanding the provider -- would be thwarted if Sprint was not also under any obligation to provide its listings to competing carriers so that "directory assistance operators . . . [could] maintain records of all telephone numbers . . . in the area for which they have the responsibility of furnishing service." See Rule 25-4.040(5), Florida Administrative Code.

Based on the foregoing, it appears that BellSouth has stated a cause of action for which the Commission may grant relief. Therefore, Sprint's Motion to Dismiss should be denied.

ISSUE 2: What emergency relief, if any, should the Commission grant BellSouth on its Petition for Emergency Relief pending the outcome of the hearing to be held in this matter and the Commission's final order?

RECOMMENDATION: If Issue No. 1 is approved, staff recommends that the Commission order Sprint to provide its directory assistance listings to BellSouth to repopulate BellSouth's directory assistance database, including existing listings and all new listings and updates, pending the outcome of the hearing and the Commission's final Order. **(FAVORS)**

STAFF ANALYSIS: This matter has been set for hearing on April 17, 2000. However, since BellSouth has filed a Petition for Emergency Relief, this issue addresses what emergency relief, if any, the Commission should grant BellSouth pending the outcome of the hearing and the Commission's final order.

As stated previously, BellSouth asserts that after it advised Sprint that it would begin providing Sprint's directory assistance listings to third parties, including ALECs, Sprint ceased sending new and updated directory listings to BellSouth. As a result, BellSouth removed the existing Sprint directory listing information from its database because of the strong possibility that the information was no longer accurate. BellSouth argues that Sprint's refusal to provide its directory listings to BellSouth and the resulting purge of Sprint's listings from BellSouth's database has impaired its ability to provide customer service, impaired competition, and is not in the best interest of the public.

Sprint argues that this issue arises out of an agreement between the parties, and that it does not provide for Commission jurisdiction in resolving disputes arising under it:

17. The circumstances that BellSouth obviously seeks to place before the Commission in this legally deficient Petition arise out of the

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Directory Assistance Agreement Between BellSouth and Sprint ("contract") whose terms do not provide that the FPSC has jurisdiction to resolve disputes under it. While the subject matter of the contract (DA listings) is related to matters over which the Commission has generally exercised some level of jurisdiction, the dispute here is a private contractual matter over which the FPSC has traditionally found that it has no jurisdiction.

Sprint further argues that central to its agreement with BellSouth was the provision that its database not be resold. Sprint states that "only when BellSouth sought and achieved regulatory action in furtherance of unrelated corporate objectives (i.e., Section 271 authority) and set in motion events that upset the balance achieved in the negotiated contract, and began reselling the DA listing database, did the contract no longer make economic sense to Sprint." According to Sprint, BellSouth can still act in the public interest and enter into a contract amendment that commits to compensating Sprint for listings that it resells to third parties.

Staff believes that the heart of the dispute between the parties is whether Sprint should be compensated for its directory listings that are included in BellSouth's database when BellSouth sells its database to third parties. However, neither of the parties have raised compensation as an issue in this case. Order No. PSC-98-1484-FOF-TP, which ordered BellSouth to provide its entire directory assistance listings database to MCI was also silent as to compensation. Staff believes that any contract provision between the parties which may have prohibited the resale of Sprint's directory assistance listings by BellSouth has been rendered null and void by the Commission's Order. Additionally, as discussed in Issue 1, staff believes that Sprint has as much obligation to provide its directory assistance listings to BellSouth and other LECs as BellSouth does to Sprint and other LECs. In light of these facts, staff believes that the parties may well benefit from the negotiation of new contract terms which may or may not provide for reciprocal compensation.

Notwithstanding the compensation issue, by Order No. PSC-98-1484-FOF-TP, the Commission ordered BellSouth to provide MCI with its entire directory assistance listings database, clearly intending that customers should have the benefit. Staff believes that customers, particularly those in the Orlando area, are being

adversely affected by this dispute between BellSouth and Sprint. Customers who subscribe to BellSouth's directory assistance service are unable to obtain the telephone numbers of customers in Sprint's service area, including those of ALECs, such as Orlando Telephone Company, even though they are in the same local calling area. Similarly, customers in Sprint's service territory are unable to have their telephone numbers provided to customers who subscribe to BellSouth's directory assistance service. This situation could potentially have an even greater adverse effect on business customers.

Since customers seem to be most affected by this dispute, staff recommends that the Commission order Sprint, on an emergency basis, to provide its directory assistance listings to BellSouth to repopulate BellSouth's directory assistance database, including existing listings and all new listings and updates, pending the outcome of the hearing and the Commission's final Order.

ISSUE 3: Should the Commission consolidate Dockets Nos. 990930-TL and 991037-TP?

RECOMMENDATION: Yes. Staff believes that consolidation of Dockets Nos. 990930-TL and 991037-TP would "promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights" of any party. Accordingly, staff recommends that if Issue 1 is approved, the Commission should consolidate Dockets Nos. 990930-TL and 991037-TP and all the issues therein.
(CLEMONS)

STAFF ANALYSIS: As stated previously, on August 4, 1999, Orlando Telephone Company, Inc. (OTC) filed a petition against both BellSouth and Sprint regarding the companies' "method[s] of providing directory assistance and white page directory listing information." As a result, Docket No. 991037-TP was established; however, the matter has not yet been set for hearing.

In its Petition, OTC raises two issues regarding Sprint's and BellSouth's practices, which it claims are having "serious negative impact on all subscribers both business and residence." First, OTC states that Sprint is not providing its directory assistance listings to BellSouth and vice versa:

Historically, Sprint/United provided directory assistance information for all customers within their franchise territory to BellSouth. In most cases this customer information was available to the BellSouth D.A. operators within 48 hours. In mid-June of this year, Sprint/United stopped providing this information to BellSouth. Conversely, BellSouth stopped providing this information to Sprint/United.

Second, OTC asserts that its customers residing in Sprint's territory and receiving new service between May and July are not being included in the BellSouth white pages directory, distributed in November, even though the actual BellSouth deadline for inclusion in the directory is not until July 22. OTC blames this problem on the fact that neither BellSouth nor Sprint will accept customer listings from a LEC, other than an ILEC, when the customers live outside of their respective service territory:

With regard to white page directory listing information, Sprint/United sold their current database for the Orlando area to BellSouth in mid-May. The BellSouth directory didn't close until July 22nd. This means that any new customers in the Sprint/United franchise area that are connected between mid-May and late July are not included in the new BellSouth directory that is distributed in November. Sprint/United plans to buy the BellSouth white page information in August for their directory that will be delivered in December.

BellSouth has adopted the position that they will not accept white page listing or directory assistance information orders from customers outside of their franchise territory from anyone other than an ILEC. Sprint/United appears to have adopted the same position. Let us point out that neither company has any problem with accepting this information from CLEC's when the CLEC customer is located within their respective franchise areas.

Rule 28-106.108, Florida Administrative Code, states that "[i]f there are separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated

if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." Staff believes that consolidation of Dockets Nos. 990930-TL and 991037-TP would "promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights" of any party. The issue of Sprint's obligation to provide its directory assistance listings to BellSouth is common to both dockets, and all of the parties involved -- BellSouth, Sprint, and OTC -- have all agreed that consolidation of that particular issue would be appropriate; however, with regard to the white pages listings, both Sprint and BellSouth maintain that this issue should be bifurcated as an unrelated matter. Staff disagrees. The directory assistance listings issue and the white pages listings issue are closely intertwined, inasmuch as they both relate to the customer's ability to access subscriber listings without regard to the identity of his local service provider. Therefore, neither should be addressed in a vacuum.

Accordingly, staff recommends that if Issue 1 is approved, the Commission should consolidate Dockets Nos. 990930-TL and 991037-TP and all issues therein.

ISSUE 4: Should Dockets Nos. 990930-TL and 991037-TP be closed?

RECOMMENDATION: Docket No. 991037-TP should remain open pending final disposition by the Commission. If staff's recommendation in Issue 1 is approved, Docket No. 990930-TL should also remain open pending final disposition by the Commission. If, however, Issue No. 1 is not approved, Docket No. 990930-TL should be closed.
(CLEMONS)

STAFF ANALYSIS: Docket No. 991037-TP should remain open pending final disposition by the Commission. If staff's recommendation in Issue 1 is approved, Docket No. 990930-TL should also remain open pending final disposition by the Commission. If, however, Issue No. 1 is not approved, Docket No. 990930-TL should be closed.