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October 22, 1999

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: In Re Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended, CC Docket No. 99-273

Dear Ms. Salas:

Pursuant to Section 1.1206(b) of the Commission's Rules, this letter is to inform the Commission of a meeting which took place on Thursday, October 21, 1999, among Brett Haan and Kelly Cameron, representing Telegate AG, and Mark Schneider, legal adviser to Commissioner Ness and Karl Kensinger of the International Bureau. The purpose of this meeting was to discuss issues addressed in Telegate's comments submitted on October 13, 1999 in the above-captioned rulemaking proceeding. A copy of those comments is attached hereto for reference.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,

Kelly Cameron

Kelly Cameron

For Powell, Goldstein, Frazer & Murphy LLP

KC/rlg
Attachment
Cc: Mark Schneider
Karl Kensinger

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Provision of Directory Listing	)	CC Docket No. 99-273
Information Under the	)	
Telecommunications Act of 1934,	)	
As Amended	)	

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To: The Commission

COMMENTS OF TELEGATE AG

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Its Attorney

October 13, 1999

I. SUMMARY

The public interest requires the opening of the directory assistance market more fully to competition. This should be a fully competitive market, but there are two obstacles: limited access to directory assistance databases and the fact that there is a single standard directory assistance dialing code — 411 — that allows the serving telephone company to provide this service non-competitively. The Commission should carry out Congress's intent to make all telecommunications markets competitive by countering these obstacles. This can be accomplished by (1) giving non-carriers nondiscriminatory access to directory assistance databases and (2) either ending the use of 411 for directory assistance or opening 411 up to competition and allowing customers to choose their provider of directory assistance service, just as they can choose their primary interexchange carrier.

Since its founding in Germany in 1996, Telegate AG has grown into a leading competitive directory assistance provider in Europe. Telegate has created over 2000 new jobs, mostly in Eastern Germany, an area with chronic high unemployment. Telegate provides new directory assistance products that respond to consumer demand. This was made possible by the European Union's determination to facilitate the provision of directory assistance as a competitive service, instead of leaving it to be dominated by the PTTs. Telegate plans to become a competitive U.S. directory assistance provider, provide new services to consumers, and create jobs, but it faces the daunting obstacle that directory assistance is not yet a competitive service in the United States.

First, there needs to be nondiscriminatory access to up-to-date, accurate directory assistance databases. Section 251 only requires telephone companies to give other telecommunications carriers access to these databases, but non-carrier directory assistance providers need access as well. The Commission should make clear in this rulemaking that the procompetitive, market-opening objectives of the Telecommunications Act would be served by finding that the public interest — and in particular the interest of consumers — would be served by opening access to these databases further. The Commission's ancillary jurisdiction, its general rulemaking powers, and its Title II jurisdiction over common carriers give the Commission ample authority to adopt such a requirement.

The next obstacle is the numbering system used by consumers to reach local directory assistance. Unlike Europe, the United States uses a single number for local directory assistance — 411. This number is, as a practical matter, only available to the incumbent telephone company serving a given customer. As a result, the continued use of 411 for directory assistance serves to perpetuate the non-competitive delivery of this service, which the European example shows can flourish as a competitive service.

One way to address this is to end the use of 411 as a standardized directory assistance number. This would provide a clean break with the non-competitive provision

of directory assistance service and foster a fully competitive industry. This is the way Europe brought competitive directory assistance to consumers.

However, the FCC has noted that the 411 number serves the public interest, while also acknowledging the anticompetitive aspect of allowing that number to be used by the incumbent telephone company for competitive services. A procompetitive solution that would be consistent with prior FCC policies, would be to follow the example of competitive long-distance service. Customers have the ability to choose their primary long-distance carrier in a balloting process and need not memorize any special codes to use their chosen carrier by default. The extension of this system to directory assistance service would give customers the ability to choose the company they use for 411 directory assistance calls. Such a policy for directory assistance is consistent with how the FCC has treated long distance service. This will clearly benefit consumers and fulfill the policy objectives of the Telecommunications Act.

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As Amended	)	

To: The Commission

COMMENTS OF TELEGATE AG

Telegate AG,[1] by its attorney, hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, CC Docket No. 99-273, FCC 99-227 (Sept. 9, 1999).

The *Notice* tentatively concludes that non-carrier providers of directory assistance "play an increasingly important role in ensuring that consumers receive the benefits of competition in all telecommunications related services" and that "the presence of these directory assistance providers benefits competition, and that [the Commission] should encourage such competition in the provision of directory assistance." *Notice* at ¶183. Based on these tentative conclusions, the Commission seeks comment on whether non-

[1]Telegate AG was founded in Germany in August 1996. Since the opening of directory assistance in the EU to competition, Telegate has become a leading provider of directory assistance service in Germany, and is expanding its services to other European nations as well. Telegate hopes to enter the U.S. directory assistance service market, also, but is concerned about the barriers to true competition that still exist here.

carrier providers of directory assistance ("DA") should be entitled to non-discriminatory assess to the directory assistance databases of incumbent local exchange carriers ("ILECs"). *Id.* at ¶¶184, 190-91.

As discussed below, Telegate believes that unquestionably the answer is yes. Telegate also urges the Commission to continue building a procompetitive framework for the provision of services to telephone customers by facilitating the provision of DA on a competitive basis. Specifically, the Commission should adopt rules that would require balloting by local exchange carriers ("LECs") with regard to DA. By doing so, the Commission will fulfill the procompetitive, market-oriented objectives of the Telecommunications Act.

I. THE COMMISSION SHOULD ADOPT RULES REQUIRING LECS TO PROVIDE NON-DISCRIMINATORY ACCESS TO THEIR DIRECTORY ASSISTANCE DATABASES FOR ALL COMPETITIVE PROVIDERS OF DIRECTORY ASSISTANCE, REGARDLESS OF CARRIER STATUS

Telegate concurs with the Commission's tentative conclusion that non-carrier DA providers serve the public interest by ensuring that DA is provided on a competitive basis. *Id.* at ¶183. In addition to competing with ILECs in the provision of DA, non-carrier DA providers serve the public interest by providing new and innovative services. *Id.* at ¶190. These public interest benefits will disappear, however, if ILECs are not required to provide non-carrier DA providers with non-discriminatory access to ILEC DA databases.

Without access to ILEC DA databases, non-carrier DA providers must rely on information obtained from other commercial sources such as credit companies, U.S. Postal Service, and magazine subscription companies. The sources are inherently unreliable, however, because the information is updated very infrequently. Moreover, these commercial sources do not generally indicate whether a particular telephone number is otherwise unlisted. Thus, a competitive DA provider relying on these commercial sources may distribute an otherwise unlisted number. These problems

associated with commercial databases undermines the ability of non-carrier DA providers to become effective competitors to ILEC DA.[2]

At least two state commissions have adopted rules requiring ILECs to provide non-discriminatory access to their DA databases by non-carrier DA providers.[3] In both instances, the commissions recognized the importance of non-carriers providing DA. According to the New York Public Service Commission, competition in the provision of DA is necessary to "promote adequate telephone service at just and reasonable rates."[4] To ensure the continued development of such competition, the New York PUC required each ILEC "to provide access to its directory databases to *any entity* that requests it for the purpose of . . . providing directory assistance service."[5] Similarly, the California Public Utilities Commission required ILECs to "provide nondiscriminatory access to their DA database listings to all competitors, *including third-party database vendors* and shall provide access by readily accessible tape or electronic format."[6]

Given the FCC's determination that non-carrier DA providers serve the public interest by ensuring the availability of competitive DA services, Telegate submits that the FCC should adopt rules requiring ILECs to provide non-discriminatory access to their DA databases by non-carriers. As the record to date in this proceeding has established, ILECs have generally refused to provide non-discriminatory access to their DA databases by non-carriers absent a regulatory requirement.

Section 251(b)(3) requires all LECs to provide other telecommunications carriers with access to their DA databases, but it is silent with respect to providing such access to

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[2]*See generally* Letter from Richard Thayer, Excell, to William F. Caton, Secretary, FCC (Sept. 18, 1997) ("*Excell Ex Parte*").

[3]California Public Utilities Commission, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-043 (Jan. 23, 1997); New York Public Service Commission, *Order Regarding Directory Database Issues*, Case 94-C-0095 *et al.* (July 19, 1998).

[4]New York Public Service Commission, *Order Regarding Directory Database Issues*, Case 94-C-0095 *et al.* (July 19, 1998).

[5]*Id.* (emphasis added).

[6]California Public Utilities Commission, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-043 (Jan. 23, 1997)(emphasis added).

non-carrier DA providers. Accordingly, the Commission appears to be correct when it claims that Section 251(b)(3) does not guarantee such access to non-carrier DA providers, except insofar as they are acting as agents for carriers.[7] That does not end the inquiry, however.

The Commission has in the past sought to further the procompetitive objectives underlying the provisions of Section 251 by extending their protections beyond the limits of that section, pursuant to its ancillary jurisdiction and general rulemaking authority.[8] The Commission followed this approach, for example, when it subjected commercial mobile radio service ("CMRS") providers to its number portability requirements.[9] Only LECs are subject to the statutory number portability requirements, as set forth in Section 251(b)(2), and CMRS providers are not classified as LECs. Nevertheless, the Commission found that extending the number portability requirement to these providers would "serve the public interest by promoting competition between and among local wireless and wireline carriers, as well as among providers of interstate access service."[10]

Following this example, the Commission clearly has jurisdiction to require all LECs to provide non-discriminatory access to non-carrier DA providers pursuant to its ancillary jurisdiction and general rulemaking powers.[11] At the same time, the

[7]The fact that the only way non-carriers can require LECs to provide them with access to the DA database is by acting as an agent for a telecommunications carrier has artificially skewed the DA market. As the Commission notes, some non-carrier DA providers enter into agency relationships with carriers. *Notice* at ¶184. Under Section 217, 47 U.S.C. § 217, a non-carrier DA provider in such circumstances stands in the shoes of the carrier principal. Thus, Section 251 would require a LEC to provide access to its DA database to such "non-carriers" when they are acting as an agents for telecommunications carriers.

The fact that non-carrier DA providers can currently obtain mandatory access to the DA database only by acting as agents for carriers artificially shapes the DA marketplace. It forces companies that would be full-fledged competitors, if the game were not limited to carriers, to act only as agents on behalf of those holding seats at the table because of their carrier status. As a result, the number of competitors is artificially constrained and consumers are denied the benefits of fully competitive delivery of this service.

[8]*See* 47 U.S.C. §§ 151, 152(a), 154(i), (j), 201, 202, 303(r).

[9]*See, e.g., Telephone Number Portability,* CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking,* 11 FCC Rcd. 8352, 8434-36 (1996), *recon. denied, First Memorandum Opinion and Order on Reconsideration,* 12 FCC Rcd. 7236, ¶¶ 140-42 (1997); *Third Report and Order,* 13 FCC Rcd. 11,701 (1998).

[10]*Third Report and Order,* 13 FCC Rcd. at ___ [¶ 18]; *accord First Memorandum Opinion and Order,* 12 FCC Rcd. at ___ [¶ 141]; *First Report and Order,* 11 FCC Rcd. at ___ [¶ 153].

[11]*See* Sections 1, 2(a), 4(i), 303(r), 47 U.S.C. § 151, 152(a), 154(i), 303(r).

Commission has full authority to regulate common carrier practices, such as LECs' provision of access to DA databases, pursuant to Sections 201 and 202. Under Section 201(b), the practice of providing non-discriminatory access to DA databases for some DA providers, but not all, constitutes an unjust and unreasonable practice. Similarly, such a practice constitutes unjust and unreasonable discrimination pursuant to Section 202(a). It is unreasonable to exclude one class of DA providers from obtaining nondiscriminatory access to DA databases. As explained below, it also is unreasonable because non-carrier DA providers can obtain the information (in essence) contained in an ILEC's DA database if the DA provider publishes the directories. If the information is available for directory publication, it also should be available for the provision of DA.

Section 222(e) of the Communications Act requires all telecommunications carriers, including ILECs, to "provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format." 47 U.S.C. § 222(e). Thus, a non-carrier can obtain all the information necessary for DA if it intends to publish directories. These directories could be electronic and used by non-carrier operators to provide DA. It would be unreasonable to require non-carriers to create and use public, electronic telephone directories simply to provide competitive directory assistance. Thus, DA providers should be entitled to obtain the information solely for the provision of DA.

II. THE U.S. NUMBERING PLAN SHOULD BE ALTERED TO PROMOTE COMPETITION IN THE PROVISION OF DIRECTORY ASSISTANCE

In addition to requiring ILECs to provide nondiscriminatory access to their DA databases by non-carrier DA providers, the Commission should take further steps to facilitate the provision of DA on a competitive basis. As the Commission has acknowledged, the use of the 411 dialing code affords ILECs with an inherent competitive advantage in the provision of DA services — which "stem[s] from [their]

dominant position in the local exchange and exchange access markets."[12] Moreover, the Commission has recognized that ILECS "will retain [their] advantageous use of the 411 dialing code until [their] local markets are open to competition."[13] To foster increased competition, Telegate urges the Commission to eliminate the use of 411 and instead, adopt a system similar to one used by the European Union ("EU").

Telegate has extensive experience in providing DA in Europe, where EU authorities concluded that incumbent PTTs' dominant position in the DA market stifled competition. To promote competition, the EU made DA a competitive market and gave national regulatory authorities legal grounds for changing the numbering system to promote competitive delivery.[14] As a result, where EU decisions have been implemented, no single dialing code, such as 411 in the United States, automatically provides a customer with DA. Instead, DA providers each possess a unique dialing code by which customers can access the DA service of their choosing. This system has proved to foster competition in Europe and improve the quality of service. Moreover, because customers must consciously choose a DA provider, there is a stronger incentive for providers to educate consumers of the available DA plans, thereby facilitating informed, rational consumer choice. This also gives DA providers incentives to search aggressively for new ways to meet consumer demand.

Telegate is an example of how this procompetitive policy has succeeded. Since it was established in 1996, Telegate has taken advantage of the European demonopolization of DA by providing a variety of DA-related services. In Germany, it provides up-to-date telephone number information for subscribers on the landline telephone network as well

[12] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance,* CC Docket No. 97-172, *Memorandum Opinion and Order,* FCC 99-133, at ¶ 35 (Sept. 27, 1999) ("*U S WEST Order*").

[13] *Id.,* at ¶ 44.

[14] *See* Status Report on European Union Telecommunications Policy – Update: March 1999, Brussels, March 22, 1999 at 24-25 *citing* Commission Directive of 13 March 1996 amending Commission Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (96/19/EC; OJ L 74/13, 22.03.1996). The Status Report may also be viewed on the Internet at www.ispo.cec.be/infosoc/telecompolicy/en/tcstatus.doc

as all wireless networks. In addition, it provides specialized information services, such as DA for calls to other nations, Turkish-language DA service, as well as cinema listings, weather, and other services. In three short years, Telegate has created over 2000 new jobs, mostly in the former East Germany, where there is chronically high unemployment. Telegate puts all of its DA operators through an extensive training program, producing highly trained professionals who provide efficient service that earns high customer satisfaction ratings.

Accordingly, Telegate urges the Commission to capitalize on the experiences of the European Union and level the DA playing field by altering the numbering plan in the United States, starting with the elimination of the single-provider 411 dialing code.

III. IF THE U.S. NUMBERING PLAN IS NOT ALTERED, THEN LECS SHOULD BE REQUIRED TO BALLOT ALL CUSTOMERS REGARDING THE PROVISION OF DIRECTORY ASSISTANCE

Telegate understands the Commission's view that customers "benefit from the convenience of using the 411 or 1-411 dialing code" because the public has become accustomed to obtaining DA via the 411 dialing code.[15] Indeed, the Commission decided in its *N11 Order* that retaining the 411 code for directory assistance was "justified by public convenience and necessity."[16] However, the Commission there also recognized that this code should not give ILECs a competitive advantage over information service providers competing with them.[17] If the Commission continues to believe that the benefits of using 411 for directory assistance warrant retention of that standard number over changing to a dialing plan that is truly procompetitive, it can nevertheless promote a competitive environment by no longer limiting this code to a single carrier's exclusive use.

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[15] *Id.*, at ¶ 51.

[16] *Use of N11 Codes and other Abbreviated Dialing Arrangements,* CC Docket No. 92-105, *First Report and Order and Further Notice of Proposed Rulemaking,* 12 FCC Rcd. 5572, ¶ 47 (1997).

[17] *Id.* at ¶ 48.

The Commission clearly has jurisdiction to accomplish this. Under Section 251(e)(1),[18] the Commission has exclusive and plenary jurisdiction over the North American Numbering Plan in this country. Indeed, the *N11 Order,* in which the Commission retained the 411 dialing code, was adopted under authority of Section 251(e)(1), as well as other provisions of the Communications Act.[19] The Commission therein ordered, pursuant to this authority, 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 for which it is using the code to facilitate distribution of their enhanced services."[20] Now that Europe has shown that DA can flourish as a competitive business, the Commission should take the further step of opening up the 411 code to all providers of DA pursuant to its exclusive authority over the NANP in the United States.

The optimal method for eliminating the competitive advantage associated with use of the 411 code by the ILEC is to eliminate its exclusivity. As at least one ILEC has conceded that there is no technical reason this cannot be accomplished by having customers pre-select their DA provider just as they do their long distance carriers.[21] By requiring a balloting and allocation system, the Commission would ensure that no one company would enjoy the benefit of being assigned the 411 dialing code. Moreover, through a process of allocating unpresubscribed customers fairly among DA providers, the Commission would be able to guarantee all DA providers equal treatment, and in turn, help to level the playing field among providers. At the same time, consumers benefit because they can access their DA provider of choice simply by dialing the traditional 411 DA number.

[18] 47 U.S.C. § 251(e)(1).

[19] *N11 Order* at ¶ 13.

[20] *N11 Order* at ¶ 86.

[21] *U S WEST Order* at n.103. While U S WEST acknowledged that opening up the 411 code was technically feasible, it also claimed that per-customer revenues from DA do not justify the substantial costs of implementing such a system. There is little evidence to support this claim. Ironically, similar arguments were raised and rejected by the Commission when it proposed to require BOCs to assign IXCs pursuant to a balloting and allocation plan. *See Allocation Order* at ¶ 24.

This approach mirrors that taken by the MFJ court to promote unfettered competition for the provision of interexchange services. Specifically, the court required the Bell Operating Companies ("BOCs") to permit their customers to "presubscribe" to an interexchange carrier ("IXC") of their choice, rather than the provider chosen by the BOCs.[22] Thus, for the first time, a customer could access the services of the IXC of its choice by simply dialing a "1." Among the plans developed to implement the MFJ court's presubscription requirement, Northwestern Bell ("NWB") implemented a *pro rata* balloting and allocation plan. The Commission recognized the success of this plan in fostering competition, noting that the NWB plan enjoyed nearly double the amount of customer participation in presubscribing an IXC than other BOCs (60-70% participation versus 30%). Based on the experience of NWB, the Commission decided to require all BOCs to assign IXCs pursuant to a balloting and allocation plan.[23] According to the Commission, such a balloting and allocation plan would foster "rational, informed choices" by customers and in turn, "promote" efficient functioning of the market."[24] Indeed, five years after mandating equal access by balloting and allocation, the Commission recognized that the divestiture of AT&T combined with the implementation of equal access effectively "removed the principal structural barriers, thereby paving the way for heightened long-distance competition."[25] Today, AT&T is confronted with a number of rivals in the long-distance industry, and thus, customers are able to choose from a variety of providers whose services can be accessed both by presubscription and by specific dialing codes.

Based on the foregoing, DA presubscription is not a unique concept. As in the interexchange context, consumers will benefit because they will be able to access the

[22] *United States v. AT&T*, 552 F. Supp. 131, 196 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983) ("MFJ").

[23] *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145 Phase I, 101 FCC 2d 911, ¶ 21 (1985).

[24] *Id.*

[25] *See Competition in the Interstate Interexchange Marketplace*, CC Docket 90-332, *Notice of Proposed Rulemaking*, FCC 90-90 (1990).

services of the DA provider of their choice simply by dialing 411. Accordingly, LEC customers should be entitled to choose their DA providers pursuant to a balloting and allocation plan similar to the one used for assigning IXCs.

CONCLUSION

Telegate supports the Commission's efforts to foster competition in the provision of competitive DA services. To ensure effective competition, however, two steps must be taken. First, *all* DA providers must be entitled to nondiscriminatory access to ILEC DA databases. Second, LECs should be required to assign DA providers to their subscribers pursuant to a balloting and allocation plan similar to that associated with the assignment of IXCs.

Respectfully submitted,

TELEGATE AG

By: _____

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October 13, 1999

CERTIFICATE OF SERVICE

I, Carla Littlejohn, hereby certify that copies of the attached Comments of Telegate AG, were served on October 13, 1999, via hand delivery, on the following parties:

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