

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.**

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I. INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. ("U S WEST") comments herein on certain issues discussed in the filings of various parties in response to the three issues on which the Federal Communications Commission ("FCC" or "Commission") sought comment in a Notice of Proposed Rulemaking:<sup>1</sup> the convergence of directory publication conduct and the provision of directory assistance (or "DA") services; the provision of directory listing information to DA service providers, including those who themselves provide neither telephone toll nor telephone exchange services; and the need to mandate incumbent local exchange carriers ("ILEC") to provide out-of-

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<sup>1</sup> In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended, Third Report and Order in CC Docket No. 96-115 ("SLI Order"), Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, ("Second Order on Reconsideration") and Notice of Proposed Rulemaking in CC Docket No. 99-273, FCC 99-227, rel. Sep. 9, 1999 ("NPRM").

region directory listings to other carrier service providers.

We support the comments of those who argue -- consistent with U S WEST's position -- that no regulatory intervention is warranted or necessary with respect to any "convergence" between directory publication and directory assistance at this time. The marketplace is capable of working through any issues associated with a true product -- rather than regulatory -- convergence. And, given the deregulatory thrust of the Telecommunications Act of 1996, enacting additional regulations that would most assuredly skew the continued development of the marketplace would be anathema to the goals of the Act itself.

We also support those commentators who argue that Internet directories are clearly within a reasonable reading of the phrase "directory in any format." However, we also support those who argue that the terms and conditions associated with the provision of subscriber list information ("SLI") can reasonably be different depending on whether the SLI will be used in a print or an electronic publication.

We oppose the arguments of those non-carrier, independent DA Providers which seek to strain the language of the 1996 Act beyond all logical and linguistic meaning. These commentators seek to transform statutory provisions designed to apply solely to entities engaged in the provision of telecommunications services to conduct that in no way involves such provisioning. They claim legal entitlement to information under the law of agency, then make a mockery of that law by claiming a right to use the information beyond the scope of the agency. Finally, they seek,

through strained -- if not tortured -- advocacy, to gain access to listings available to directory publishers when DA services are being provided instead.

Finally, we agree with all commentors arguing that a local exchange carrier ("LEC") should have no obligation to provide non-local directory listings to competing providers of telephone exchange or telephone toll service. Given that the LEC itself must secure such listings from third parties through negotiated agreements, and that the information itself is in the open market due to the obligations inherent in Section 251, the market circumstances would clearly not support imposing an "access" legal imperative on LECs. And, already articulated sound policy advises against forcing LECs to be clearinghouses for information against their will.<sup>2</sup>

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<sup>2</sup> While we do not address the following argument below, it must be stated that the Metro One argument that the carriers in possession of listing information do not own the information -- its ownership being lodged in the customer to whom it refers -- (Metro One at 14) is just as wrong here as when the Commission made a similar argument in the CPNI proceeding. In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 8093 ¶ 43 (1998) ("CPNI Order"), vacated on appeal, U S WEST, Inc. v. FCC, (No. 98-9518, 10<sup>th</sup> Cir., Aug. 18., 1999), Brief for Respondents, filed Sep. 28, 1998 at 12, 13, Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc, filed Oct. 1, 1999 at 8. But, if the information is not "owned" by the party licensing it to Metro One, it is not "owned" by Metro One, either.

Such an "assertion [would] certainly come as a surprise to the thousands of American businesses, including telephone carriers, which have created valuable assets through billions of dollars of investments in customer information databases. . . . [Such a] view is contrary to the established trade secrets law of every state, as

II. INTERNET PUBLICATIONS CAN QUALIFY AS "DIRECTORIES"

U S WEST agrees with those commentators who argue that Internet publications qualify as "directories in any format."<sup>3</sup> As we stated in our opening comments, whether such a publication is a directory or a tool for providing directory assistance will depend on the information contained in the offering and provided to those accessing the data.

We also agree with Bell Atlantic and CBT, however, that the terms and conditions associated with an Internet directory publication can be different from those found in license agreements associated with print directories, and still be "nondiscriminatory" and "reasonable."<sup>4</sup> For example, a requirement that access to the information be limited to so many items per search and not be capable of downloading would be a reasonable term and condition, in the absence of statutory data protection covering the SLI information.<sup>5</sup>

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well as well-settled commercial expectations." Opposition to Petitions for Rehearing and Suggestions for Rehearing En Banc, filed by U S WEST, October 21, 1999, in U S WEST, Inc. v. FCC, No. 98-9518 (10<sup>th</sup> Circuit) at 5.

<sup>3</sup> Bell Atlantic at 1-2; CBT at 2-3; GTE at 2-4.

<sup>4</sup> Bell Atlantic at 2-3; CBT at 4-5. And see Metro One at 9 n.19.

<sup>5</sup> Congress has, for a while, been considering legislation that would provide statutory protection for data compilations that would not qualify for copyright protection under Feist. Feist Publication v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). While some of these iterations would (erroneously in U S WEST's view) exempt SLI provided by telecommunications carriers from such protection, the general idea is not an unlawful one. An offeror of the information should be able to accomplish the recovery of monetary remuneration for multiple uses of the information through appropriate contractual provisions.

III. THE CONVERGENCE OF DIRECTORY PUBLICATION  
AND DIRECTORY ASSISTANCE

Overall, U S WEST agrees with the position of GTE and USTA: the Commission should stay out of the matter of convergence between directory publishing and directory assistance.<sup>6</sup> As the comments of the filing parties indicates, there is a range of opinions on this matter, from a difference of opinion as to whether there is any convergence at all<sup>7</sup> to a general agreement that directory publishing and the provision of directory assistance implicate different regulatory regimes.<sup>8</sup>

From U S WEST's perspective we certainly agree that directory publishing and directory assistance involve historical differences in regulatory treatment. But

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Bell Atlantic takes a somewhat different tack, essentially arguing the reverse proposition. It claims that **if** the information is capable of download or bulk transfers, it would not amount to a "directory." Bell Atlantic at 2. If the intent of the purchaser were to engage in such bulk downloading, then the telecommunications carrier possessing the SLI would not have an obligation to provide it. Under either the CBT or the Bell Atlantic argument, a contractual restriction regarding downloading would be an appropriate provision.

For this reason, ADP is simply incorrect when it asserts that companies, like CBT, "have no motive for this restriction other than to protect the market share of its own electronic database and printed directories from competitors" and that such a restriction would be "anticompetitive." ADP at 8. Even Metro One (at 9 n.19) concedes that such a restriction might be appropriate.

<sup>6</sup> See GTE at 6 ("[s]hould these offerings converge, it should be the marketplace -- not the FCC -- that drives such a result"); USTA 1, 6.

<sup>7</sup> See CBT at 6, YPPA at 3, Bell Atlantic at 3-4 (all arguing that "directory publication" and "directory assistance" are mutually exclusive categories).

that just begs the question. The issue is whether the Commission should try to “clarify” **today** how services that might have aspects of different regulatory “classifications” should be treated. That is, “which ‘box’ should they be in?”

U S WEST encourages the Commission to reserve comment and judgment on the matter. We continue to believe that “a regulator-driven market [is] the total antithesis of the deregulatory and market-focused structure envisioned by Congress;” and that the Commission must “avoid perpetuating or creating” “definitional anomalies” in the future.<sup>9</sup>

The truth of the matter is that not only are markets affected by regulatory classifications but fortunes are made -- and lost -- on them. Classifications such as “basic” and “enhanced” obviously were not sufficient to accommodate a reasonable accommodation of the public interest, begging for some intermediate classification to render any sense to the fundamental dichotomies. Thus, the creation of the “adjunct to basic” category. The question of when a service is a “telecommunications service” when offered over the Internet or *via* Internet

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<sup>8</sup> See GTE at 5 (“directory assistance and directory publishing logically and legally are different offerings under the Act, and the Commission may not eliminate these distinctions”) and n. 11; YPPA at 3-4; Bell Atlantic at 3-4.

<sup>9</sup> See In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10, Comments of U S WEST, Inc., filed Mar. 27, 1998 at 14-19 (commenting on the danger of imposing classifications in the first instance; and arguing that, as time goes on and competition develops, outmoded classifications seriously and materially interfere with the natural operations of markets and the development of technology).

technology looms large on the regulatory horizon.<sup>10</sup>

The point being: this Commission is not free to create and dissemble regulatory and statutory classifications as the mood hits it and as some commentators advocate.<sup>11</sup> Having intervened in the dynamic operations of an unregulated marketplace, it must have some commitment to living with the regulatory classifications it -- or Congress -- insinuated into that marketplace. To behave otherwise materially (and usually in the case of the LECs adversely) affects the commercial operations of reputable companies and their established shareholder expectations and returns. As LSSi has correctly captured from a different Commission initiative, "The Commission's role 'is not to pick winners or losers . . . but rather to ensure the marketplace is conducive to investment, innovation, and meeting the needs of customers.'"<sup>12</sup>

We believe this docket is a clear example of the challenge of managing a marketplace rife with regulatory insinuation. Even if a real world "convergence"

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<sup>10</sup> In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, FCC 99-181, rel. Sep. 29, 1999 ¶¶ 177-82.

<sup>11</sup> For example, some commentators argue that they should unequivocally have access to directory listings as an "agent" for a carrier, but then turn around and argue that they should be entitled to use the information beyond the scope of the agency relationship. See discussion below at Section IV.C. Such self-serving arguments are devoid of logic. Such does not stop commentators from advancing them, however.

<sup>12</sup> LSSi at 32-33 and n.62, quoting from the Commission's Advanced Services Order.

were not taking place, the arguments over whether the oral provision of directory assistance services constitute the “publication of a directory” strongly demonstrates the extent to which “convergence” will be advocated when it is to the benefit of someone to claim it, even though the result would be a compromise of commonplace understandings and settled regulatory classifications.

In the end, the more salient question than whether there is a burgeoning convergence is whether anything should be done about it -- either the reality or the advocacy. The answer is “no.” The market will work this out better than any conceivable type of regulatory intervention.

Indeed, it already has. Most of the commenting parties arguing for the need for regulatory action are million dollar companies who got there without any help from the Commission. And now is not the time to lend such a helping hand -- not when one of the major goals of operating the FCC of the 21<sup>st</sup> Century is to move to a “minimal or no regulation” operational mode.<sup>13</sup> The fact is that when a million

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<sup>13</sup> “A New Federal Communications Commission for the 21<sup>st</sup> Century,” See also Statement of William E. Kennard, Chairman, FCC, Before the Subcommittee on Commerce, Justice, State, and the Judiciary Committee on Appropriations, U.S. Senate, on the FCC’s Fiscal Year 2000 Budget Estimates, Mar. 25, 1999 (“I want to describe . . . my vision of an FCC for the 21<sup>st</sup> century. . . . As the marketplace changes, so must the [FCC]. The topdown regulatory model . . . is . . . out of place [and] [a]s competition and convergence develop, the FCC must . . . eliminate regulatory burdens. Technology is no longer a barrier, but old ways of thinking are.”). And see also Dissenting Statement of Commissioner Harold Furchtgott-Roth at 1, attached to Notice of Inquiry, In the Matter of Low-Volume Long-Distance Users, CC Docket No. 99-249, FCC 99-168, rel. July 20, 1999 (“I respectfully dissent . . . I write to express my ardent opposition . . . because I believe that the mere suggestion of re-regulating a competitive market is antithetical to the

dollar company wants to publish a directory in any format, it can purchase SLI from a telecommunications carrier providing telephone exchange service at the rates established by the carrier, and subject to the terms of the Commission's SLI Order - terms which permit the selling carrier to restrict the use of the information to directory publishing.<sup>14</sup> When that same million dollar company wants to provide DA services, it can purchase directory listing information under two different statutory provisions, each with its own pricing parameters. We discuss these purchasing options below.

In both cases, as discussed more fully below, the offering telecommunications carrier can -- in its licensing agreements -- reasonably restrict the use of the listings to the purpose for which they were provided, even if the statute itself does not

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Telecommunications Act of 1996. . . . The message from Congress is clear: federal regulators must refrain from intruding in competitive markets.”); Statement of Commissioner Harold Furchtgott-Roth, attached to Notice of Proposed Rulemaking, In the Matter of Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 1, CC Docket No. 99-253, FCC 99-174, rel. July 14, 1999 (“I write separately because I continue to be concerned about the Commission’s micro-management of all telecommunications carriers . . . . In today’s increasingly competitive telecommunications marketplace, the Commission should be focusing its efforts on transitioning to this more competitive environment. . . . The amount of detailed . . . regulatory scrutiny required . . . is inordinate and should be reduced. I am becoming increasingly convinced that the current regulatory mechanisms . . . are no longer necessary in today’s increasingly competitive marketplace. I believe the Commission must consider even further deregulation as . . . cumbersome regulations become unnecessary.”).

<sup>14</sup> Compare SLI Order ¶ 21 (talking about carriers being free to restrict to publication of directories). Indeed, the arguments of a number of commentators seem to constitute a collateral attack on the SLI Order.

prescribe a singular use. The fact that a statute does not proscribe additional uses in no way constrains the right of the licensor to establish commercially reasonable restrictions.

#### IV. ACCESS TO LISTINGS FOR INDEPENDENT “DIRECTORY ASSISTANCE” PROVIDERS

Not surprisingly, commenting independent directory publishers advocate that the Commission should engage in Congressional novation<sup>15</sup> and simply change the regulatory obligations that Congress imposed in the 1996 Act. Contrary to the limited rights and duties contained in both Sections 222 and 251, these commentators argue that the Commission should expand the duties of telecommunications carriers to grant these non-carriers coveted “rights.”

Their arguments really are not much different than other non-carriers, such as customer premises equipment (“CPE”) vendors and enhanced service providers (“ESP”) have made over the years. These vendors argue, for example (quoting from the NPRM), that they can be in a position to “play an increasingly important role in

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<sup>15</sup> The fact that the Joint Statement references “or any other person” (see Teltrust at 5-6) cannot be claimed to change the express statutory language that the information needs to be provided only to a limited class of purchasers. Given the various iterations of different provisions of the 1996 Act over time, the Joint Statement is not always an accurate source of resolved Congressional intent. In any event, it would only be consulted in the case of ambiguous language, with which the Commission is not confronted. See, e.g., ALLTEL Information Servs. v. FDIC, 1999 U.S. App. Lexis 26563 \*8 (9<sup>th</sup> Cir. 1999) (No. 97-56472); In re LAN Assocs. XI, L.P., 1999 U.S. App. Lexis 24655 \*20 (3<sup>rd</sup> Cir. 1999) (No. 98-5434).

ensuring . . . competition in all **telecommunications related** services.”<sup>16</sup> Their advocacy is always phrased as “being in the public interest,” rather than positions taken in hopes of adding to their own pecuniary gain.

Here, a number of million dollar companies press this “public interest” argument.<sup>17</sup> Yet, they brazenly advocate the Commission take action that clearly

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<sup>16</sup> Telgate at 1, quoting from the NPRM ¶ 183 (emphasis added). Telgate’s arguments go so far beyond the scope of the issues raised in the NPRM (arguing about the numbering plan and the use of the N11 411, at 5-10) that the Commission should, on its own motion, strike them from the record.

<sup>17</sup> Telgate argues that the FCC has determined that “non-carrier DA providers serve the public interest.” Telgate at 2, citing to the NPRM ¶¶ 183, 190. Actually, neither paragraph actually states what it is cited for. Paragraph 183 states that the existence of such providers “benefits competition.” And, paragraph 190 states that such providers “may make innovative and increased services available to their customers,” who quite often are not the end user or public in the first instance.

In U S WEST’s opinion, the standards of “increasing competition” and “the public interest” are not identical. While benefiting competition may be one factor in deciding whether the public interest is served, it is certainly not the only -- or even the controlling -- factor. Whether such providers do or do not serve the public interest depends, at least in material part, on the benefits the public realizes from their provision of service -- especially the end user. Most of the commenting independent directory assistance providers serve only as wholesale suppliers and have done nothing to bring lower DA prices to consumers. Large carriers buy DA services from these large providers and sell the service to consumers at high prices with big margins. As the FCC acknowledged in the National DA Order, the public interest is best served when the retail customer enjoys the benefit of lower prices -- not when the profits are retained at the corporate entity. Compare In the Matter of Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, CC Docket No. 97-172, Reply Comments of U S WEST Communications, Inc., dated Apr. 23, 1998 at 12-13 (noting that the scope of existing competition with respect to NDA did not result in lower prices for consumers).

Moreover, even if the existence of more and more directory assistance providers could be argued to be in the public interest, that does not mean that the Commission can ignore the law or sound policy in an attempt to advance their

would be contrary to the public interest since it would require the Commission to ignore clear Congressional language, bastardize plain English (as discussed above), and urge the Commission to act in a manner that would clearly be unlawful under the Communications Act.

Entities desiring to provide DA already exist in the marketplace. While they may have begun their operations and their growth through the utilization of “bad data” (they claim), the 1996 Act clearly provided them an avenue to secure better, more accurate data and improve the quality of their service offerings. The fact that they have been successful was only recently commented on by the Commission in the National DA Order.<sup>18</sup>

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economic expansion. There must be some statutory authority through which the Commission can lawfully act before it can intervene. And, the fact that some state laws may permit state public utility commissions to act in a certain way (Telegate at 3 and n.3) is basically immaterial.

<sup>18</sup> In the Matter of Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of U S WEST Communications, Inc. for Forbearance, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, CC Docket Nos. 97-172 and 92-105, Memorandum Opinion and Order, FCC 99-133, rel Sep. 27, 1999 ¶ 37 (“National DA Order”). There the Commission stated that the non-local directory services market “faces competition from AT&T and MCI as well as from Internet service providers, providers of payphone and cellular telephone services, and independent directory assistance service providers, such as Metro One and INFONXX.” Id. ¶ 33. And see GTE at 10, citing to the Commission’s Press Release associated with the UNE Remand Proceeding, wherein it was stated that “the market [for directory assistance services] has developed since 1996 to where competitors can and do self-provision these services, or acquire them from alternative sources.”; Teltrust at 7-8 and n.13 (acknowledging emergence of competitive alternatives).

Some commentators in this proceeding, while not directly engaged in a collateral attack on the UNE Remand Order, argue that the loss of competitive support they

Is it necessary for the Commission to lend aid to the growth of these businesses, beyond the roadmap already outlined by Congress to achieve this objective? Hardly. The provisions of the Communications Act dealing with access to listings already provides ample access; other provisions simply have no applicability.

A. Access To Listings For DA Providers

Non-carrier DA providers already have sufficient access to listings:

- ◆ Currently, they can purchase directory listing information under Section 251 as an unbundled network element (“UNE”) under TELRIC pricing,<sup>19</sup> to the extent the purchaser is acting as an agent for a competitive LEC (“CLEC”) within the CLEC’s certified territory, providing the DA service only to the CLEC’s customers.
- ◆ Should a carrier, or its agent, desire a right of broader use (including a use associated with telephone toll service), it can purchase the information under the dialing parity provisions in Section 251(b)(3).<sup>20</sup> When purchasing under this provision, of course, the TELRIC pricing rules do not control the pricing of the listing.<sup>21</sup> Moreover, there may be

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believed occurred through that Order’s treatment of DA should be “fixed” through the Commission’s current inquiry. See Excell at 16-17; INFONXX at 1-2; LSSi at 14.

<sup>19</sup> It is not at all clear, based on the Press Release regarding the UNE Remand Order, that directory listing information is a UNE any longer. If it is not, then it would be offered under Section 215(b)(3) but not necessarily at TELRIC prices.

<sup>20</sup> This would be the case where the purchaser was acting on behalf of a CLEC who wanted to use the information beyond the CLEC’s certified territory or purchased the information on behalf of an interexchange carrier (“IXC”).

<sup>21</sup> The fact that TELRIC does not control the pricing under this circumstance forms the foundation for commentors both here, and in other proceedings, to argue that the pricing is “unreasonably high.” See, e.g., TWTC at 3-4. And compare Teltrust at 2 (employing the most recent of regulatory advocacy strategies -- that of asking for “clarification” when an entire body of regulatory precedent is being asked to be changed or modified -- to press its case for “incremental cost-based rates”), 13-14

restrictions properly associated with agency relationships imposed on the use of the information.<sup>22</sup>

- ◆ It may also be the case that other purchasing/pricing options are available for them to choose from.<sup>23</sup>

And, entities that currently operate as non-carrier independent directory assistance providers can convert their operations into carrier operations. We agree with those commentators who argue that “complete a call functionality” can be a telecommunications common carrier service.<sup>24</sup> However, as pointed out by Bell Atlantic, CBT and USTA, an entity does not get to pick and choose when it wants to be a carrier.<sup>25</sup> The law does not countenance an entity claiming carrier status when

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(arguing that price squeezing is going on, presenting no proof or specific example); Metro One at 11-13; Excell at 13 (we note here that we have had a communication from Excell complaining about our pricing, similar to that asserted here in its comments). Of course, no attempt is ever made by commentators to prove the serious allegations they assert. Rather, it appears that the commentators subscribe to the “let’s fling it and see if it sticks” school of advocacy, where hopes of regulator empathy are counted on in *lieu* of proffered evidence.

<sup>22</sup> See CBT at 11 (“if a non-carrier directory assistance provider obtains access to directory assistance as an agent to a principal carrier, the non-carrier can not [sic] misappropriate that information to serve its own customers or the customers of another carrier”). And see U S WEST Comments at n.10 and discussion below at Section IV.C.

<sup>23</sup> For example, U S WEST allows a DA provider acting as an agent for multiple providers of CLECs/IXCs to purchase under a “multiple use” license where the charges are less than if each carrier represented by the DA provider purchased the information separately. Contrary to the suggestion of Metro One (at 12) and INFONXX (at 19-20), such action is not required by law or compelled by public policy. Rather, the decision around license terms associated with the provision of information appropriately is lodged, in the first instance, in the licensor.

<sup>24</sup> See Excell at 10-11; INFONXX at 6-12; LSSi at 10-14, 33.

<sup>25</sup> See Bell Atlantic at 5; CBT at 11-12; USTA at n.9.

that status confers a benefit (e.g., such as a right to receive information pursuant to Section 251(b)(3)) but eschewing that status when other carrier obligations are pressed upon it (e.g., obligations to contribute to the Telephone Relay Service (“TRS”) fund and the Universal Service Fund (“USF”) or to pay appropriate assessments for Local Number Portability (“LNP”) administration).

In any event, the Commission should not attempt to embellish upon the plain language of Section 251(b)(3) or plain “common carrier” jurisprudence by attempting to extend the right to directory listings to non-carriers through general statutory provisions such as Sections 201 and 202.<sup>26</sup> This is most particularly the case since, as the Commission itself has acknowledged<sup>27</sup> -- and as commentators here concede<sup>28</sup> -- the provision of third-party DA services is already robust and increasingly competitive. It most certainly does not need a “jump start” accomplished through what would be, at a minimum, a risky interpretation of Sections 201 and 202 in the particular context under consideration.

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<sup>26</sup> See GTE at 9 (“Congress has precisely spoken to this issue . . . and the Commission may not change this result by turning to the general obligations in Sections 201 and 202 to create new legal obligation[s]”).

<sup>27</sup> See note 28, infra.

<sup>28</sup> LSSi at 18-19 (“There has been significant competition and innovation in the directory assistance market, including third-party DA providers attempting to meet the changing and increasing demand for directory assistance services, particularly those enhanced with consumer-friendly features. . . . Moreover, it is becoming more apparent that the companies that are in the best position to offer DA services or even develop innovations to those services are not LECs, but rather third-party providers of DA.”).

B. Access To DA Listings Is **Not** Through Section 222

A number of commenting parties in this proceeding claim that the oral delivery of information is a “publication of a directory” that entitles them to purchase information for directory assistance purposes under the statutory provision associated with SLI -- a term peculiarly associated with directory publication. This argument -- while potentially beneficial to DA providers -- is neither supported by the statutory language nor the structure of the 1996 Act, which already addresses DA providers and their ability to access listing information. The “convergence” arguments pressed by these commentators disserve the law of statutory construction and do nothing whatsoever to further the public interest. The arguments only serve to advance the pecuniary interests of those proffering them.

Commentors arguing that the oral provision of an individual name, address or telephone number to a customer requesting assistance in securing the information is equivalent to the publication of a directory under Section 222 ignore that the critical activity associated with the right of access to SLI under that Section is not that the purchaser is engaging in a publication<sup>29</sup> or dissemination<sup>30</sup> of

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<sup>29</sup> See Teltrust at 9 (“A . . . DA provider may decide to publish information in a wide variety of formats.”). Commentors argue on both sides of the question of whether a publication is or is not taking place. See CBT at 7-8, GTE at 7-8 (all arguing that a “publication” is not taking place); but see ADP at 9; Teltrust at 9-10 (arguing that “publication by many means” is incorporated in the provisions of Section 222); Metro One at 4-5 (arguing that a publication occurs during the provision of DA

information, **but that the publication is “a directory in any format.”**<sup>31</sup> DA providers providing oral DA services are not engaging in the publication of a directory in any format, regardless of whether they are engaged in “publishing” or “disseminating” information.

The Commission is not free to engage in a Congressional novation of the provisions of Section 222 under some misguided notion that to do so would “elevate

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services), 9-11 (same and citing to Commissioner Furchtgott-Roth Statement at 4); INFONXX at 28-29.

It is probably fair to say that most persons, when they use the term “publish” don’t mean to encompass the oral delivery of information within the scope of the term. See CBT at 7 (the “oral provision of [SLI] is also contrary to the common use of ‘publish’”). On the other hand, lawyers (and many legislators are lawyers) use the term “publish” within the context of libel law to encompass the oral dissemination of information. See Metro One at 5; INFONXX at 29. Thus, such a dissemination might be included within the term “publish,” based on the circumstances. Given that Section 222(e) contains additional language after the word publish, i.e., of directories in any format, it seems fair to say that an “oral” publication was not contemplated.

<sup>30</sup> Teltrust at 10 (“The focus of the FCC’s examination should be the activity of disseminating subscriber listings to the public, not the form of publication.”).

<sup>31</sup> Compare CBT at 2 (“the medium used . . . is controlling as to whether [Section] 222(e) applies. . . [T]he operative term is ‘publishing directories,’ which should be contrasted with ‘directory assistance.’”). And see Teltrust at 9, who, while arguing it should get the benefits of Section 222(e), itself acknowledges that the section applies to “kinds of **directories**” (emphasis added) which would include “paper telephone directories” that might in the future give way to “electronic directories accessible via the Internet”; and Metro One at 3-4, 9-10 who acknowledges that the formatting activity must involve publishing directories but who argues that DA services fit within that category. Apparently, Metro One sees no conflict between its position and the “ordinary and natural meaning” of the term “directory”. Id. at 4. See also INFONXX at 27-28 (arguing that DA is a publication of a directory).

form over substance.”<sup>32</sup> Moreover, the fact that the SLI offering would provide them information insufficient in scope to provide a complete DA offering, i.e., nonlisted information,<sup>33</sup> buttresses the argument that the Section 222(e) offering was not contemplated as one to support directory assistance providers.

C. Restrictions On Use Of Listing Information

In the SLI Order, the Commission made clear that licensors of that information were free to restrict the use of the information to the publication of directories. Indeed, the law of licensing is that the licensor of information is free to impose reasonable terms and conditions on use, as well as charge for disparate uses if desired.

Telegate is simply wrong as a matter of law when it argues that if “information is available for directory publication, it should also be available for the provision of DA.”<sup>34</sup> Telegate is also incorrect in its assertion that a DA provider could purchase customer information under the provisions associated with publication of directories and then use it to provide DA.<sup>35</sup> Whether the multiple use would be permissible, of course, is a decision of the licensor of the information who might -- but is not compelled to -- provide the information as a multiple use

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<sup>32</sup> Teltrust at 10.

<sup>33</sup> See INFONXX at 12 n. 16; Teltrust at n.36.

<sup>34</sup> Telgate at 5.

<sup>35</sup> Id. And see Metro One at 12 (arguing that a DA provider should be able to use listing information purchased under a single price for both DA and directory publications).

offering.<sup>36</sup>

And commentators, such as Excell and INFONXX are wrong when they argue that they have a lawful right to purchase information as an agent for a provider of “telephone exchange” or “telephone toll” service, but have no obligation to abide by the scope of the agency relationship.<sup>37</sup> Such arguments make a mockery out of sound legal analysis and disserve any sound public policy objectives.

The Commission should reject those arguments asking that it essentially wipe out the law of contracts in this area and permit purchases of listing information to use that information without regard to the law of agency or of

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<sup>36</sup> See Bell Atlantic at 6-7. Arguments such as those proffered by LSSi -- that those possessing customer listings should not be able to restrict the uses to which the information is put -- (LSSi at 3, 20-21, 25 (complaining that current restrictions allow only for single uses and prohibit such acts as “the identification of customers for potential customers to receive marketing information, directory compilation, sales, telemarketing, and numerous other uses”) fly in the face of well-established contractual principles associated with the law of licensing. Furthermore, an entity’s customer list is certainly not something regarding which the entity should be deprived of a right to use for marketing, even if marketing restrictions are imposed on third-parties being provided with similar information. The expectations of privacy are patently different between the two contexts. See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752, 8770 ¶ 34 (1992); and see CPNI Order, 13 FCC Rcd. at 8176 ¶ 162.

<sup>37</sup> Compare the comments of those subscribing to the “I want my cake and want to eat it too” school of advocacy, such as Excell (at 5-6), arguing that it should be able to secure directory listing information from LECs as an agent for carriers entitled to purchase under Section 251(b)(3), but (at 7-8) then arguing that the law of agency is “nonsensical” when it comes to restricting the use of the information; INFONXX (at 17), acknowledging that a competitive DA provider requesting access to LECs’ lists should be deemed “the act of the carrier whose subscribers the DA provider will be serving” but than arguing (at 18-19) that it should be able to use the purchased information far beyond the scope of the agency that supported the purchase.

licensing. The fact that a statute does not proscribe additional uses<sup>38</sup> in no way constrains the right of the licensor to establish commercially reasonable restrictions.

Commentors have failed to demonstrate that the imposed-restrictions deviate so radically from commercially-reasonable licensing provisions that they should be struck down as unreasonable. Moreover, it is fair to say that if the use of their property was being demanded along the same terms they demand here (i.e., “through establishment of a clear policy of unfettered ability to use data that is purchased by an agent of a competitive carrier for the benefit of any party”),<sup>39</sup> they would be the first to argue interference with contract and with the rules of licensing.

The lesson from the above: The Commission already got it right when it held that the DA market in the United States is already vigorously competitive. In many cases, that competitive environment began even before the mandates of the 1996 Act. Those mandates simply ensure that the competition will simply increase and continue to grow more robust. There is no need for further Commission intervention.

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<sup>38</sup> See Teltrust at 4 (arguing that the Commission is right in its observation that Congress did not explicitly prohibit the provision of directory listing information to non-carrier DA providers, implying that that fact means it would be okay for the Commission to mandate such access); INFONXX at 20 (arguing that the Act does not proscribe additional uses of DA information, so it would be lawful for the Commission to mandate that such uses be permitted).

<sup>39</sup> Excell at 9.

V. ACCESS TO NON-LOCAL LISTINGS

U S WEST agrees with all those commentators who argue, persuasively (sometimes based on the language of the National DA Order), that the Commission should not require LECs to act as clearinghouses for non-local listings purchased from other carriers or data brokers.<sup>40</sup> As commentators argue, in the National DA Order, the Commission declined to require U S WEST to provide non-local nationwide data to others because “U S WEST [did] not exercise monopoly power with respect to obtaining the telephone numbers of subscribers outside its region, [so the Commission found] no reason to require U S WEST to provide these numbers to unaffiliated providers of nonlocal directory assistance service.”<sup>41</sup> Consistent with that holding, the Commission should not require that LECs provide non-local, nonregional directory listings to third parties since those third parties have the same opportunity to secure the information directly on their own behalf from the data source.<sup>42</sup>

Just as the Commission has determined that LECs should not have to operate as “clearinghouses” for the provision of SLI information,<sup>43</sup> the Commission should not require that they act as such with respect to non-customer data readily

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<sup>40</sup> CBT at 13-14; USTA at 7-8 (not referencing Order).

<sup>41</sup> U S WEST NDA Order ¶ 33. And see GTE at 11-12.

<sup>42</sup> See GTE at 10 (noting that it purchases directory listings from “companies such as Volt-Delta, LSSI, and others”), 12 (noting that Metromail, Dun & Bradstreet and RR Donnelly are sources of directory listings).

<sup>43</sup> National DA Order ¶ 55.

available on the open market. Such an obligation would impose a burden on them not imposed on other providers of NDA.<sup>44</sup> Moreover, to the extent that non-LEC uses are an inherent component of a LEC's purchase/use of the listings, it is obvious that the mandate would affect the general market dynamics associated with the sales of listings. Clearly, sales that would have otherwise been made by list brokers will be foregone.<sup>45</sup> And, it is reasonable to assume that the offeror of the listings will charge the LEC more for the original purchase to recoup some of those foregone revenues.<sup>46</sup> LECs should not have to undergo this additional financial obligation with the attendant need to devise a "cost recovery" scheme to be made whole.

## VI. CONCLUSION

For all the above reasons, the Commission should leave the market to its own devices with respect to any convergence between directory publishing and directory assistance. However, it should find that Internet publications can easily be categorized as Internet "directories," such that the publishers of such directories are entitled to purchase SLI from those obligated to provide it. While certain terms and

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<sup>44</sup> Compare GTE at 14 ("requiring LECs to provide third-party information would impose unique and unwarranted burdens on LEC provision of nationwide directory assistance offerings -- burdens that would not be imposed upon other providers of such services, such as AT&T and MCI WorldCom").

<sup>45</sup> See LSSi at 24 ("requiring LECs to provide access to [non-local] listings would devalue the efforts of competitors that have already gone through the effort to compile the listings, allowing providers that have not exerted the effort essentially to obtain a free-ride from NDA providers and offer a competing service[ ] with [much] less effort.").

conditions might be appropriate with respect to Internet directory publications that are not necessary with respect to print directories, the differences in the terms and conditions would not necessarily render the circumstances discriminatory or unreasonable.

Furthermore, contrary to the advocacy of some, the Commission most assuredly should not countenance the purchase of information (e.g., directory listings under Section 251(b)(3)) permissible solely because of an agency relationships and then endorse the abrogation of the contractual rights/obligations associated with such relationship. Nor should it seek to employ general statutory provisions, i.e., provisions in existence prior to the 1996 Act, to extend rights to entities where Congress itself did not extend such rights in specific provisions covered by the 1996 Act.

Finally, there is no sound reasons to require LECs to provide non-local, non-regional directory listings available to third parties. Not only do the LECs in possession of such information come to it through purchase agreements generally available to others but mandating that LECs become the primary source of the information upsets the current market dynamic and the licensing arrangements reasonably anticipated by those entities in the business of providing the listings.

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<sup>46</sup> Compare U S WEST Reply Comments, CC Docket No. 96-98, File No. CCBPol 97-4, filed May 6, 1997 at 15.

Such a “dual whammy” to the current practices associated with the availability of listings is unwarranted and contrary to sound market and public policy.

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October 28, 1999

## CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused 1) the foregoing **REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be filed electronically with the FCC by using its Electronic Comment Filing System, 2) a courtesy copy of the **REPLY COMMENTS** to be served, via hand delivery, upon the persons listed on the attached service list (those marked with an asterisk), 3) a copy of the **REPLY COMMENTS** to be served, via first class United States mail, postage pre-paid, upon all other persons listed on the attached service list, and 4) a copy of the **REPLY COMMENTS** to be served, via hand delivery, upon the following entity:

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