

ORIGINAL

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE: 44-171-495-5655
TELEFAX: 44-171-495-3101

TELEFAX: (202) 662-6291
TELEX: 89-593 (COVLING WSH)
CABLE: COVLING

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-512-9890
TELEFAX: 32-2-502-1598

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January 18, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Re: CC Docket No. 99-273 – Provision of Directory Listing Information
Ex Parte Communication

Dear Ms. Salas:

We write on behalf of INFONXX, Inc. ("INFONXX"), a competitive directory assistance ("DA") provider, in connection with the Commission's consideration of rules to implement Section 251(b)(3) of the Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"). In prior filings in this proceeding, INFONXX and other commenters have urged the Commission to adopt pro-competitive, pro-consumer rules ensuring that competitive DA providers have nondiscriminatory access to directory listing information controlled by local exchange carriers ("LECs"). Among other things, INFONXX has explained that a competitive DA provider that is an agent of a competitive local exchange carrier ("CLEC") should be entitled to obtain LECs' directory listing information to the same extent and on the same terms and conditions as the CLEC principal obtains "nondiscriminatory access to . . . directory assistance" pursuant to Section 251(b)(3). This position is supported by Commission precedent and traditional agency law.¹ We write now to clarify that a competitive DA provider that obtains directory listing information as a CLEC's agent should pay for the information based on the LEC's cost of maintaining, compiling, and transferring the data, not based on the information's value where it will be put to multiple use.

Some may suggest that a LEC can charge competitive DA providers for directory listing information based on the LEC's perception of the information's *value* to the DA provider, who may use the information in the service of more than one CLEC once the information is part of the DA provider's central database. However, the Commission consistently has found that cost, not perceived value, is the basis upon which a LEC may charge competitors for access. A

¹ See INFONXX Comments in CC Docket No. 99-273 at 13-18 (Oct. 13, 1999); INFONXX Reply Comments in CC Docket No. 99-273 at 6-7 (Oct. 28, 1999).

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Ms. Magalie Roman Salas
January 18, 2000
Page 2

LEC's costs to compile and transmit directory listing information are the same regardless of the use or uses to which a competitive DA provider puts that information.

Directory Information Pricing Should Be Based On Cost, Not Value

The Commission already has rejected the argument that multiple use by a purchaser of listing information entitles a LEC to charge higher rates for that information. In its *Third Report and Order* in the subscriber list proceeding, the Commission refused to adopt a value-based pricing methodology for subscriber list information ("SLI").² The Commission specifically rejected the "argument that carriers should be permitted to charge higher rates for subscriber list information just because the independent publisher intends to use them in multiple directories."³ The Commission correctly observed that carriers cannot copyright SLI, and thus carriers are not analogous to software manufacturers that may charge extra for copyrighted software programs which a customer installs on multiple computers.⁴ In construing Section 222(e), the Commission settled on SLI rates that allow LECs to recover the incremental costs of providing the SLI to directory publishers plus a reasonable allocation of common costs and overheads.⁵ While the Commission rejected a methodology that was based solely on incremental costs, its solution was nonetheless cost-based.

In its first *Report and Order* implementing the Local Competition Provisions of the 1996 Act, the Commission also adopted "a cost based methodology for states to follow in setting interconnection and unbundled element rates."⁶ The Commission concluded that a cost-based approach was the approach for setting prices that best furthered the pro-competitive goals

² Third Report and Order, *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No 96-115, FCC 99-227, ¶¶ 83-90 (rel. Sept. 9, 1999) ("Third Report and Order").

³ *Id.*, ¶ 90.

⁴ *Id.* The Commission cited *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 362 (1991), for the proposition that carriers cannot obtain copyright protection for SLI that has been published in their own directories. See Third Report and Order, ¶ 90 n. 209. That proposition is the sum and substance of the *Feist* opinion. Any suggestion that *Feist* supports a LEC's ability to charge DA providers more for multiple use of directory listing information totally misreads the case. In *Feist*, a regional directory publisher defended its use of directory listing information taken from a LEC's own white pages directory on the ground that the information is beyond copyright protection. 499 U.S. at 344. The Supreme Court agreed. The Court clearly articulated that facts are not copyrightable and that originality is a prerequisite to copyright protection. *Id.* at 344-45, 351-54. The Court concluded that the LEC could not copyright the factual information in its white pages and that its alphabetical listing was not original so as to qualify for protection. *Id.* at 363-64. Nowhere in *Feist* does the Court address the issue of what the LEC might have charged the publisher had the LEC sold its information. Furthermore, the case provides no basis for distinguishing between directory publishers and DA providers that seek to use factual information obtained from a LEC.

⁵ Third Report and Order, ¶ 92.

⁶ Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Implementation of Sections 3(n) and 332 of the Communications Act*, CC Docket No. 96-98, FCC 96-325, ¶ 432, 61 Fed. Reg. 45476, 45542 (rel. Aug. 8, 1996).

Ms. Magalie Roman Salas
 January 18, 2000
 Page 3

of the 1996 Act.⁷ Moreover, the Commission stated that it believed "that a forward-looking economic cost methodology enables incumbent LECs to recover a fair return on their investment, *i.e.*, just and reasonable rates."⁸ Nothing in the current proceeding justifies a departure from this pro-competitive approach or from the Commission's long history of using cost, not value, as a basis for pricing access.⁹

Even under a cost-based approach, the 1996 Act's pro-competitive goals cannot be fulfilled unless the prices that LECs charge competitive DA providers for directory listing information truly reflect the LECs' incremental costs. In contrast to prices of \$0.05/listing and higher that some LECs are charging or propose to charge competitive DA providers, there is an ever-growing body of evidence that the actual cost to LECs for compiling and transmitting listing information is much, much lower – as low as \$0.001/listing.¹⁰ Thus, in implementing a cost-based pricing methodology, the Commission should ensure that competitive DA providers pay prices based on LECs' actual costs, not based on LECs' perceived value of the information.

Value-Based Pricing Would Lead To Inequitable Results

Any value-based pricing scheme would require competitive DA providers to unfairly pay varying rates depending on the size and number of principals under whose authority they obtain directory listing information. For example, if a competitive DA provider is the agent of a nationwide carrier, such as AT&T, and obtains a LEC's directory listing information, it could use that information nationwide in the service of its single principal. However, if a competitive DA provider is the agent of several smaller regional IXCs, it would pay much more to use directory information in the service of those several principals, yet the information would be disseminated in a smaller area than with a single, nationwide principal. Also, a value-based pricing scheme would unfairly discriminate between a competitive DA provider that serves several CLECs and a CLEC that self-provisions DA services. A competitive DA provider would pay much more for the same information than a single CLEC would pay under a value-based scheme, despite the fact that the cost to the LEC providing the information would be the same in

⁷ *Id.*, ¶¶ 425-427, 61 Fed Reg. at 45541.

⁸ *Id.*, ¶ 505, 61 Fed. Reg. at 45553.

⁹ See Memorandum Opinion and Order, *In re AT&T Long Lines Dept.*, 61 FCC 2d 587, 607 (1976)

("[A]scertainment of the actual cost of providing services underlies the requirement that rates be just, reasonable, and nondiscriminatory.").

¹⁰ See Excell Agent Services, L.L.C. Comments in CC Docket No. 99-273 at 13, n. 20 (Oct. 13, 1999) (citing Texas PUC determination that SWBT's cost-based rate is \$0.0011/initial electronic listing); Metro One Telecommunications Comments in CC Docket No. 99-273 at 13, n. 27 (Oct. 13, 1999) (citing state public utility commission proceedings establishing LEC costs as low as \$0.001/listing); MCI WorldCom Comments in CC Docket 99-273 at 8-9, n. 5 (Oct. 13, 1999) (citing testimony of SWBT employee that costs are \$0.0064/lising (initial load), \$0.0026/listing (daily update via tape), and \$0.0019 (daily update via e-file transfer)); Consolidated Comments of INFONXX, Inc. on Petitions for Forbearance of SBC Communications, Inc., Bell Atlantic and BellSouth, CC Docket No. 97-172, at 8-9, attachment A (Nov. 29, 1999) (citing Bell Atlantic tariff in New York that sets price of directory listing information for entire state at initial price of \$83,341 and monthly fee of \$3,866 for daily updates).

Ms. Magalie Roman Salas
January 18, 2000
Page 4

both cases.¹¹ Where a competitive DA provider offers DA service to more than one carrier in a region, as INFONXX does, it would be wasteful and inefficient to force the DA provider, as each carrier's agent, to pay multiple times for access to the same information.¹²

* * * * *

In accordance with the foregoing, INFONXX urges the Commission to reject any contention that competitive DA providers obtaining directory listing information under Section 251(b)(3) as agents of carrier principals should pay higher rates for multiple use. Rather, the Commission should require a cost-based approach to pricing that would further the 1996 Act's pro-competitive goals and that would be simple to apply.

Please address any questions to the undersigned.

Sincerely,



Gerard J. Waldron
Mary Newcomer Williams
Russell Jessee*
COVINGTON & BURLING
1201 Pennsylvania Avenue N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000 (t)
(202) 662-6391 (f)

Counsel to INFONXX

* Member of the Bar of the Commonwealth of Virginia
Not admitted to the Bar of the District of Columbia

cc: Mr. Robert Atkinson
Mr. Greg Cooke
Mr. Dennis Johnson
Mr. Kurt Schroeder
Ms. Robin Smolen

¹¹ See Ex Parte Letter to Ms. Magalie Roman Salas, Secretary, FCC, from Excell Agent Services, L.L.C., CC Docket Nos. 99-273 and 97-172, Dec. 9, 1999, at 2-3.

¹² See INFONXX Comments in CC Docket No. 99-273 at 19-20 (Oct. 13, 1999); INFONXX Reply Comments in CC Docket No. 99-273 at 7 (Oct. 28, 1999).