

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Provision of Directory Listing Information)	
Under the Telecommunications Act of 1934,)	CC Docket No. 99-273
As Amended)	
)	
Telecommunications Relay Services)	
And Speech-to-Speech Services for)	CC Docket No. 98-67
Individuals with Hearing and Speech)	
Disabilities)	
)	
TO: The Commission)	

COMMENTS OF INFONXX, INC.

InfoNXX, Inc. ("InfoNXX"), an independent directory assistance ("DA") provider, by its attorneys, urges the Commission not to allow consideration of a new and unrelated matter to delay the resolution of important questions regarding competitive access to directory listings. Telegate, Inc. ("Telegate") has proposed a presubscription plan for the 411 dialing code that raises a number of important questions that may be worthy of full and lengthy examination, but such unrelated issues clearly do not belong in a proceeding devoted entirely to resolving questions about access to directory listings controlled by incumbent local exchange carriers ("ILECs"). Independent DA providers have been waiting for more than seven months for the Commission to act on CC Docket No. 99-273, and Telegate should not be allowed to further delay the proceeding with unrelated issues. Telegate raises a number of interesting questions about how to ameliorate the unfair advantages that accrue to ILECs because they control the 411 dialing code. However, rather than tack on consideration of the 411 proposal to

the Directory Listings Proceeding in CC Docket No. 99-273 as an afterthought, the Commission should create a separate proceeding to fully study and examine the proposal.

I. TELEGATE'S 411 PROPOSAL DOES NOT PROPERLY BELONG IN THE DIRECTORY LISTINGS PROCEEDING.

A. The Directory Listings Proceeding Is Narrowly Focused On Access To ILECs' Directory Listings By Competitive DA Providers.

The entire and narrow focus of the Notice of Proposed Rulemaking in the Directory Listings Proceeding¹ ("Notice") is an inquiry into various statutory bases for competitive DA providers and Internet directory providers to gain access to directory listings over which LECs exert bottleneck control. Specifically, the Notice sought comment on whether Section 222(e)² or Section 251(b)(3)³ allows a competitive DA provider to obtain directory listings.⁴ The Notice also asked if the Commission should require LECs to provide competitive DA providers with access to directory listings under its authority in Sections 201 and 202⁵ to prevent unjust practices and unjust charges as well as unreasonable discrimination.⁶ Finally, the Notice asked if LECs should be required to provide access to nonlocal directory listings that they obtain as well as to local directory listings.⁷ Any mention of – let alone discussion of or inquiry into – the 411 dialing code is conspicuously absent from the Notice.

¹ Notice of Proposed Rule Making, *In re Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, 14 FCC Rcd. 15550 (1999) ("Notice").

² 47 U.S.C. § 222(e).

³ 47 U.S.C. § 251(b)(3).

⁴ See Notice at ¶¶ 180, 184-185.

⁵ 47 U.S.C. §§ 201 & 202.

⁶ See Notice at ¶¶ 190-191.

⁷ See *id.* at ¶¶ 193-195.

B. Telegate Attempts To Shoehorn Its Proposal Into The Directory Listings Proceeding Through A Mischaracterization Of The Directory Listings Proceeding As Encompassing ILEC Bottleneck Control Of The 411 Dialing Code.

Clearly, the impetus for the Commission's inquiry in the Directory Listings Proceeding is the monopoly control that ILECs exert over directory listings. ILECs control the most complete and accurate compilations of directory listings. In order for independent DA providers to provide true competition in the DA marketplace, they must have nondiscriminatory access to ILECs' directory listings at reasonable rates. Consequently, the Notice explores various avenues for access to ILECs' directory listings.

Telegate, however, purposefully misconstrues the scope of the inquiry as encompassing all barriers to competition in the DA marketplace in order to get its 411 presubscription proposal before the Commission. Telegate attempts to justify the injection of its proposal into the Directory Listings Proceeding by stating that "[t]he NPRM in this docket creates a superset of rules intended to promote competition in the provision of directory assistance."⁸ Earlier in its March 10 *ex parte* filing, however, Telegate asks the Commission to "eliminate *another barrier* to competition – the ILECs' exclusive control over 411, the universally recognized DA dialing code."⁹ Telegate also states that "the Commission must do *more than it proposed*" in the Directory Listings Notice and that it "must take *further steps* in order to promote the development of a competitive DA industry."¹⁰ In effect, Telegate recognizes that its 411 proposal is not within the narrow scope of the Directory Listings

⁸ Telegate March 10 *ex parte* at 21.

⁹ *Id.* at 2 (emphasis added).

¹⁰ *Id.* at 3-4 (emphasis added).

Proceeding. Yet Telegate expresses surprise that no party commented on its 411 proposal in reply comments in the proceeding.¹¹ Likely, no one commented on Telegate's 411 proposal because parties to the Directory Listing Proceeding saw the proposal for what it is: a blatant attempt to shoehorn 411 presubscription into a proceeding concerned solely with access to directory listings.

The Administrative Procedure Act provides that a notice of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."¹² "[T]he comments of other interested parties do not satisfy an agency's obligation to provide notice."¹³ Now, the Commission has sought to provide subsequent notice of and an opportunity to comment on Telegate's proposal, as it must do if the proposal is to be considered properly.¹⁴ However, the Commission's final rule in the Directory Listings Proceeding still must be a "logical outgrowth" of the proposals contained in the Notice.¹⁵ Given the total absence of any mention of the 411 dialing code in the Notice, it is difficult to see how any rule related to Telegate's proposal that the Commission would promulgate could be a logical outgrowth of the Notice. Even with the Commission's subsequent notice of Telegate's proposal, the substance of the proposal – 411 presubscription – is too unrelated to the subject of the

¹¹ *Id.* at 19.

¹² 5 U.S.C. § 553(b)(3).

¹³ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986).

¹⁴ *See, e.g., Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991); *National Black Media Coalition*, 791 F.2d at 1023; *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

¹⁵ *See, e.g., Shell Oil Co.*, 950 F.2d at 750-751; *National Black Media Coalition*, 791 F.2d at 1022; *AFL-CIO*, 757 F.2d at 338.

Directory Listings Notice – access to directory listings – to legitimately form the basis of a rule in this proceeding.

C. Telegate Raises A Number Of Profound Questions That Need Further Study And Extensive Consideration In Their Own Rulemaking.

Despite the clear fact that Telegate's 411 proposal is outside the scope of the Directory Listings Proceeding, Telegate raises a number of profound questions about a remedy for the ability of ILECs to stifle competition in the DA marketplace because they control the 411 dialing code. The list of questions is long and wide-ranging, and InfoNXX discusses many of them in more detail below in Section III. However, the multitude and diversity of questions raised by the proposal demonstrate that the Commission must consider Telegate's 411 proposal in its own rulemaking proceeding. Telegate's 411 proposal cannot be considered adequately at this late stage of the Directory Listings Proceeding. Rather, the Commission should provide ample time for further study and extensive debate in a new, separate proceeding.

D. The Most Important Aspect Of The Directory Listings Proceeding Is To Facilitate Competition By Fostering Access To ILECs' Directory Listings.

InfoNXX and other competitive DA providers have been kept waiting for more than seven months for an order resolving the specific issues raised in the Directory Listings Notice, and their quest for nondiscriminatory access to LECs' directory listings at reasonable rates has continued for a number of years. Indeed, InfoNXX originally sought access to LECs' directory listings under Section 222(e) but had that modest request shifted to this proceeding because of issues of "notice" and "late filed" *ex partes*. In light of the *UNE Remand Order*, the Commission now is relying on the market, including independent DA providers, to provide

directory assistance services to CLECs and other competitors of ILECs.¹⁶ However, competition in the DA marketplace cannot be effective and efficient if independent DA providers do not have access to directory listings of the same quality as their LEC competitors. Every delay in granting independent DA providers nondiscriminatory access to directory listings is another delay in the advent of effective DA competition.

E. Whatever The Commission Does Regarding Telegate's Proposal, It Should Not Delay Issuing A Report And Order Resolving The Actual Questions Raised In The Directory Listings Proceeding.

Regardless of how the Commission chooses to deal with Telegate's 411 proposal, it should not delay issuing an order soon that resolves questions about independent DA providers' nondiscriminatory access to directory listings at reasonable rates. InfoNXX believes that if the Commission is going to develop Telegate's 411 proposal, the best course is to issue a further notice of proposed rulemaking in CC Docket No. 99-273 or initiate a separate proceeding. Also, the Commission could determine on the basis of these comments that the proposal does not warrant further development at this time. Whichever route it pursues, the Commission should not allow Telegate to hinder the development of a robust DA marketplace and further delay nondiscriminatory access to directory listings by engendering debate on a proposal that clearly has no place in the Directory Listings Proceeding.

¹⁶ See Third Report and Order, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, at ¶¶ 441-442 (1999) ("*UNE Remand Order*").

II. IF AND WHEN THE COMMISSION CONSIDERS THE MERITS OF THE PROPOSAL, IT MUST RECOGNIZE THAT 411 PRESUBSCRIPTION SHOULD APPLY ONLY TO WIRELINE ILECS.

While Telegate's 411 proposal should not delay the resolution of access to directory listings issues, if and when the Commission considers the proposal, it must be clear that only ILECs should have to implement 411 presubscription. Indeed, Telegate states that its proposal seeks to remedy "ILECs' exclusive control over 411."¹⁷ Moreover, the advantages to ILECs of controlling the 411 dialing code are increasing because many ILECs now are offering national directory assistance ("NDA") via 411.¹⁸ However, both wireless carriers and CLECs already operate in the context of competition and, thus, have no control that warrants a remedy over the 411 dialing code.

A. The Proposal Should Apply Only To Wireline Carriers.

Only wireline carriers can be said to control the 411 dialing code by virtue of their monopoly position. In contrast to the traditional model of one LEC offering voice service over wirelines into a community's residences and businesses, a number of wireless carriers can provide service to a mobile telephone. Wireless telephony is a fully competitive industry.¹⁹ And

¹⁷ Telegate March 10 *ex parte* at 2.

¹⁸ See Memorandum Opinion and Order, *In re Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of Directory Assistance, Petition of U S WEST for Forbearance*, CC Docket No. 97-172, FCC 99-133 (1999); Memorandum Opinion and Order, *In re Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, CC Docket No. 97-172, FCC 99-2990 (1999); Memorandum Opinion and Order, *In re Petitions of BellSouth, SBC Communications, Inc. and Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, CC Docket No. 97-172, FCC 00-514 (2000).

¹⁹ See Fourth Report, *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 – Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services*, 14 FCC Rcd. 10145, 10148-49, 10163-64 (1999).

while mobile telephones utilize the 411 dialing code, DA simply is part of a bundle of services that a wireless customer purchases from competing carriers. Indeed, it was on this basis that Congress declared in the Telecommunications Act of 1996 that wireless carriers are not required to provide equal access to long distance companies because customers may choose between carriers providing various long distance options.²⁰ Consequently, no principle of communications regulation or safeguarding competition supports extending 411 presubscription to wireless carriers, should the Commission ever implement such a program.

B. The Proposal Should Apply Only To ILECs.

As with wireless carriers, when a customer purchases wireline service from a CLEC, the customer purchases DA as a bundle of services that the CLEC offers. The customer purchases DA in a competitive environment, and the CLEC cannot be said to "control" the 411 dialing code because it does not control the primary market for wireline service. However, ILECs, despite the presence of some CLEC competition, clearly control the primary market for wireline service. Thus, should the Commission implement 411 presubscription to remedy control over the 411 dialing code, the remedy needs to be applied only to ILECs.

III. THE PROPOSAL RAISES A NUMBER OF IMPORTANT QUESTIONS THAT MUST BE RESOLVED BEFORE ANY 411 PRESUBSCRIPTION PLAN CAN BE IMPLEMENTED.

Telegate's 411 proposal, though offered in the wrong docket, presents a possible remedy to one of the consequences of an ILEC's monopoly position. Especially now that in many areas the 411 dialing code allows ILEC customers to obtain not just local telephone numbers but any listed number in the country, the need for a mechanism to foster competition is

²⁰ See 47 U.S.C. § 332(c)(8).

increasingly important. However, Telegate's 411 proposal should be viewed as only a first step toward implementing a remedial mechanism. The proposal raises more questions than can be adequately answered at this time and in this proceeding, including questions in the following areas:

- Costs. How accurate are Telegate's cost forecasts both for equipment/engineering and balloting/allocation? Is opening the wireline ILEC portion of the 411 DA market to competition worth the large costs it will require? Assuming the DA market is worth \$3 billion annually, what portion of that market will be opened to competition through this proposal?
- Time to Implement. Given that long distance presubscription took years to implement, what is a *realistic* time frame for implementation?
- Balloting. How will the balloting procedure be structured so as not to disadvantage smaller companies that have less access to capital and that do not and cannot do nationwide advertising? How will the influence of deep-pocketed companies be mitigated in the balloting procedure?
- Allocation. Without a reliable indicator of market share, such as usage minutes in the long distance context, how will nonrespondents be allocated among competing DA providers? The DA market has no accurate method to determine market share, but this metric is crucial to fairly allocating customers that do not choose a provider.
- Billing and Collection. How will competing DA providers actually bill customers, especially if an ILEC refuses to include the DA charges on customers' bills? Will ILECs have to be required to provide billing and collection services in order to keep the costs of implementation reasonable?
- Databases. Are there going to be enough query points throughout the country to avoid excessive connection costs to DA providers?
- Impacts on Small Businesses. How will small businesses be able to realistically compete in an area that will require large advertising expenditures? What is the basis for a fair allocation formula? To what extent will higher transport costs and network expenses affect small businesses' ability to compete? Will smaller DA providers be able to interconnect at one access point in each ILEC's region or at all ILEC central offices? If ILECs are not required to provide one central access point, small DA providers will be at a significant disadvantage to large interexchange carriers that already have central office interconnection points in place for their long distance businesses.

Some of these questions may be answered through more research and investigation. The answer to others may only be guessed at now. What this indicates is that the proposal needs further review and that it cannot adequately be considered in the Directory Listings Proceeding.

CONCLUSION

In accordance with the foregoing, InfoNXX urges the Commission not to allow consideration of Telegate's unrelated 411 proposal to delay issuance of an order in CC Docket No. 99-273 to resolve questions about independent DA providers' access to directory listings. If the Commission is to develop the 411 proposal, it should do so in a separate proceeding to allow for full and lengthy examination.

Respectfully submitted,

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