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COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW WASHINGTON, DC  
WASHINGTON, DC 20004-2401 NEW YORK  
TEL 202.662.6000 LONDON  
FAX 202.662.6291 BRUSSELS  
WWW.COV.COM SAN FRANCISCO

ALFRED H. MOSES  
TEL 202.662.5196  
FAX 202.778.5196  
AMOS@COV.COM

June 27, 2000

BY HAND DELIVERY



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

RECEIVED  
JUN 27 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*Re: CC Docket No. 96-115, Telecommunications Carriers' Use of Customer Proprietary Network and Other Customer Information; CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 99-273, Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*

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 provide for access to directory listing information pursuant to the Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"). This letter addresses matters that have been raised in our discussions with the staff of the Network Services Division of the Common Carrier Bureau earlier this month.

Call Completion

The question arose whether InfoNXX has the ability to pass through Caller-ID information as it engages in call completion after giving the calling party the requested number. The answer is that InfoNXX has the ability to pass through that information and frequently does, but Caller-ID information does not pass through in all circumstances, because in some circumstances, the carrier who transports the call to the end destination is unable to accept or pass the information.

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### Rates for Directory Listings

Section 251(b)(3) requires local exchange carriers ("LECs") to provide competing carriers with "nondiscriminatory access" to directory assistance ("DA") and directory listing information. InfoNXX and others have explained in their comments that independent DA providers are entitled to this nondiscriminatory access when they offer call completion and/or when they are agents of competing carrier principals.<sup>1</sup> The Commission has determined that "nondiscriminatory access" as used in § 251(b)(3) means that a providing LEC must provide access that "(a) does not discriminate between or among requesting carriers in rates, terms, and conditions of access; and (b) is equal to the access that the providing LEC gives itself."<sup>2</sup> Thus, § 251(b)(3) tells LECs *what* they must do – provide nondiscriminatory access – and the Commission's interpretation tells LECs *how* they must provide access – without discrimination between carriers. Therefore, pursuant to part (a) of the definition, any DA provider that is found to be entitled to directory listings under § 251(b)(3) must be able to receive those listings at the same rates that a LEC currently charges to carriers such as AT&T pursuant to § 251(b)(3).

Part (b) of the Commission's definition of nondiscriminatory access contains the concept of imputed rates, a safeguard which means that *at minimum* the access a LEC provides to other carriers is no less favorable than what is provided to itself. The difficulty with imputation in this context – as InfoNXX, Excell, and others have explained in this proceeding – is that LECs are not developing rate structures for providing directory listings to themselves. Instead, they are "reverse engineering" their accounts to reach artificial prices. When these circumstances render the second part of the Commission's definition of nondiscriminatory access meaningless, the Commission must rest its review on whether the carrier discriminates between or among parties in offering rates, terms, and conditions of access. Thus, the relevant inquiry is what rates, terms or conditions are requesting carriers receiving directory listing information. The Commission in its rules should require that DA providers obtain access to listing information at these same rates.<sup>3</sup>

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<sup>1</sup> See, e.g., InfoNXX Comments in CC Docket No. 99-273 at 7-12, 13-18 (Oct. 13, 1999) ("*InfoNXX Comments*"); InfoNXX Reply Comments in CC Docket No. 99-273 at 6-7, 8-10 (Oct. 28, 1999) ("*InfoNXX Reply Comments*").

<sup>2</sup> Second Order on Reconsideration, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-227, ¶ 125 (rel. Sept. 9, 1999) (citing Second Report and Order, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 19392, ¶ 101 (1996)). See *id.* ¶ 128 (affirming definition of "nondiscriminatory access").

<sup>3</sup> This analysis is consistent with – and gains further support from – §§ 201 and 202 of the Act, which govern the reasonableness of all rates charged in connection with communications services. Section 201(b) requires just and reasonable rates and § 202(a) prohibits rates that are unreasonably discriminatory. These sections governing the Commission's general rate regulation authority apply to rates under § 251, whether or not one of its specific provisions refers to "reasonable" rates and whether or not their authority is specifically invoked. As the United States Supreme Court made clear in *AT&T Corp. v. Iowa Utilities Board*, "the grant [of rulemaking authority] in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251, and 252, added by the Telecommunications Act of 1996." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999); see *id.* at 385 ("We hold . . . that the Commission has jurisdiction to design a pricing

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**Scope of Agent's Ability To Use Directory Listings**

A majority of commenters in this proceeding have endorsed (or at least accepted) that non-carrier DA providers are entitled to nondiscriminatory access to directory listings pursuant to § 251(b)(3) as agents of carriers covered by that section.<sup>4</sup> However, several commenters also argue that an agent's use of the listings that it obtains on behalf of a principal must be limited to the service of that particular principal.<sup>5</sup> In determining the extent of an agent's use of directory listings obtained on behalf of a carrier principal, the Commission should not interfere with the contractual arrangements between requesting CLECs and providing ILECs and between CLECs and their agents, and it should not ignore the practical constraints on competitive DA providers.

First, the Commission should not interfere with the contractual framework governing the market for directory listings but simply should have rules that recognize those relationships. With respect to directory listings obtained under § 251(b)(3), a requesting CLEC's relationship with a providing ILEC is governed by standard industry practice and an agreement between the parties. A CLEC could use the directory listings in its central database to provide national directory assistance ("NDA") if not prohibited by the agreement with the ILEC. (If the

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methodology."). Thus, the Commission has the authority to determine the just and reasonable rates at which a LEC provides nondiscriminatory access to its directory listings under § 251(b)(3).

If the Commission's result is that DA providers receive TELRIC rates under § 251(b)(3), that result would not "undo" the Commission's decision in the *UNE Remand Order* to remove DA services from the list of unbundled network elements ("UNEs"). See Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, ¶ 442 (rel. Nov. 5, 1999) ("*UNE Remand Order*"). The Commission found that treating DA services as a UNE was no longer necessary in light of the specific statutory requirements Congress wrote into Section 251(c). That decision, in the context of the particular statutory language, is not being challenged here. Rather, the task before the Commission is to give meaning to other, equally valid statutory language found in Section 251(b)(3). It also should be noted that one justification for the Commission finding that DA was no longer a UNE was specifically *because* § 251(b)(3) provides nondiscriminatory access to incumbents' underlying databases. See *id.* ¶ 441; see also *id.*, Separate Statement of Commissioner Susan Ness (observing that third-party DA providers' current inability to obtain nondiscriminatory access under the Act "clearly hampers their ability to provide reliable directory assistance to those carriers that will now need to rely on a non-incumbent source for their OS/DA" and expressing hope that issue will be resolved in pending proceeding). In the *UNE Remand Order*, the Commission did not determine that TELRIC prices for directory listings are inappropriate. Rather, the Commission simply found that competitors were not "impaired" without access to incumbents' DA services as a UNE. To now say that TELRIC pricing cannot apply under § 251(b)(3) because it already applies under § 251(c)(3) would be to read subsection (b) out of the statute.

<sup>4</sup> See *InfoNXX Reply Comments* at 6 & n.11 (citing comments supporting or accepting agency theory for access under § 251(b)(3)); *Reply Comments of Bell Atlantic* in CC Docket 99-273 at 5 (Oct. 28, 1999) (agreeing with agency theory) ("*BA Reply Comments*").

<sup>5</sup> See, e.g., *BA Reply Comments* at 5; *Reply Comments of BellSouth* in CC Docket 99-273 at 6 (Oct. 28, 1999) ("*BellSouth Reply Comments*"); *Reply Comments of SBC Communications, Inc.* in CC Docket 99-273 at 13-14 (Oct. 28, 1999) ("*SBC Reply Comments*").

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ILEC wants to restrict such use, then it can negotiate for that with the competing carrier.) The relationship between a CLEC and its agent also will be defined by standard industry practice and an agreement between those two parties. It follows, then, that a CLEC's agent that wants to use directory listings obtained on behalf of the principal would be able to do so unless it is prohibited by the agreement with the principal.<sup>6</sup> (Again, if the party providing the information, *i.e.*, the CLEC, wants to restrict its use, it can contractually impose that condition on the agent.) The Commission should not adopt special rules interfering with these contractual relationships. Instead, the Commission should recognize the reality of principals and agents and allow the contracting process to take place. There is no need for the Commission to place any further regulatory limits on an agent's use of directory listings.

Second, the Commission cannot ignore the impracticality of requiring competitive DA providers to acquire and maintain separate databases for each CLEC principal. In the *UNE Remand Order*, the Commission specifically recognized that CLECs now can provide DA services by contracting with competitive DA providers.<sup>7</sup> By using a competitive DA provider, a CLEC avoids the often uneconomical prospect of buying its own DA equipment, building and maintaining its own database, and hiring its own operators. The CLEC takes advantage of the competitive DA provider's economies of scale that derive from the provider's service to many CLECs.

If a competitive DA provider is required to purchase the same information and to maintain segregated databases, then any economies of scale would be destroyed.<sup>8</sup> In effect, a CLEC would not have the choice of using a competitive DA provider rather than self-providing DA services because the costs would be comparable. "Requiring multiple purchases would discourage, rather than promote, competition in the directory assistance market and would limit the directory assistance operations available to new competitive carriers."<sup>9</sup> In short, the

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<sup>6</sup> The agent's use would not be misappropriation. Rather, it would be using the listings with the knowledge of the principal, which simply chooses not to restrict the agent's use. *Cf. Rothery Storage & Van Co. v. Atlas Van Lines*, 597 F. Supp. 217, 232 (D.D.C. 1984), *aff'd*, 972 F.2d 210 (D.C. Cir. 1986) (recognizing that principal had allowed agent to use its infrastructure but that principal could withdraw such permission).

<sup>7</sup> See *UNE Remand Order* at ¶ 441. The Commission, however, should not assume that CLECs have sufficient choices for DA provision simply because mega-carriers such as AT&T and WorldCom offer competitive DA services. AT&T and WorldCom do not focus their DA businesses on wholesale provision to CLECs and are not likely CLEC providers. Rather, independent DA providers such as InfoNXX and Excell are the cornerstones of a vibrant wholesale DA market. But they will remain so only if they can obtain access to directory listings at reasonable prices.

<sup>8</sup> See, e.g., Comments of Excell Agent Services, L.L.C. in CC Docket 99-273 at 7-8 (Oct. 13, 1999) ("*Excell Comments*"); *InfoNXX Comments* at 19; *InfoNXX Reply Comments* at 7; Reply Comments of Listing Services Solutions, Inc. in CC Docket No. 99-273 at 8 (Oct. 28, 1999) ("*LSSi Reply Comments*"); Reply Comments of Metro One Telecommunications, Inc. in CC Docket No. 99-273 at 11-12 (Oct. 28, 1999) ("*Metro One Reply Comments*").

<sup>9</sup> *Excell Comments* at 8.

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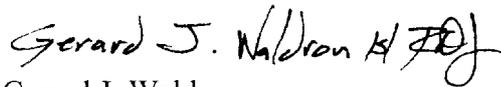
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availability of competitive DA alternatives that the Commission described in the *UNE Remand Order* would be illusory.

\* \* \* \* \*

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office. Please direct any questions regarding this notice to the undersigned.

Sincerely,



Gerard J. Waldron  
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. Greg Cooke  
Ms. Robin Smolen  
Mr. Dennis Johnson