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January 18, 2001

EX PARTE OR LATE FILED

VIA FACSIMILE AND HAND DELIVERY

Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Ex Parte Communication

Dear Chairman Kennard:

We are aware that some questions have arisen concerning the applicability of Section 201 of the Communications Act of 1934, as amended, (the "Act") to Commission action in the above-captioned proceeding. At stake is the ability of independent DA providers to obtain access to the directory listings data base at "just and reasonable" rates, terms, and conditions from ILECs that maintain a monopoly on those inputs.

The Commission consistently has denominated directory assistance – both local and non-local – as an adjunct-to-basic service and, hence, subject to Title II. Indeed, the Commission has described directory assistance as the paradigmatic adjunct-to-basic service.¹ Yet there appears to be a question whether this analysis applies if the ILEC is required to offer access to its DA database to independent DA providers that do not also offer call-completion services. There also appears to be some concern that reliance on Section 201 in this context

¹ See Memorandum Opinion and Order, *North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, 101 FCC 2d 349, at ¶ 26 (1985) ("NATA/Centrex Order").

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could trigger other claims by information service providers or by persons wanting some unbundled network elements. Both of these concerns lack merit.

First, the Commission has found consistently that access to directory assistance database is legally different from access to other offerings of a carrier, and for that reason access to a directory assistance database always has been treated differently. Indeed, in the seminal *NATA/Centrex Order*, the Commission held:

The significance of purpose in identifying a “basic” adjunct to basic service is perhaps most clear in the case of directory assistance. When a customer uses directory assistance, that customer accesses information stored in a telephone company data base. Ordinarily, assuming the data base was in a computer, such a service would be considered enhanced. “Dial-it,” for example, was a service offered by AT&T which allowed information about news, stock prices, etc., to be stored within the network for retrieval by subscribers. In the *Reconsideration*, we found Dial-it to “constitute more than the common carrier offering of a channel of communication and [therefore to] clearly fall outside the scope of a basic service.” The only significant difference between Dial-it and directory assistance is that the latter service provides only that information about another subscriber's telephone number which is necessary to allow use of the network to place a call to that other subscriber. An offering of access to a data base for the purpose of obtaining telephone numbers may be offered as an adjunct to basic telephone service; an offering of access to a data base for most other purposes is the offering of an enhanced service.²

The Commission therefore found that the access to DA database was subject to Title II regulation, though clearly this holding did not create any rights or claims for other persons.

Second, this conclusion is not altered by the fact that a carrier may be providing access to the database to independent DA providers which do not offer call completion. Under Section 201, a carrier is required to have just and reasonable charges and practices for communications services and “in connection with” such services. The Commission has held that directory assistance is “in connection with” a communications service, and thus subject to Title II regulation.³ Thus, the same analysis applies: a carrier is offering communications service to the

² *Id.* (footnote omitted).

³ *Id.*

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public, subject to Title II, and it also has a directory assistance database that it offers and maintains “in connection with” the offering of such service, also subject to Title II. The Commission is not opening new ground by stating that a carrier has an obligation to provide services “in connection with” communications at just and reasonable rates, terms and conditions to any person.

Third, that the Commission has authority to require carriers to give access to directory assistance database pursuant to Section 201 to persons not using the communications offerings of the carrier was recently affirmed by Commissioner Furchtgott-Roth. In the *U S WEST Forbearance Order*, the Commission retained the nondiscrimination requirement of Section 272(c)(1) – that U S West make available to unaffiliated entities all of the in-region directory listing information it uses to provide regionwide directory assistance service at the same rates, terms, and conditions it imputes to itself – as a condition of allowing U S WEST to provide national directory assistance without using a separate affiliate.⁴ In a Separate Statement, Commissioner Harold Furchtgott-Roth challenged the Commission’s authority under Section 10 to impose such a condition.⁵ However, his dissent clearly states that if the Commission were to impose a condition, Sections 201 and 202 would give the Commission authority to require U S WEST to provide all unaffiliated entities with directory information at just and reasonable rates.⁶ Indeed, according to Commissioner Furchtgott-Roth, this would be a less burdensome condition than the nondiscrimination requirement that the Commission imposed. In that case, Commissioner Furchtgott-Roth apparently accepted that Sections 201 and 202 were applicable in the case where an ILEC was providing directory listings to independent DA providers. Indeed, it was assumed that the sections applied to require just and reasonable rates for all unaffiliated entities if the Commission had a legitimate basis for imposing the condition.

Finally, these precedents also establish that access to directory assistance data base is distinct and distinguishable from other services. The Commission can rely on more than fifteen years of precedent to limit the scope of an order asserting jurisdiction pursuant to Section 201 to access to directory assistance databases. The Commission should simply declare that for present purposes any assertion of jurisdiction based on Section 201 and “adjunct to basic” is confined to those services or features which the Commission has determined meet that narrow definition.

⁴ *U S West Forbearance Order* at ¶ 37.

⁵ *See U S West Forbearance Order*, Separate Statement of Commissioner Harold Furchtgott-Roth.

⁶ *See id.* (“The majority should not be able to impose such a requirement without explaining why less burdensome options such as requiring US WEST to provide the directory information at just and reasonable rates and enforcing that requirement through the section 201-202 complaint process – would be insufficient to meet the threshold requirements of section 10.”).

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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. A copy also is being submitted each to the individuals listed below. Please direct any questions regarding this notice to the undersigned.

Sincerely,



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