

WILMER, CUTLER & PICKERING

Washington • Baltimore • New York • London • Brussels • Berlin

February 12, 2001

TELECOMMUNICATIONS LAW UPDATES

FCC Clarifies, Expands Rights to Access LECs' Local Listing Information

In an order adopted on the last full day of Chairman Kennard's term, the FCC clarified and expanded the responsibilities of local-exchange carriers ("LECs") to provide access to their customer information. In its First Report and Order, *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended*, CC Dkt. 99-273, FCC 01-27 (rel. Jan. 23, 2001), the FCC broadened the category of entities who have a right to access a LEC's local directory assistance database, defining certain directory assistance providers as eligible "LECs" for that purpose, and expanding LECs' access rights to LECs' agents. The FCC also decided that LECs must provide subscriber list information ("SLI") to internet-based directory publishers in addition to traditional directory publishers. The Order, which is based on a broad reading of the FCC's authority to promote competition and regulate access to directory information, granted almost all the wishes of various commenters who had sought access, and leaves LECs very little control over access to and competitor use of that information.

As part of the market-opening regime established by the Telecommunications Act of 1996, LECs were required to provide nondiscriminatory access to telephone numbers, operator services, directory assistance and directory listings "to competing providers of telephone exchange service and telephone toll service." 47 U.S.C. § 251(b)(3). The FCC has read this provision as requiring LECs to provide any competing LEC with readily usable access to their directory assistance services and local directory assistance databases. The Order determines for the first time that two types of entities that are not state-

certified LECs nevertheless are entitled to nondiscriminatory access to databases under section 251(b)(3). First, the FCC held that directory assistance providers that "perform" their own call completion over their own or resold facilities and collect a fee from the customer are entitled to database access. The FCC determined that the act of completing calls constitutes "telephone exchange service," which is a LEC activity. It held that providers that merely hand the call off to another carrier for the completion of the call do not qualify as LECs, however. The FCC specified that any directory assistance provider that does qualify as a LEC (and thus may obtain access to the LEC's directory database) should seek state certification and will be obligated to contribute to federal assessments such as the universal service, number portability, and North American numbering plan funds. The FCC did not suggest, however, that having such certification or complying with these federal regulatory requirements are a prerequisite for seeking access. This ruling may have an unanticipated financial impact on some directory service providers that had not previously budgeted for the various costs of state and federal regulatory obligations. Second, the FCC held that directory assistance providers that enter an agency relationship with one or more LECs to provide directory assistance qualify for access, because they are acting on behalf of a LEC. The FCC refused further to extend the availability of access under section 251(b)(3) to cover directory assistance providers who do not fit one of these categories; however, it did suggest the possibility, which it left to a later day, that LECs might be obliged to provide database access even to non-LECs under the catch-all non-discrimination provisions in sections 201 and 202 of the Act.

The Order also expands SLI access. The Act requires LECs to provide SLI to anyone “for the purpose of publishing directories in any format.” 47 U.S.C. § 222(e). SLI is simply the list of customer names, addresses and phone numbers in printed format, and excludes all customers who choose to have unlisted or unpublished numbers. For some time, it has been unclear whether entities other than competing white and yellow pages telephone *book* publishers had a right to SLI – for example, online directory information providers. The Order concludes that the “publishing of directories” does include Internet directories, noting that Internet publishing fits comfortably within the standard definition of publication. The FCC did not agree with commenters who urged extending the SLI access right to providers of voice-provided directory assistance, which it found was not the “publishing” of a directory; the FCC thought it noteworthy that section 251(b)(3) specifically provides access to databases for such oral “directory assistance” provision, while section 222 says nothing of directory assistance.

With respect to both directory assistance databases and SLI, the Order restricts a LEC’s right to cabin the use of the information once its competitor has accessed it; in the case of directory database information, in fact, LECs may not restrict use of the information at all. Thus, the Order notes that LECs may not even require the agent of a CLEC to restrict the use of database information to the specific carrier for which access was obtained, and makes clear that agents may use the information for any purpose permitted to (and by) their carrier-principal. As a result, directory assistance providers may lawfully obtain information from the ILEC and then resell that information, to the financial detriment of the LEC who amassed it in the first instance. Nor may LECs require Internet publishers to use SLI in a way that reduces the

risk of disassembly or mass downloading by competing publishers; the FCC suggested that Internet “publishers” have independent incentives to control downloading of their online directories.

There were few “victories” in this Order for ILECs. Although the FCC did clarify that database access rights would not extend to non-local directory databases, over which the agency found ILECs lack market power, it required that should a LEC provide non-local databases to some purchasers, it must provide that same information to all comers on an MFN basis. The FCC also refrained from setting rates for providing access to directory databases, agreeing with commenters that the pricing structure for database access should remain distinct from the pricing structure for SLI. But it reminded LECs that they must timely provide details about rates, terms and conditions for access to information to requesting parties.

Finally, the FCC indicated that it would open a new proceeding to consider whether it should require customers to “presubscribe” to a default directory assistance provider (rather than being automatically “subscribed” to the directory assistance provided by the customer’s carrier), or abandon the 411 directory assistance dialing code and instead institute a system of unique dialing codes for each directory assistance provider. ILECs objected to that proposal, made in comments filed by Telegate AG, suggesting that such changes are not necessary to enhance the already competitive directory assistance market, and that implementing either suggestion would create needless expense and consumer confusion. The FCC’s suggestion that an independent proceeding is merited and will be opened on this proposal could signal support for a wholesale change in the regulatory framework for directory assistance.

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

Lynn Charytan
John Harwood
William Lake
Daniel Phythyon
William Richardson

202-663-6455
202-663-6333
202-663-6725
202-663-6545
202-663-6038

LCharytan@wilmer.com
JHarwood@wilmer.com
WLake@wilmer.com
DPhythyon@wilmer.com
WRichardson@wilmer.com