

**Case No. 11-12221-EE**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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LSSI DATA CORP.,  
*Plaintiff-Appellee,*

v.

COMCAST PHONE, LLC,  
*Defendant-Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
CASE NO. 1:11-cv-01246-CAP

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**AMICUS BRIEF FOR THE  
FEDERAL COMMUNICATIONS COMMISSION  
IN SUPPORT OF NEITHER PARTY**

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SEAN A. LEV  
ACTING GENERAL COUNSEL

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH  
DEPUTY ASSOCIATE GENERAL COUNSEL

PAMELA L. SMITH  
COUNSEL  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554  
(202) 418-1740

June 18, 2012

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, the Federal Communications Commission states that it is an independent agency of the U.S. government. The trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal are listed in the Brief of Appellant Comcast Phone, LLC, as supplemented by the Brief of Appellee LSSi Data Corp.

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*\* Cases and other authorities primarily relied upon are marked with an asterisk.*

## **STATEMENT OF INTEREST**

The Federal Communications Commission (“FCC”) has primary responsibility for implementing and enforcing the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (“the Communications Act” or “the Act”). The FCC has an interest in ensuring that the Act, the agency’s implementing rules, and its precedents are correctly interpreted. At the Court’s invitation, the FCC respectfully files this brief as amicus curiae in support of neither party.

## **STATEMENT OF THE ISSUE**

By order dated April 12, 2012, the Court invited the FCC to set forth its position on the following question:

Does a local exchange carrier (LEC) violate the non-discrimination requirements of Sections 202, 222(e), or 251(b)(3) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“the Act”), when the LEC selects a single contractor to serve as its exclusive agent in selling its directory assistance listing data (DALD) to all other LECs and directory publishers, when that contractor also acts as an agent or contractor to other LECs in acquiring DALD and competes with at least one qualifying directory assistance provider in that regard? See *In re Provision of Directory Listing Information under the Communications Act of 1934*, as amended, 16 F.C.C. Rcd. 2736 (F.C.C. Jan. 23, 2001) (First Report and Order), available at 2001 WL 55620.

Answer: As explained below, the FCC believes that the answer to the Court’s question is no.

## STATUTORY AND REGULATORY BACKGROUND

1. For most of the last century, American consumers could purchase local telephone service from only one source: their incumbent local exchange carrier (“LEC”). Until the 1990s, regulators generally treated local telephone service as a monopoly. States typically granted an exclusive franchise in each local service area to the LEC that owned and operated the local telephone network. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 726 (1999).

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (“the 1996 Act”), fundamentally altered this regulatory framework “to achieve the entirely new objective of uprooting . . . monopolies.” *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 488, 122 S. Ct. 1646, 1660 (2002). The 1996 Act amended the Communications Act to create “a new telecommunications regime designed to foster competition in local telephone markets.” *Verizon Md., Inc. v. Public Serv. Comm’n*, 535 U.S. 635, 638, 122 S. Ct. 1753, 1756 (2002). Two components of the local telephone competition regime are section 222(e) and section 251(b)(3) of the amended statute, 47 U.S.C. §§ 222(e), 251(b)(3). *Implementation of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, 14 FCC Rcd 15550, 15553 (¶ 1) (1999) (“*SLI/DA Order and NPRM*”).

2. *Section 222(e)*. Section 222(e) of the Communications Act mandates that “a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.” 47 U.S.C. § 222(e). Subscriber list information (“SLI”) is defined as “any information: (A) identifying the listed names of subscribers of a carrier and such subscribers’ telephone numbers, addresses, or primary advertising classifications . . . , or any combination of such listed names, numbers, addresses or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.” 47 U.S.C. § 222(h)(3).

While section 222(e) provides that SLI shall be provided under “nondiscriminatory and reasonable rates, terms, and conditions,” 47 U.S.C. § 222(e), the FCC has explained that section 222(e)’s nondiscrimination requirement “does not prohibit *all* variations in the rates, terms, and conditions under which a carrier provides subscriber list information to directory publishers.” *SLI/DA Order and NPRM*, 14 FCC Rcd at 15582 (¶ 59) (emphasis added). But if a carrier is charged with violating section 222(e) in a complaint proceeding before



the FCC,<sup>1</sup> the carrier has the burden of showing that “specific factors, such as differences in the costs of providing subscriber list information to particular directory publishers, warrant differences in the rates, terms, and conditions under which the carrier provides that information to those publishers.” *Id.* at 15582-83 (¶ 59). *See also McLeodUSA Publ’g Co. v. Wood Cnty Tel. Co.*, 17 FCC Rcd 6151 (2002) (finding that a LEC failed to meet its burden of showing that the rate charged a directory publisher for access to SLI was reasonable).

3. *Section 251(b)(3)*. Section 251(b)(3) of the Communications Act requires LECs to allow “competing providers of telephone exchange service and telephone toll service<sup>2</sup> . . . nondiscriminatory access to . . . directory assistance, and

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<sup>1</sup> Under Section 208 of the Act, “[a]ny person, . . . complaining of anything done or omitted to be done by any common carrier subject to th[e Act], in contravention of any provision thereof, may apply to [the FCC] by petition” and the common carrier “shall be called upon to satisfy the complaint.” 47 U.S.C. § 208.

<sup>2</sup> Telephone exchange service is defined as “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” 47 U.S.C. § 153(54). Telephone toll service is defined as “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” 47 U.S.C. § 153(55).

directory listing.” 47 U.S.C. § 251(b)(3).<sup>3</sup> The FCC has determined that ““nondiscriminatory access,” as used in section 251(b)(3), encompasses both: (1) nondiscrimination between and among carriers in rates, terms and conditions of access; and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC.” *Local Competition Second Report and Order*, 11 FCC Rcd at 19402 (¶ 12); *id.* at 19444 (¶ 101).

If a competing provider files a complaint with the FCC alleging that a providing LEC has violated section 251(b)(3) by failing to offer nondiscriminatory access to DA, “the providing LEC . . . bear[s] the burden of demonstrating that it is permitting nondiscriminatory access, and that any disparity in access is not caused by factors within the providing LEC’s control.” *SLI/DA Order and NPRM*, 14 FCC Rcd at 15619 (¶ 131) (*citing* 47 C.F.R. § 51.217(e)(1)).

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<sup>3</sup> A “providing LEC” is a LEC that is required to permit nondiscriminatory access to its services pursuant to section 251(b)(3); a “competing provider” is a provider of telephone exchange service or telephone toll service that seeks nondiscriminatory access from a providing LEC. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19444 n.244 (1996) (“*Local Competition Second Report and Order*”). The FCC also has determined that certified competing LECs, providers that offer call completion service, and providers that are acting as the agents of entities that otherwise qualify under section 251(b)(3) are likewise entitled to nondiscriminatory access. *See Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, First Report and Order, 16 FCC Rcd 2736, 2743-50 (¶¶ 12-29) (“*DA First Report and Order*”) (2001). In this brief, the abbreviation DA refers collectively to directory assistance and directory listings.

4. *Section 202(a)*. A provision of the Communications Act that predates the 1996 amendments, section 202(a), establishes a general bar against unreasonable discrimination by common carriers in their provision of service to customers. That section makes it “unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . , or to make or give any undue or unreasonable preference or advantage to any particular person, . . . or to subject any person, . . . to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. § 202(a). Notwithstanding the conclusion of the FCC’s staff that *section 251(b)(3)* of the Act does not require LECs to furnish their DA database information to DA providers that do not provide telephone exchange or telephone toll service, *see SLI/DA Order and NPRM*, 14 FCC Rcd at 15632 (¶ 156), the Commission has explained that the question whether LECs must furnish such service under *section 202(a)* of the Act “raises complex issues that have not been fully developed.” *DA First Report and Order*, 16 FCC Rcd at 2750 (¶ 31). The FCC specified, however, that when such DA providers have been designated to act as the agent of a provider of telephone exchange or telephone toll service, “that competing DA provider is entitled to nondiscriminatory access to the providing LECs’ local DA database.” *Id.* at 2748 (¶ 27).<sup>4</sup>

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<sup>4</sup> The FCC also noted its expectation that an agent-DA provider’s request for access “will be accompanied by a letter or other documentation from the [provider of telephone exchange service or telephone toll service] evidencing its intent that

## SUMMARY OF ARGUMENT

Nothing in the Communications Act or the FCC's implementing rules precludes a LEC from designating an agent to provide nondiscriminatory access to its subscriber list information and directory assistance databases, as required by sections 222(e) and 251(b)(3) of the Act. For purposes of those statutory provisions, nondiscriminatory access means that the LEC (or its agent) must afford qualified entities the same access to its databases as it provides to its own directory publisher under section 222(e), or its own directory assistance provider under section 251(b)(3), nor may a LEC favor one qualified entity over another with respect to the rates, terms, or conditions of access to its databases. Thus, so long as a LEC's agent provides competing LECs or directory publishers the same access to the LEC's databases that it provides to the LEC and other qualified entities, neither the LEC nor its agent would violate sections 222(e), 251(b)(3), and 202(a) of the Act.

## ARGUMENT

“Congress has delegated to the [FCC] the authority to ‘execute and enforce’ the Communications Act.” *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S. Ct. 2688, 2699 (2005) (quoting 47 U.S.C. § 151).

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the DA provider receive access so that it may fulfill its obligations to [the principal-competing provider].” *DA First Report and Order*, 16 FCC Rcd at 2748 (¶ 27).

The “ambiguities” that Congress incorporated into the statute “will be resolved by [the FCC as] the implementing agency.” *AT&T*, 525 U.S. at 397, 119 S. Ct. at 738. Thus, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the [FCC].” *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984).

Similarly, the courts owe substantial deference to the FCC’s construction of its own regulations, *see Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260-61 (2011), and precedents, *see Boca Airport, Inc. v. FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004). The FCC’s construction of its own regulations is controlling unless that construction is “‘plainly erroneous or inconsistent with the regulation[]’ or there is any other ‘reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.’” *Talk Am.*, 131 S. Ct. at 2261 (quoting *Chase Bank, N.A., v. McCoy*, 131 S. Ct. 871, 881 (2011)). As the Supreme Court has explained, this rule of deference extends to FCC interpretations set forth in an amicus brief. *Talk Am.*, 131 S. Ct. at 2261 (deferring to FCC rule interpretation contained in amicus brief).

In response to the Court’s question, nothing in the Communications Act or FCC rules would preclude a LEC from designating an agent to provide qualified entities with nondiscriminatory access to the LEC’s SLI and DA databases. Those qualified entities include publishers of directories under section 222(e) or

competing providers of telephone exchange or telephone toll services (including their designated agents) under section 251(b)(3).<sup>5</sup>

The nondiscriminatory access requirements of sections 222(e) and 251(b)(3) require a LEC to provide access that is at least equal to that enjoyed by the LEC itself, and on the rates, terms, and conditions of access that the LEC provides to other qualified entities. “[A]ny standard that would allow a LEC to offer access inferior to that enjoyed by the LEC itself would be inconsistent with Congress’ intention of establishing competitive, deregulated markets for all telecommunications services.” *SLI/DA Order and NPRM*, 14 FCC Rcd at 15616 (¶ 125) (footnote omitted). *See also id.* at 15582 (¶ 58) (the FCC has determined that section 222(e)’s “nondiscrimination requirement . . . obligates each carrier that gathers subscriber list information in its capacity as a provider of local exchange service to provide that information to requesting directory publishers at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation, its directory publishing affiliate, or another directory publisher”); *id.* at 15618 (¶ 128) (the FCC affirmed that “under section 251(b)(3), ‘nondiscriminatory access’ means that providing LECs must offer

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<sup>5</sup> A LEC’s duty to provide nondiscriminatory access to directory assistance and directory listings “is owed to competing providers of telephone exchange service and/or telephone toll service, and not to ‘all telecommunications carriers.’” *Local Competition Second Report and Order*, 11 FCC Rcd at 19457 (¶ 133). *See also* n.3, *supra*.

access equal to that which they provide to themselves”); *id.* at 15630 (¶ 152) (the FCC concluded that “section 251(b)(3) prohibits providing LECs from providing directory assistance database information in a manner that is inferior to that which they supply to themselves.”).

For example, consistent with the nondiscriminatory access requirement of section 251(b)(3), the FCC’s rules require that “a LEC share [with competing providers] the names and addresses of subscribers with unpublished numbers if the LEC provides those names to its own directory assistance operators.” *Id.* at 15638 (¶ 167). And, “[i]f a LEC, in its provision of directory assistance service to itself, allows its own directory assistance operators to see the names and addresses of subscribers with unlisted information, this information must also be made available to the requesting competitive LEC.” *Ibid.* Similarly, with respect to section 222(e), the FCC has observed that, depending on the circumstances, a failure to provide competing directory publishers with the names and addresses of their subscribers with unlisted or unpublished numbers (which are excluded from the definition of SLI) “may be unreasonable or unreasonably discriminatory within the meaning of sections 201(b) and 202(a) of the Communications Act” if the LEC provides such information to its own directory publisher. *SLI/DA Order and NPRM*, 14 FCC Rcd at 15575 (¶ 41).

At bottom, whether a LEC's actions constitute a violation of the nondiscriminatory access requirements of sections 222(e) and 251(b)(3) hinges on the particular facts of a case – specifically, whether the LEC is providing access to its DA and SLI databases that is equal to the access the LEC itself enjoys and on the same rates, terms, and conditions that it provides to others. Thus, a LEC's use of an agent to provide access to its DA and SLI databases does not necessarily constitute a violation of sections 222(e), 251(b)(3), or 202(a) of the Act; nor would the agent's status as a competitor in acquiring DA and SLI for other LECs. Rather it is the LEC's (or its agent's) conduct that is most determinative of whether the LEC has provided nondiscriminatory access to its databases as required by sections 222(e) and 251(b)(3) of the Act. *See* 47 U.S.C. § 217 (“In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.”). *See also McLeodUSA*, 17 FCC Rcd 6151 (LEC that employed an agent to provide its SLI to requesting telephone directory publishers held to be charging unreasonably high rates under section 222(e)).



## **CONCLUSION**

As explained above, the FCC believes that the answer to the Court's question is negative.

Respectfully submitted,

Sean A. Lev  
Acting General Counsel

Peter Karanjia  
Deputy General Counsel

Richard K. Welch  
Deputy Associate General Counsel

/s/ Pamela L. Smith

Pamela L. Smith  
Counsel

Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1740

June 18, 2012

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned certifies that this brief complies with the applicable type-volume limitations of FRAP 32(a). It was prepared using a proportionately spaced type: Times New Roman, 14 point. Exclusive of the portions exempted by FRAP 32(a)(7)(B)(iii) and 11<sup>th</sup> Circuit Rule 32-4, the brief contains 2776 words. This certificate was prepared in reliance on the word-count function of the wordprocessing system used to prepare this brief: Microsoft Office Word 2003.

/s/ Pamela L. Smith  
Pamela L. Smith

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**LSSi DATA CORP.,  
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**v.**

**COMCAST PHONE, LLC,  
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**CERTIFICATE OF SERVICE**

I, Pamela L. Smith, hereby certify that on June 18, 2012, I electronically filed the foregoing Amicus Brief for the Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

Robert P. Williams II  
Bradley M. Davis  
Claiborne Benson Smith  
Troutman Sanders, LLP  
600 Peachtree St NE Ste 5200  
Atlanta, GA 30308-2216  
*Counsel for: LSSi Data Corp.*

\*Michael C. Sloan  
\*Robert G. Scott  
Davis Wright Tremaine, LLP  
1919 Pennsylvania Ave NW Ste 800  
Washington, DC 20006-3401  
*Counsel for Comcast Phone, LLC*

11-12221-EE

\*Samuel S. Woodhouse III  
The Woodhouse Law Firm, LLC  
260 Peachtree St NW Ste 1402  
Atlanta, GA 30303-1237  
*Counsel for: Comcast Phone, LLC*

\*Jaime A. Bianchi  
White & Case, LLP  
200 S Biscayne Blvd Ste 4900  
Miami, FL 33131-2346  
*Counsel for Comcast Phone, LLC*

/s/ Pamela L. Smith