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August 17, 2001

VIA FEDERAL EXPRESS

Hon. Charles A. James
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530

Re: Business Review Request – National Consumer Telecom & Utilities Exchange (NCTUE)

Dear Mr. James:

We represent the National Consumer Telecommunications Data Exchange, Inc. ("NCTDE"), which was the subject of a favorable Business Review Letter issued by your predecessor, Joel I. Klein, on September 3, 1997. *See* Letter 97-14, 6 Trade Reg. Rep. (CCH) ¶ 44,097.[1] Pursuant to 28 C.F.R. § 50.6, we are requesting that the Department of Justice provide us with an expedited business review letter setting forth the Department's antitrust enforcement intentions with respect to the expansion of NCTDE to include within its membership utility companies that are currently members of three separate consumer credit information clearinghouses similar in concept and operation to NCTDE. If the Department of Justice provides a favorable response to this request, NCTDE's name will be changed to the National Consumer Telecom & Utilities Exchange, Inc. ("NCTUE"), and its membership will be open to telecommunications carriers and utility companies organized and operating in the United States. At the outset, current members of NCTDE and of the Southeast Online Match Exchange ("SOME"), the Mid-Atlantic Utility Exchange ("MAUE"), and the New England Exchange ("NEX") will be members of NCTUE; thereafter, membership applications will be accepted from other eligible firms throughout the United States.[2]

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[1]Your attention is also directed to Letter 94-6, 6 Trade Reg. Rep. (CCH) ¶ 44,094, which is the Business Review Letter issued on March 8, 1994, by Anne K. Bingaman, Assistant Attorney General - Antitrust Division, in which the Department of Justice a favorable opinion with respect to the National Telecommunications Data Exchange, Inc. ("NTDE"). NTDE is a credit data exchange comparable to NCTDE, with the exception that the data in NTDE relates only to small business customers, and not to consumers.

[2]Lists of the current membership of NCTDE and the regional utility company exchanges

As background, we are attaching as Exhibit "B" hereto, our May 7, 1997 letter to Mr. Klein that led to the issuance of the above-referenced Business Review Letter for NCTDE. That letter provides much of the factual information and legal support upon which the current request is based. We are also attaching as Exhibits "C" through "E" hereto, copies of the proposed NCTUE Bylaws, Operating Guidelines and Statement of Compliance with the Antitrust Laws, which were approved by NCTDE's Board of Trustees on July 24, 2001.

The proposed expansion of NCTDE to include not only telecommunications carriers but also utility companies reflects a desire on the part of the participants to benefit from the fact that the two industry groups have complementary customer identification information. By the very nature of the services that they provide, telecommunications carriers are likely to have accurate telephone numbers for their customers. Because the services provided by utility companies are tied to physical location, those firms tend to have accurate address information. Combining these two sets of data will enable more precise identification of customers, with the result that exchange members will be in a better position to assess credit risk and to protect against incurring bad debt. This will inure to the benefit of consumers, as the burden of bad debt on telecommunications and utility service providers can be minimized.

In addition, the improved quality of the data and results from the proposed combination will provide opportunities to grant access to certain components of the data (primarily customer name, address and telephone number) to other entities, *e.g.*, state and local welfare agencies responsible for enforcing child support obligations, through the independent third-party commercial reporting agency ("CRA") that will maintain the credit database, on a compensated basis that will help to defray the operational costs of the exchange for its members. This will further benefit consumers.[3]

As is discussed more fully below, the proposed combined exchange will incorporate the safeguards that presently exist in NCTDE against potential anticompetitive concerns. The 1997 Business Review Letter regarding NCTDE (as well as the 1994 Letter concerning NTDE) indicates

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are attached hereto as Exhibit "A."

[3]Such access will be subject to the safeguards regarding data use that are designed into NCTUE.

that those safeguards proved satisfactory in addressing the exchange of credit data among direct competitors in the telecommunications industry. Because competition in certain portions of the utility industry is just emerging, the concerns that had to be faced in the telecommunications industry are only now beginning to appear. Nevertheless, the safeguards in NCTUE will address such issues not only as they relate to the utility members but also to the extent that they may arise between telecommunications and utility service providers.

General Information Concerning NCTUE

Rather than restate the background information that was presented to the Department of Justice previously, we refer you to pages 2 through 4 of our May 1997 letter to Mr. Klein (Exhibit "B" hereto). We would note that, as a result of mergers and acquisitions in the telecommunications industry, the Founding Members of what will become NCTUE are the following: AT& T Corp.; BellSouth Telecommunications, Inc.; Citizens Communications, Inc; Global Crossing, Inc.; Broadwing Communications, Inc.; Verizon Long Distance Company; Sprint Communications Company LP and MCI Telecommunications, Inc. Under Article III of the proposed NCTUE Bylaws, each of these Founding Members has the right to designate a member of the NCTUE Board of Trustees. Prior to January 2003, if a Founding Member goes out of existence, then non-Founding Member telecommunications industry members ("Telecom Members") shall have the right to elect a replacement Trustee. After January 2003, the right of telecommunications industry members, whether Founding or non-Founding, to designate or elect Trustees is subject to change such that the number of Trustees representing those members could fall to six. Prior to January 2003, the Utility Members of NCTUE will have the right to designate four specific individuals as Trustees;[4] thereafter, they have the right to elect at least four, and as many as six, Trustees depending the number of Founding Member Trustees remaining on the Board at that time. The 8-to-4 initial split of the Board of Trustees in favor of the telecommunications industry members recognizes the significant contributions of the Founding Members in terms of data, resources, managerial commitment, and organizational experience that they have already made to NCTDE. The gradual shift to Board of Trustees parity (6-to-6) between the telecommunications and utility members is intended to reflect the anticipated contributions of the new exchange members. As an additional recognition of the new members' role, the position of Executive Vice President of the Board of Trustees has been created to allow for the sharing of responsibilities between representatives of the telecommunications industry members and the utility industry members. *See* Proposed NCTUE Bylaws, Article III, Section 3 (Exhibit "C" hereto).

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[4]These designees represent American Electric Power; Baltimore Gas & Electric; Duke Power; and Southern Company, companies that have been active in the regional utility exchanges.

Purpose and Operation of NCTUE

The purpose of NCTUE is "to promote the exchange of consumer account information among its Members." Proposed NCTUE Bylaws, Article I, Section 3 (Exhibit "C" hereto). Building upon NCTDE's experience, NCTUE will contract with Equifax Information Services L.L.C. ("Equifax"), an unrelated, independent third-party vendor to act as CRA, creating and maintaining the data base of closed consumer accounts having uncollected balances.[5]

The operation of NCTUE is, with certain exceptions, the same as that of NCTDE. A description of the operation is set forth on pages 5 to 9 of our May 1997 letter to Mr. Klein (Exhibit "B" hereto). Your attention is directed to the NCTUE Proposed Operating Guidelines (Exhibit "D" hereto); those operating guidelines specify the obligations of NCTUE members regarding the nature, timing and use of data provided and received from the exchange. The existing members of NCTDE (as they did previously), and the utility exchange members who will join them as embers of NCTUE, affirmatively commit to the following:

1. **No** information about individual Members, their credit terms or practices, either in general or in specific terms, will be exchanged.

2. **No** information about how each Member treats applicants identified as having bad debt will be exchanged.

3. **No** Member will discuss or agree on credit terms or how applicants with bad debt should be handled. The program will only identify whether an applicant's description matches that of a customer with an unpaid debt, the amount of the

[5]NCTDE selected Equifax to act as its CRA in 1997, utilizing a Request for Proposal as outlined in the May 1997 letter to Mr. Klein. NCTDE's experience with Equifax during the subsequent years, coupled with Equifax's provision of credit exchange services to SOME, MAUE and NEX, the three regional utility data exchanges whose members are to be incorporated into NCTUE, has led to its selection as the CRA for the proposed, combined exchange. Equifax's past performance, its presently unique capability to provide the required services, its demonstrated willingness to bring about cost reductions that are passed on to exchange members, and its commitment to find and exploit appropriate opportunities for third-party access to exchange data, passing the revenues generated thereby back to exchange members to defray their costs, all support this decision. A five-year agreement with Equifax, contingent upon the outcome of this business review request, already has been negotiated. Although its terms are confidential, that agreement provides substantial, ever-increasing economic incentives that will inure to the benefit of NCTUE members and their customers.

undisputed debt, and the connect and disconnect dates for the customer's previous service.

4. The identity of the Member to whom the bad debt is owed will **not** be disclosed to the inquiring Member.

As noted, the NCTUE Operating Guidelines (Exhibit "D" hereto) set forth the types of information to be provided by each Member, the time frames during which such information shall be provided to the CRA, the matching process, and the means of notification provided when a match is made.

Upon joining NCTUE, a Member identifies all unpaid closed accounts ("UCA") for the prior six (6) months. A UCA is the account of a former consumer customer whose service was disconnected, either voluntarily or involuntarily, by the Member in accordance with its standard business practices, with an undisputed, unpaid balance of at least $50 (although a Member may submit a lower value). Each Member is thereafter obligated promptly to identify each new UCA.

The following data (if known) must be provided for each UCA:

1. Customer Billing Name
2. Customer Billing Address
3. Customer Service Address (if known)
4. Social Security Number (if known)
5. Date of Birth (if known)
6. Driver's License Number (if known)
7a. Billing Telephone Number and/or 7b. Customer Telephone Number
8. Previous Billing Telephone Number (if known)
9. Previous Address (if known)
10. Account Number
11. Alternate Contact Name (if known)
12. Alternate Contact Telephone Number (if known)
13. Spouse/Shared User Name (if known)
14. Spouse/Shared User Social Security Number (if known)
15. Customer-Provided Information (if known)
16. Member Identifier (for use only by the CRA or electing Member)
17. Installation Date
18. Disconnect Date
19. Original Amount of Debt (at point of submission)
20. Current Outstanding Balance
21. Date of Last Balance Update

22. Date of Last Payment (if applicable)
23. Fraud Indicator (if known)
24. Never Pay Disconnect Indicator (if known)
25. Nonpayment Disconnect Indicator (if known)
26. Type of Service Indicator

All information submitted to the UCA Database will be retained in the active database for two years.

Additionally, Members may request information about consumers whose applications for new services have been approved. For each such consumer applicant, the Member submits information used to create a Consumer Service Application ("CSA") Record. The CSA information includes items 1-17 and 26 provided for in the UCA Database. When a Member submits a CSA Record that matches a record in the Database, a "Match Report" will be generated where the outstanding balance owed exceeds a certain threshold amount. This Match Report will contain all information in the Record **except** for the identity of the Member submitting the account record.[6]

If desired, a Member may request that a Match report be updated. When an update is requested, the CRA will contact the Member submitting the matching UCA Record to determine if any of the relevant information has changed since the UCA Record was submitted, *e.g.*, the bad debt has been cleared. Where a change is noted, the CRA shall change the UCA Record and a new report will be generated by the CRA and forwarded to the requesting Member.[7]

NCTUE's Operating Guidelines further provide that CSA Records will be retained and reviewed for matches for six (6) months. First, it will often take a few months for a Member to determine that a bill will not be paid, close the account with an unpaid balance, and report the closure. Therefore, a UCA Record may not be submitted until months after another Member makes an inquiry about an applicant for service. Second, a customer often applies for service with a new carrier prior

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[6]When receiving a Match Report, a Member may request that the Member Identifier be revealed **if and only if** the member is the source of the UCA Record. In this way, a Member lacking reliable internal reporting controls can use NCTUE to determine that the prospective customer was, in fact, its own customer and thereby take the requisite action to initiate appropriate collection procedures.

[7]The NCTUE Operating Guidelines further require that the Member disclose to the applicant that it used information obtained from NCTUE if it uses any information from a Match Report when making its credit decision. *See* Art. III, C. Additionally, Match Reports may only be used by a Member's responsible consumer financial personnel in connection with decisions to facilitate the early identification of, and the taking of appropriate action with respect to, risk accounts and to locate former consumer customers. *See* Art. III, B.

to disconnection by its existing service provider. During this period, an inquiry by a Member will not result in a match. By retaining CSA Records for six (6) months, a match will be made when the first Member completes its internal closing process and submits the UCA Record, thereby increasing the likelihood of a match. As noted above, the database will be operated by an independent, unrelated third-party vendor, designated in the proposed Bylaws as the CRA. NCTUE will be managed on a daily basis by an Executive Director, who will be responsible for communicating with Members, outside vendors, and the CRA. All NCTUE Members will submit data directly to, and receive reports directly from, the CRA. There will be no direct communication between Members as a consequence of their exchange of credit information through NCTUE. The proposed Bylaws set forth the corporate governance procedures for NCTUE, including provision for annual and "special" Member meetings. Such meetings can only be called on written notice, which must state the purpose(s) for which the meeting is called and must provide a written agenda. Formal minutes will be kept for all meetings. Independent counsel for NCTUE will attend all such meetings. Counsel for the various Members are permitted to attend all such meetings together with the Members' respective credit personnel.[8]

Antitrust Analysis

A. NCTUE Has Been Structured to Comply with the Antitrust Laws.

NCTUE's proposed Bylaws and Operating Guidelines (Exhibits "C" and "D" hereto, respectively) provide the framework for NCTUE's operations, including its goals, membership, fees, management, data submission requirements and use limitations, and related issues. Membership in NCTUE is open to "[a]ny telecommunications carrier (as defined under the Telecommunications Act of 1996) with consumer telecommunications accounts and any utility company organized and

[8]The proposed Bylaws permit the holding of meetings limited to Telecom Members or Utility Members; however, the Executive Director, a Trustee, or a person designated by the Board of Trustees must attend all such meetings. Proposed NCTUE Bylaws, Article II, Section 4(D) (Exhibit "C" hereto). These "industry-only" meetings cannot take any actions or make any decision binding on NCTUE and are governed by the Statement of Antitrust Compliance. *Id.*, Article II, Section 4(D) & (E).

operating in the United States." Proposed NCTUE Bylaws, Article II, Section 1. The Bylaws set forth the process by which a prospective Member may join NCTUE, requiring that each Member applicant sign an agreement to obey NCTUE's Bylaws, which include an obligation to refrain from violating the antitrust laws. Article I, Sections 4-5; Article II, Sections 2, 4.

All NCTUE Members must also agree, in writing, to abide by the terms of the NCTUE Statement of Compliance with the Antitrust Laws (Exhibit "E"), which is referenced in NCTUE's proposed Bylaws, and which provides that NCTUE and its Members:

> shall not agree with, participate in, or give consideration to any activity, plan, understanding, agreement, or arrangement that would constitute a violation of any federal or state law proscribing conduct intended to or tending to restrain trade . . .

This Statement of Compliance prohibits Members from discussing, exchanging information, or agreeing with other Members about: pricing, terms and conditions of sale, customers, business strategies and marketing plans, and boycotts and refusals to deal. In addition, the Statement of Compliance prohibits Members from restricting or interfering with the exercise of any Member's free and independent judgment in the management or operation of its business.

The Statement of Compliance also prohibits Members from exchanging credit data directly with one another. Instead, it requires all such information, as well as all requests for credit information, to be submitted to the CRA. The CRA is prohibited from providing any Member with the identity of any other member submitting information. The Board of Trustees has the power to suspend or expel a Member for a material violation of the regulations set forth in Antitrust Compliance Statement. *See* Proposed NCTUE Bylaws, Article II, Section 7 (Exhibit "B" hereto).

These safeguards against antitrust concerns maintain the protections already in place for NCTDE, which the Department of Justice indicated "should not produce any anticompetitive effects . . . to the extent that the [exchange] is operated in accordance with its statements and commitments. . . ." *See* Letter 97-14, 6 Trade Reg. Rep. (CCH) ¶ 44,097, at p. 43,463.

B. <u>Expansion of the Exchange is Pro-Competitive</u>.

The expansion of NCTDE to include utility industry participation will: (1) spread the benefits of that exchange beyond the telecommunications industry; (2) more formally institutionalize the safeguards against potential antitrust concerns insofar as the utility industry is concerned;[9] and (3)

[9]As noted previously, competition in the utility industry is just beginning. Although the members of SOME, MAUE and NEX are aware of, and have taken steps to address, potential antitrust concerns, the limited competitive opportunities that have characterized that industry in the past have not necessitated the more rigid protections that will be present in NCTUE.

reduce the costs of identifying and acting upon credit risks for all Members, including future telecommunications and utility industry participants who are not affiliated with any existing exchange. Expansion of NCTDE will enable members of the existing exchanges, and future NCTUE Members, to make informed decisions about the creditworthiness of potential consumer customers, thereby reducing the risk of bad debts. By decreasing bad debt, an NCTUE Member reduces expenses, enabling it to concentrate on services to its customers.[10]

These pro-competitive benefits will be accomplished with no risk to competition whatsoever. The database will be maintained by an independent, third-party vendor. No information will be exchanged directly between NCTUE Members with respect to their credit terms and practices. The reports provided to Members will provide information only with respect to the account of the applicant and will not disclose the Member who is holding the bad debt or the Member to whom the applicant has applied for service. There will be no discussion between Members regarding the information in the reports or what the response of a Member should be to the applicant with the bad debt, nor will there be any discussion of credit practices, terms or conditions.

Along with the proposed Bylaws, the NCTUE Statement of Compliance provides additional guidance on the manner in which all NCTUE meetings must be held. The Statement references the requirement in the Bylaws that a written agenda be prepared, including the date, time, and place of the meeting, the names of those scheduled to attend, and a brief description of the topic(s) to be discussed. Within ten (10) days of the meeting, the Executive Director shall circulate a record of the meeting, which will include the information noted above, as well as a summary of the discussions and any action(s), or a notation that no action was taken. The Statement of Compliance also mandates that all business-related activities be transacted or discussed at formal NCTUE meetings; **no** private conversations between Members with respect to any NCTUE business are permitted.

C. Relevant Legal Standards.

Cases interpreting federal antitrust law have found that credit information exchange programs are pro-competitive and legal, provided that they are properly structured and operated. As early as 1925, the United States Supreme Court recognized that the gathering and dissemination of credit

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[10]Also, to the extent that additional revenues are derived from appropriate third-party access to certain portions of the NCTUE Database and are then passed on to Members, costs will be reduced even more.

information was not illegal under the antitrust laws, provided that those persons exchanging the information are free to use it as they please. *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 603-04 (1925). This reasoning has been restated in more recent cases. *See, e.g., Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1048 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976) ("it is not a violation of [Sherman Act] § 1 to exchange such [credit] information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement."); *Zoslaw v. MCA Dist. Corp.*, 693 F.2d 870, 886 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983) (a credit information exchange does not violate § 1 of the Sherman Act where it "was the sort the distributors could use for self protection purposes," and where there was no agreement to fix credit terms); *Metro Video Dist., Inc. v. Vestron Video, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 68,986, at p. 63,352 (D.P.R. 1990) (national video software manufacturers association members' exchange of dealers' historical credit information does not pose antitrust problem absent agreements relating to extension of credit).

In addition to the favorable consideration which the Antitrust Division gave with respect to NCTDE in 1997 and NTDE in 1994, your attention is also directed to the following Business Review Letters which also address the exchange of credit information: Letter 87-18 (Atchison, Topeka & Santa Fe Railway Co./National Railroad Industry Trade Group), 1987 WL 12401 (Aug. 3, 1997); Letter 00-15 (Carrier Credit Services, Inc.), 6 Trade Reg. Rep. ¶ 44,100 (Nov. 6, 2000); Letter 01-4 (Transportation Services, Inc.), 6 Trade Reg. Rep. ¶ 44,101 (May 1, 2001). In each instance, a determination not to initiate enforcement action was made by the Department of Justice based on the nature of the information to be exchanged and the safeguards against potential anticompetitive effects built into the exchange entity.

The benefits of credit information clearinghouses are substantial and widely recognized. Their use is widespread. Because NCTUE is designed to comply with the standards spelled out in the case law and the above-referenced business review letters, we ask that you provide a favorable response to this request. The expanded exchange that will become NCTUE promises substantial benefits, and we are anxious to move forward with the steps to turn those promises into reality. Accordingly, we seek expedited review of this request. *See* 63 Antitrust & Trade Reg. Rep. (BNA) 710-11 (Dec. 3, 1992).

To the extent that you require any additional information, please do not hesitate to contact me. Thank you in advance for your prompt consideration of this matter.

Respectfully yours,

Craig L. Caesar

CLC/lcb
Enclosures