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VIA FEDERAL EXPRESS

Honorable Joel I. Klein
Acting Assistant Attorney General
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530

Re: Business Review Request: National Consumer Telecommunications Data Exchange, Inc.

Dear Mr. Klein:

We represent the National Consumer Telecommunications Data Exchange, Inc. ("NCTDE"). Pursuant to 28 C.F.R. § 50.6, NCTDE requests that the Department of Justice provide it with an expedited business review letter setting forth the Department's antitrust enforcement intentions with respect to a consumer credit information clearinghouse that NCTDE wishes to establish for the benefit of its members, all of whom are telecommunication carriers. Except that its focus will be on individual consumers, rather than business customers, the business of NCTDE will be similar to that of National Telecommunications Data Exchange, Inc. ("NTDE"), as to

which the Department issued a favorable business review letter on March 8, 1994.[1]

To assist the Department's review, this letter will generally describe NCTDE, provide relevant background on the telecommunications industry, and discuss problems that have led to the need for establishing a consumer credit information clearinghouse. Thereafter, we will discuss the operative provisions of the clearinghouse, provide the appropriate materials with which to analyze the competitive effects of the exchange, and highlight why the proposed activities of NCTDE poses no risk to competition, and in fact encourages same.

AN OVERVIEW OF NCTDE

NCTDE is a credit data exchange service, patterned on services offered by vendors such as Experian, Equifax, and Trans Union. Like all such services, NCTDE's principal purpose is to provide members with advance warning about individual consumers who pose a potential credit risk relating to the provision of telecommunication services, enabling members to protect themselves from incurring bad debt. NCTDE is a voluntary, not-for-profit New Jersey corporation whose members are telecommunications carriers.[2] Participating members ("Members") will submit to an unrelated, independent third-party vendor ("Vendor") data on certain closed consumer accounts with unpaid and undisputed balances above a certain amount (or any closed fraudulent account regardless of balance due). Members may then submit requests to the Vendor for information about new consumer customers ("Applicant(s)") to determine whether an Applicant has recently left another Member with an outstanding debt.

Courts have long recognized that companies may exchange credit and debt information without violating the antitrust laws, provided that they continue to make independent decisions on the basis of such information. NCTDE has been structured to satisfy these

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[1] Attached as Tab A.

[2] The nine founding members of the NCTDE are: AT&T Corp.; BellSouth Telecommunications Inc.; Citizens Utilities Co.; Frontier Communications Services Inc.; IXC Communications; MCI Telecommunications Corp.; NYNEX Long Distance Co.; Sprint Communications Company, L.P.; and WorldCom, Inc. However, membership is open to all telecommunications carriers as defined under the Telecommunications Act of 1996.

conditions and avoid any adverse effect on competition. The details of the program are set forth below. Most fundamentally, NCTDE will exchange data only in electronic or written form; only with regard to unpaid debt for closed consumer accounts; and only through the auspices of an unrelated, independent third-party Vendor. The information to be exchanged through the Vendor will not identify the Member(s) supplying or requesting information; there will be no direct communication between Members regarding any specific account(s); and no information will be exchanged between Members regarding credit practices and/or procedures.

THE NEED FOR THE SERVICE

Telecommunications carriers, like many other companies, are plagued by the ever-growing level of uncollected debt that they carry. The causes of uncollectible accounts range from a consumer's inability to pay bills to telecommunications toll fraud. Whatever the cause, many consumers close their accounts leaving unpaid balances and then seek to obtain telecommunications services from another carrier which is unaware of the consumer's credit history. The problem is compounded by virtue of the relative ease with which consumers can switch telecommunications carriers. Traditionally, telecommunications companies have attempted to protect themselves against credit risk by requiring an advance deposit or prepayment of bills where circumstances warrant.[3] NCTDE's objective is to provide a source of information that will allow Members to evaluate the creditworthiness of new consumer applicants in an effort to further reduce credit risk.

General credit histories as reported by traditional consumer reporting agencies are not only expensive, but also of limited use to telecommunications carriers. Moreover, the failure to pay telecommunications bills is a better indicator of the credit risk associated with an applicant requesting telecommunications services than is the failure to pay other kinds of bills. It is difficult to confirm that bad debt accounts identified from general consumer credit reports relate to the prospective new customer's prior

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[3] Historically, telecommunication carriers have imposed such requirements on customers with histories of poor payment with that carrier. However, the proliferation of telecommunications companies in the past twenty years has meant that carriers now routinely receive requests for services from customers unknown to them. This is one of the effects of the high level of competition in the telecommunications industry which NCTDE is intended to address to ensure that such competition can remain robust.

experience with a telecommunications carrier. Accordingly, NCTDE believes that a database devoted exclusively to consumer telecommunications credit histories will significantly improve the ability to reduce uncollectibles.

Another problem facing telecommunications carriers resulting from the rise in unpaid consumer debt is the collection of unpaid debt. Often, consumers move, requiring telecommunications carriers to locate them to collect the debt owed. Tracing individuals responsible for bad debt (known as "skip tracing") is an equally important element in reducing the burden of unpaid bills and toll fraud. NCTDE will offer its members a service to assist in skip tracing consumer accounts.

The limited exchange of customer identification data by telecommunications service providers for billing and collection purposes was authorized by the Telecommunications Act of 1996, Pub. L. 104-104, Title VII, § 702(d), *codified at* 47 U.S.C. § 222(d):

> a telecommunications carrier. . . [may use, disclose or permit access] to customer proprietary network information obtained from its customers, either directly or indirectly through its agents -- (1) to initiate, render, bill, and collect for telecommunications services; [or] (2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services . . . .

As the House Conference Report relating to the passage of the Act noted, "[t]he conferees intend new subsection 222(d)(2) to allow carriers to use [customer proprietary network information] in limited fashion for credit evaluation to protect themselves from fraudulent operators who subscribe to telecommunications services, run up large bills, and then change carriers without payment." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 205, *reprinted in* 1996 U.S.C.C.A.N. 217. Prior Federal Communications Commission regulations also permitted some limited information exchanges among telecommunications service providers. See 47 C.F.R. § 64.1201 (1996). NCTDE seeks to build on the above-described statutory and regulatory foundation to aid in its Members' collection efforts, which will reduce their costs and ultimately will benefit telecommunications consumers.

THE NATIONAL CONSUMER TELECOMMUNICATIONS DATA EXCHANGE

NCTDE's purpose is "to promote the exchange of consumer account information among telecommunications carriers." NCTDE Bylaws, Article I, Section 3.[4] NCTDE intends to contract with an unrelated, independent third-party vendor to establish a data base of closed consumer accounts having uncollected balances. An NCTDE Member considering a new Applicant will be able to query the Vendor about the Applicant. The inquiring Member will then be advised by the Vendor if NCTDE data reflects that the consumer Applicant has an outstanding undisputed debt with a NCTDE Member. This information will enable the inquiring Member to make a more informed decision as to the creditworthiness of the Applicant, and to take appropriate measures to protect against a bad credit risk, such as limiting the amount of credit extended or requiring a deposit or prepayment.

NCTDE will also provide a skip tracing service. By using this service, a Member with an outstanding debt can elect to be advised by the Vendor if its former customer has applied for service with another NCTDE Member. The skip trace report will contain the customer's current address to enable the Member carrying the bad debt to trace the debtor to a new location and seek recovery of its unpaid debt.

Although the information available to Members will undoubtedly assist in reducing the dollar value of uncollectibles, it is important to note what information will not be exchanged under the NCTDE program:

(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 undisputed debt, and the connect

[4] A copy of the Bylaws is attached as Tab B.

and disconnect dates for the customer's previous service.

(4) Identity of the Member to whom the bad debt is owed will not be disclosed to the inquiring Member and, in the instance of skip tracing, the name of the inquiring Member will not be disclosed to the Member whose customer has been traced.

The NCTDE Operating Guidelines[5] specify the types of information to be provided by each Member, the time frames during which such information shall be provided to the Vendor, the matching process, and the means of notification provided when a match is made. NCTDE has prepared a Request for Proposal ("RFP") to seek bids from unrelated, independent third-party vendors for the contract to operate the database and related functions. The RFP sets forth the technical specifications and requirements for the bid. The RFP has been distributed to independent, third-party vendors but NCTDE will not enter into any binding contract with any such vendor until and unless a favorable business review letter is received by NCTDE from the Department of Justice.

Upon joining NCTDE, a Member identifies all unpaid accounts, closed within the previous six (6) months ("Unpaid Closed Accounts"). An Unpaid Closed Account ("UCA") is defined as the account of a former consumer customer (1) whose services were disconnected, whether voluntarily or involuntarily, in accordance with the Member's standard business practices, (2) whose debt to the Member exceeds a certain threshold amount and (3) whose debt to the Member is not disputed. Each Member is thereafter obligated promptly to identify each new UCA.

In order to establish the UCA Database, each Member must provide the following UCA information (if known), to the Vendor:

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

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[5] Attached as Tab C.

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 (Local, Long Distance, or Other)
27. Member Comments (if known)
28. Customer Comments (if known)

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

Additionally, Members may request information about consumers whose application for new telecommunications services has 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, 27 and 28 provided for in the Unpaid Closed Account 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 Vendor will contact the Member submitting the matching UCA Record to determine if any of the relevant information has changed since the UCA Record was initially submitted, e.g., the bad debt has been cleared. Where a change is noted, the Vendor shall change the UCA Record and a new report will be generated by the Vendor and forwarded to the requesting Member.[7]

NCTDE's Operating Guidelines further provide that CSA Records will be retained and reviewed for matches for six months. This is essential for at least two reasons. First, often it will 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 to disconnection by its existing carrier. During this period, an inquiry by a Member will not result in a match. By retaining the CSA Records for six 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.

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[6] When receiving a Match Report, a Member may request the Carrier Source Identification Option. This option does not allow a Member to identify any other NCTDE Member; rather, it identifies if the requesting Member itself was the source of the Unpaid Closed Account Record. In this way, a Member lacking reliable internal reporting controls can use the NCTDE 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 NCTDE Operating Guidelines further require that the Member disclose to the applicant that it used information obtained from NCTDE if it uses any information from a Match Report when making its credit decision. See Art. III, F. Additionally, Match and Skip Reports may only be used by a Member's consumer financial personnel in connection with extending new service or locating a former customer. See Art. III, E.

NCTDE provides a service through which a Member may obtain a Skip Report when an account it has identified in a UCA Record matches another Member's new CSA Record. This Report will provide information included in the CSA Record, not including the identity of the Member submitting this Report. Thus, it will identify the current location of the customer owing the bad debt, but will not identify the Member from which it is seeking service.

As noted above, the databases will be operated by an independent, unrelated third-party Vendor, described in the Bylaws as the Consumer Reporting Agency ("CRA"). NCTDE has not yet selected a CRA. NCTDE 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 NCTDE 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 NCTDE.

NCTDE will have an annual meeting to discuss various administrative matters involved in operating the program, such as organizational structure, membership, finance, adequacy of data exchange program, etc. It may also hold "special" meetings at the request of Members. Both regular and "special" meetings can be called only upon written notice. Notices must state the purpose or purposes for which the meeting is being called and shall provide a written agenda. Meetings shall be chaired by the Executive Director. Formal minutes will be kept for all meetings. Independent counsel for NCTDE will attend all such meetings. Counsel for the various Members are permitted to attend all such meetings together with the Members' respective credit personnel.

ANTITRUST ANALYSIS

A. NCTDE Has been Structured to Comply with the Antitrust Laws

NCTDE's Bylaws (Tab B) and Operating Guidelines (Tab C) provide the framework for NCTDE's operations, including its goals, requirements, membership, fees, management, and related issues.

Membership in NCTDE is open to "[a]ny telecommunications carrier (as defined under the Telecommunications Act of 1996) with consumer telecommunications accounts." Bylaws, Article II, Section 1. The Bylaws set forth the process by which a carrier may join NCTDE, requiring that each Member Applicant sign an agreement to obey NCTDE's Bylaws, which include an obligation on the part of NCTDE and its Members to refrain from violating the antitrust laws. Article I, Section 4 & Article II, Section 4. Each Member shall

pay fees, dues, or other assessments as proposed by the Executive Director and as approved by NCTDE's Board of Trustees. Article II, Section 6.

All NCTDE Members must also agree, in writing, to abide by the terms of the NCTDE Statement of Compliance with the Antitrust Laws (also in Tab B), which is referenced in NCTDE's Bylaws, and which provides that NCTDE 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 about, 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 Vendor. The Vendor is prohibited from providing any Member with the identity of any other Member submitting information.

B. Implementation of the Exchange is Pro-competitive

NCTDE's objective is to facilitate early identification of credit risks by providing Members with timely information about the credit history of Applicants for consumer telecommunications services, and to trace customers owing unpaid balances. Implementation of the NCTDE program will enable Members to make informed decisions about the creditworthiness of potential consumer customers, thereby reducing the risk of bad debts. By decreasing

bad debt, an NCTDE member reduces expenses, enabling it to concentrate on services to its customers.[8]

These pro-competitive benefits will be accomplished with no risk to competition whatsoever. The database will be managed by an independent, unrelated third-party Vendor. No information will be directly exchanged between NCTDE Members with respect to their credit terms or practices. The reports provided to Members, Match and Skip Trace Reports, will provide information only with respect to the account or Applicant and will not disclose either 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 a bad debt, nor will there be any discussions of credit practices, terms, or conditions.

Along with the Bylaws, the Statement of Compliance provides additional guidance on the manner in which all NCTDE meetings must be held. The Statement references the requirement in the By-Laws 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 to be discussed. Within ten days after any 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 actions taken, 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 NCTDE meetings; no private conversations between Members with respect to any NCTDE business are permitted.

Cases interpreting federal antitrust law have found that credit information exchange programs such as NCTDE 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 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

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[8] NCTDE will enable its Members more effectively to carry out the goal of the Telecommunications Act of 1996 to "open[] all communications services to competition . . . result[ing in] lower prices to consumers, . . . greater choice of services, more innovation, . . . and less regulation." H.R. Rep. No. 204, 104th Cong., 2d Sess. 48, *reprinted in* 1996 U.S.C.C.A.N. 11.

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 Distrib. 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).

In addition to its similarity to the previously approved NTDE, NCTDE is also similar to the National Railroad Industry Trade Group credit information clearinghouse (the "NRITG") about which the Department issued a favorable business review letter on August 4, 1987. 1987 WL 124101 (D.O.J.) The NRITG was designed to reduce the risk of railroads' incurring bad debts by making available to subscribing members information about the creditworthiness of particular shippers. Like the proposed activities of NCTDE, the NRITG uses a third party (Dun & Bradstreet), which acts as the clearinghouse to receive information from and disseminate information to the various members. Also like the proposed activities of NCTDE, the NRITG does not exchange current price or credit terms, nor does it identify the sources of the information or which members had problems with particular accounts. Based on all of these factors, the Department stated that it did not intend to challenge implementation of the NRITG. The information exchange proposed by NCTDE is actually more limited than that approved by the Division in the NRITG letter. The NRITG allowed significantly more information about credit to be submitted to the third-party clearinghouse and to be retrieved by members of the NRITG in response to requests.

The benefits of such credit information clearinghouses are substantial and widely recognized and their use is widespread. Several other utility groups already operate similar information exchanges. We would be happy to provide additional information regarding these exchanges at the Department's request.

EXPEDITED BUSINESS REVIEW REQUEST

In 1992, the Department committed to providing expedited treatment to business review requests with respect to information exchange programs such as this. See 63 Antitrust & Trade Reg. Rep. 710-11 (December 3, 1992). NCTDE requests expedited treatment of this business review letter in order to move rapidly toward

addressing this significant financial problem in the telecommunications industry.

We have set forth (1) the persons expected to participate in the exchange; (2) its purpose and objectives; (3) the nature, type, timeliness, and specificity of the information to be exchanged; (4) the method by which the information will be exchanged; (5) the general characteristics of market(s) involved; (6) the identity of the firms involved and the fact that the program is open to all telecommunications carriers as defined under the Telecommunications Act of 1996; (7) the safeguards built into the program; and (8) the benefits that will flow from this exchange.

The only information identified in the Justice Department's press release describing the expedited review program that we have not provided is detailed information about all telecommunications services provided by the companies involved, including pricing and marketing practices, the availability of information regarding marketing conditions, individual transactions and individual competitors, and the ten largest customers for each of the telecommunications services provided. From our reading of the press release, it appears these provisions were included in anticipation that most information exchanges would involve the exchange of price, production, or capacity information. To evaluate the competitive effect of such exchanges, it is important to fully understand the markets in which the exchange takes place, the competitive process in those markets, and the current availability of information about pricing, sales, production, etc. Hence, the information outlined in the Justice Department press release with regard to market conditions, availability of information, and customers is highly relevant to the analysis of such information exchanges. However, such detailed information is not relevant to an evaluation of the competitive effects of the information exchange NCTDE is proposing, one limited to the exchange of bad debt information. Attempting to compile such data for an industry as complex as the telecommunications industry would be extremely burdensome and would not, in our view, further your analysis. Of course, if there is any additional information that you do need, we will promptly provide that information to you.

We look forward to a prompt and favorable response to our request. The NCTDE promises substantial benefits and we are anxious to move forward with its implementation and operation. Please contact me if you have any questions.

Sincerely yours,

Craig L. Caesar

CLC/gle

Enclosures

NCC15601.WP5