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November 14, 2012

VIA WEB PORTAL

David W. Danner
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Post Office Box 47250
Olympia, Washington 98504-7250

Re: Docket No. UT-120541 Rulemaking to Consider Modifications to, or Elimination of,
WAC 480-120-251
Further Comments of Dex One Corporation

Dear Mr. Danner:

Enclosed for filing in the above-referenced proceeding are the Further Comments of Dex One Corporation, pursuant to the Commission's October 31, 2012, Notice of Opportunity to Comment.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,



Brooks E. Harlow, P.C.

cc via email

Mr. Jeffrey Goltz
Mr. Patrick Oshie
Mr. Philip Jones
Mr. Brian Thomas
Mr. Greg Kopta
Mr. William Weinman
Mr. John Cupp

**BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

Re: Rulemaking to Consider Modifications to, or)
Elimination of, the Requirement Related to)
Distribution of Telephone Books in)
WAC 480-120-251) Docket UT-120451
)
Notice of Opportunity to File Written) FURTHER COMMENTS OF DEX
Comments Issue October 31, 2012) ONE CORPORATION
)

FURTHER COMMENTS OF DEX ONE CORPORATION

1 Dex One Corporation (“Dex One”) appreciates this further opportunity to comment on
2 possible revisions to WAC 480-120-251 (“Directory Rule”), pursuant to the Commission’s
3 October 31, 2012, Notice of Opportunity to Comment (“Notice”). The Notice specifically
4 requests further comment on the Commission’s latest proposed revised rule (“Draft”), as is set
5 forth in the Notice. At the outset, Dex One notes its sincere appreciation for the Commission’s
6 expeditious, considered, and clearly well-intentioned approach to this issue, especially in light of
7 the recently changed legal landscape created by the opinion in *Dex Media v. Seattle*, ___ F.3d
8 ___ (9th Cir., Oct. 15, 2012). Unfortunately, despite the Commission’s best intentions, for Dex
9 One the new Draft creates a “worst of both worlds” situation.

10 **A. “Worst of Both Worlds.”**

11 First, in order to switch to upon request delivery of the residential white pages the Draft
12 requires action by the LEC; *i.e.* putting directory listings online or linking to an online database
13 of listings. CenturyLink and Dex One have made clear that they are not in agreement on this
14 issue, meaning it is *unlikely* that Dex One, CenturyLink’s customers, or the communities in the

1 five most populous areas in the state will obtain the intended benefits of the Draft—reduced
2 waste and reduced costs—in the foreseeable future.

3 Second, despite the Ninth Circuit case striking down mandatory regulation of directories,
4 the Draft creates new *mandatory* opt-out provisions, raising serious First Amendment issues.
5 The directory industry has been aggressive in litigating undue regulation of the content and
6 distribution of directories as *Dex Media v. Seattle* illustrates. The Draft goes so far toward
7 reducing directory regulation that Dex One can only assume the Commission did not realize that
8 that provision of the Draft would be such an anathema to the industry. The unintended
9 (hopefully) regulatory overreach can be easily remedied, however.

10 Dex One has developed three alternatives to the Draft, which are attached as Appendices
11 A, B, and C. Adoption of any alternative would solve both of the foregoing problems and enable
12 Dex One and other LEC publishers to take full advantage of the relaxed regulatory requirements.

13 **B. Revisit Repeal?**

14 Before discussing Appendices A, B and C, Dex One respectfully suggests that the
15 Commission may wish to revisit the possibility of simply repealing the Directory Rule.
16 Numerous states have no directory rule or no rule that regulates distribution of directories. No
17 party in this docket has been able to point to a single such state and demonstrate that lack of a
18 rule has led to problems for LEC customers. Dex One is not aware of such problems. Nor has
19 any party pointed to any state that lacked a directory rule and has found need to enact one. Dex
20 One does not believe such a situation has arisen anywhere.

21 As the Commission labors in good faith on the difficult task of developing a rule that
22 avoids the familiar “law of unintended consequences” it may well wish to revisit the possibility

1 of outright repeal. That will have consequences, but the precedent in numerous other states
2 demonstrates they are not dire or even serious consequences. Consumers have adapted well to
3 the new environment in deregulated and unregulated states.

4 **C. Possible Fixes—A Middle Ground.**

5 *Alternative 1: Appendix A*

6 Should the Commission wish to retain some form of regulation of directories or directory
7 distribution, despite the challenges, Dex One recommends revising the Draft as shown in
8 Appendix A to these comments. Because the Draft takes such a deregulatory approach, the
9 changes that are required to eliminate the foregoing problems are actually pretty minimal. The
10 key changes are, first, to insert after “LEC” the phrase “or its publisher” in subsection (2)(a).
11 This will enable an official LEC directory publisher to provide an electronic database even
12 absent any cooperation or interest by the LEC itself in moving to upon request (opt-in)
13 distribution of residential white pages.¹

14 The second change allows LECs the flexibility to “arrange for” the provision of a
15 reasonable opt-out program in lieu of establishing one themselves. The revision to subsection
16 (3) avoids putting an added regulatory burden on LECs relating to opt-out if their publisher has
17 already established an opt-out program.

18 The second and critically important change is to replace the word “shall” with “need” in
19 subsection (2)(b). The effect of this change is to make the opt-out provision optional and thereby
20 eliminate any risk of First Amendment challenges. LECs and independent publishers already

¹ Subject, of course, to any contractual restrictions as between the LEC and the publisher. In the case of CenturyLink, the requirements of the contract with Dex One are disputed and in litigation. The Commission need not concern itself with the merits of that contract dispute, as it will be resolved one way or the other in another and more appropriate forum. But the Commission needs to take into account the fact of the dispute if it is to achieve any public interest benefits from the relaxed regulation provided by the Draft.

1 implemented voluntary programs to honor opt-out requests by consumers. They have a strong
2 economic incentive not to incur the costs to print and deliver directories to households that don't
3 want them. Layering a regulatory obligation on top of the existing economic incentives only
4 serves to create potential liability for honest mistakes and to create unnecessary First
5 Amendment issues.

6 The only other change that Dex One suggests for clarity is to create and consistently use
7 the term "basic directory listings" in the Draft. This is not intended to be a substantive change,
8 but it is helpful to distinguish between the bare-bones name, address, and phone number listings
9 the Commission seeks to regulate and more expansive publications that the Commission is not
10 intending to regulate.

11 *Alternative 2: Appendix B*

12 Alternative 1 is the most straightforward approach to fixing the problems with the Draft
13 by recognizing that in the real world some LECs are quite independent from their directory
14 publishers. However, in case the Commission is uncomfortable adopting a rule that some might
15 interpret as regulating an entity over which the Commission lacks jurisdiction, Dex One offers an
16 alternative, attached as Appendix B. Alternative 2 contains no references to directory publishers.
17 As with Alternative 1, it changes the opt-out provision in (c) to be optional, not mandatory and in
18 subsection (3) allows LECs the flexibility to "arrange for" the provision of a reasonable opt-out
19 program in lieu of establishing one themselves. And to avoid the problem that Dex One will not
20 be able to move to opt-in if CenturyLink does not change its website to comply with proposed
21 subsection (2)(a), Alternative 2 makes the opt-in provision a stand-alone option and de-couples it
22 from the website requirement.

1 *Alternative 3: Appendix C*

2 Alternative 3 is another possible approach to fixing the problems with the Draft that again
3 takes into account real world issues and options. In particular, it allows for opt-in, but deletes the
4 requirement that the LEC must also have an online database to qualify for that option. For Dex
5 One, the real world barrier to the online link is that CenturyLink may not be willing to provide
6 the link, even though the Dex One website already provides all the required listing. But also,
7 smaller independent LECs may have the opposite problem; *i.e.*, they might be quite willing to go
8 online and opt-in, but they have no existing database to link to. And it might be expensive and
9 difficult to create a compliant database.

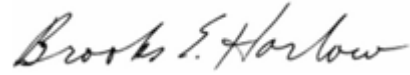
10 Since the parties concerned about access by the poor and elderly seem to assume a lack of
11 Internet access, deleting the online requirement would not seem to reduce protection of
12 “vulnerable” customers meaningfully. The provision for easy and free upon request delivery of
13 the residential white pages provides a reasonable “floor” to protect customers who lack Internet
14 access. Alternative 3 also contains no references to directory publishers. And, as with
15 Alternative 1, it changes the opt-out provision in (c) to be optional, not mandatory, to avoid First
16 Amendment issues and in subsection (3) grants more flexibility to LECs in making opt-out
17 available to consumers.

18 **D. Conclusion**

19 We look forward to continuing to work with the Commission to update or eliminate its
20 Directory Rule to promote the public interest in light of significant changes driven by

1 technology, law, and changed consumer habits and needs.

Respectfully submitted,



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Counsel for Dex One Corporation

November 14, 2012

APPENDIX A

WAC 480-120-251

Directory Listings.

(1) Basic local exchange service includes access to basic directory listings comprised of the name, address, and primary telephone number for each customer that the local exchange company (LEC) serves in a local calling area unless the customer requests to exclude some or all of this information from the LEC's directory listings.

(2) A LEC must ensure that each of its basic local exchange service customers has access to basic directory listings for the customer's local calling area through at least one of the following means:

(a) Electronically via a document, database, or link on the LEC's or its publisher's website, provided that the LEC also distributes or arranges to distribute printed directory listings to all of the LEC's customers who request a printed directory; and/or

(b) In hard copy via publishing or arranging to be published a printed telephone directory that includes the basic directory listings and distributing that directory to the LEC's customers, provided that a printed telephone directory ~~shall~~need not be distributed to any customer who requests not to receive a printed directory.

(3) A LEC must establish or arrange for reasonable means for its customers to request to exclude some or all of their information from the LEC's basic directory listings and to request to receive, or not to receive, a printed directory.

APPENDIX B

WAC 480-120-251

Directory Listings.

(1) Basic local exchange service includes access to basic directory listings comprised of the name, address, and primary telephone number for each customer that the local exchange company (LEC) serves in a local calling area unless the customer requests to exclude some or all of this information from the LEC's directory listings.

(2) A LEC must ensure that each of its basic local exchange service customers has access to directory listings for the customer's local calling area through at least one of the following means:

(a) Electronically via a document, database, or link on the LEC's website;

~~(b) provided that the LEC also d~~Distributing~~es or arrangin~~ges ~~to be distributed~~
printed directory listings to all of the LEC's customers who request a printed directory;
and/or

~~(b)~~ In hard copy via publishing or arranging to be published a printed telephone directory that includes the basic directory listings and distributing that directory to the LEC's customers, provided that a printed telephone directory ~~shall~~need not be distributed to any customer who requests not to receive a printed directory.

(3) A LEC must establish or arrange for reasonable means for its customers to request to exclude some or all of their information from the LEC's basic directory listings and to request to receive, or not to receive, a printed directory.

APPENDIX C

WAC 480-120-251

Directory Listings.

(1) Basic local exchange service includes access to basic directory listings comprised of the name, address, and primary telephone number for each customer that the local exchange company (LEC) serves in a local calling area unless the customer requests to exclude some or all of this information from the LEC's directory listings.

(2) A LEC must ensure that each of its basic local exchange service customers has access to directory listings for the customer's local calling area through at least one of the following means:

(a) ~~Electronically via a document, database, or link on the LEC's website, provided that the LEC also d~~Distributing~~es or arrangin~~ges to be distributed printed directory listings to all of the LEC's customers who request a printed directory; and/or

(b) In hard copy via publishing or arranging to be published a printed telephone directory that includes the basic directory listings and distributing that directory to the LEC's customers, provided that a printed telephone directory ~~shall need~~ not be distributed to any customer who requests not to receive a printed directory.

(3) A LEC must establish or arrange for reasonable means for its customers to request to exclude some or all of their information from the LEC's basic directory listings and to request to receive, or not to receive, a printed directory.