

WILLKIE FARR & GALLAGHER

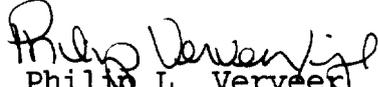
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Washington, DC
New York

A. Richard Metzger, Jr., Esq.
April 4, 1996
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If you would like to discuss the matter more fully, please
feel free to call the undersigned at (202) 328-8000.

Sincerely,


Philip L. Verveer
Theodore C. Whitehouse
Russell L. Smith
Michael F. Finn

**IMPLEMENTATION OF SECTION 222(E) OF THE COMMUNICATIONS ACT:
ACCESS TO SUBSCRIBER LIST INFORMATION**

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I. **INTRODUCTION**

The Telecommunications Act of 1996 heralds the beginning of true competition in telecommunications. One area in which Congress expressly mandated that competition occur is the provision of telephone directories - an area that had previously been, and continues to be, dominated by local exchange carriers ("LECs"). Under new Section 222(e), LECs must make subscriber list information available under nondiscriminatory rates, terms, and conditions, to competing directory publishers.

In order to enter and compete in the yellow page market, competing directory publishers -- those not affiliated with incumbent LECs -- must have reasonable and fair access to the subscriber information. In other words, the publishers must be able to obtain the information and updates (new addresses, new



II.

BACKGROUND

Telephone directory advertising -- essentially yellow pages

"compiled."⁷ The subscriber list information is the essence of the "business" of the LEC - that information must be obtained and maintained in order to provide telephone service.⁸ The LEC by

"used pricing and other terms to try to limit [] competition" in the directory market.¹²

A. Many LECs refuse to sell or license their listings

In the past, some LECs have chosen to prevent competition by refusing to sell or otherwise license their listings to competing directory publishers.¹³ For example, Rochester Telephone, a large independent LEC, refused to provide listings to directory publishers competing with its wholly-owned directory publishing subsidiary until January 5, 1996.¹⁴ As of March 1996, U.S. WEST

price from \$0.05 to \$0.45 over a three year period.¹⁸ Similarly, Southwestern Bell, noting that competing directories were vulnerable to "expense driven attacks," tripled its listings prices twice within four years until they reached \$0.50 cents per listing.¹⁹ ALLTEL Corp., a large independent LEC, currently sells its listings for \$0.98 cents per listing.²⁰ It should be noted that LECs have offered to sell their listings to non-

increas[ing] the fixed cost of operation" for "small independents."²³

C. LECs have imposed particularly burdensome conditions for the provision of updated listings

Updated information -- change of addresses, new businesses, etc. -- is indispensable to a telephone directory publisher, both to maintain the accuracy of its overall database and because (1) people moving into a community are most likely to refer to yellow page advertising and (2) new businesses are particularly likely to need such advertising. Consequently, many LECs historically refused to provide updated information.²⁴ ALLTEL Corp., a large independent LEC, continues to withhold updated listings.²⁵ GTE, which has long refused to provide updated listings, recently stated it would make them available; however, "it was unable to say when."²⁶

²³ See Great Western. 63 F.3d at 1387.

Those LECs which do provide listings often make them available on only the most onerous of conditions. Southwestern Bell, for example, required:

Independents . . . to purchase both the residential and

advertisers that listings in independent publishers' directories "are outdated on publication date."³⁰

D. LECs have committed other anticompetitive acts

Other exclusionary terms imposed by LECs include allowing the information to be used only one time, thereby forcing competing publishers to buy the listings for the LEC's entire directory anew each year, despite the fact that most of the listings were obtained previously from the LEC. Moreover, many LECs seek to restrict or regulate the kinds of directories published by their competitors. Still others impose short deadlines by which the listings must be published in the competing directory, thereby foreclosing use of listings for advertising sales leads. LECs have also attempted to force competing publishers, as a condition of acquiring listings, to print a disclaimer on the cover of their directory that the directory is not associated with the LEC.³¹ Such a disclaimer serves only to undermine consumer confidence in the competing directory. Finally, it should be noted that LECs have not

IV. CONGRESS ENACTED SECTION 222(e) TO CURB LECs' ANTICOMPETITIVE BEHAVIOR AND ENSURE ACCESS TO SUBSCRIBER INFORMATION

Section 222(e) was passed specifically to prevent LECs from continuing their anticompetitive behavior regarding directory publishing. As noted by Representative Paxon, Section 222(e) "is

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Thus, Section 222(e) "guarantees independent publishers access to subscriber list information at reasonable and nondiscriminatory rates, terms and conditions from any provider of local telephone service."³⁴

A. The FCC must implement Section 222(e) within 15 months

Section 257, as enacted by the Telecommunications Act of 1996, requires the Commission to identify and eliminate market entry barriers for entrepreneurs and other small businesses within 15 months of the Act's passage. Among the types of barriers to be eliminated are barriers in (1) the provision and ownership of information services or (2) the provision of parts or services to information services providers.

LEC control over access to subscriber information is the type of entry barrier required to be eliminated by Section 257.

Representative Denny, for example, proposed in Section 222(e)

Under section 257 of the bill, within 15 months from the date of enactment , the FCC is to undertake rulemakings to identify and remove barriers to entry for small businesses involved with telecommunications and information services. Clearly, the requirements of

information. In so doing, the court characterized access to subscriber listings as an "essential facility [which] cannot reasonably or practically be duplicated from other sources."⁴¹

In light of the above, LECs' control over subscriber list information is the type of barrier which Section 257 requires to be eliminated within 15 months.

- B. As part of implementation, the FCC should require that the price charged competing publishers be based on the incremental cost of delivery**

Section 222(e) requires that subscriber list information be made available to directory publishers at "reasonable rates." As part of its implementation of Section 222(e), the Commission should mandate that a "reasonable rate" is one based on the incremental cost of providing the materials. Such a requirement is necessary -- as recognized by two conferees to the 1996 Act -- in order for Section 222(e) to curb fully LECs' anticompetitive behavior.

One particular form of unfair behavior engaged in by LECs is the raising of rivals' costs.⁴² LECs use the market power

force higher costs upon competing directory publishers, thereby preventing such competitors from competing effectively against the LECs, (if not forcing them out of the market altogether).⁴³ By raising rivals' costs, a dominant firm immediately advantages itself through increased profits or market share as its now high-cost rivals reduce their output (e.g., the dominant firm may raise its price to that of its high-cost rivals thereby reaping higher profits or it may lower its price thereby capturing market share).⁴⁴ A dominant firm may capture both increased profits and market share when it has the ability -- as do LECs -- to elevate

1988, Southwestern Bell admitted that its costs were less than one cent per listing.⁴⁶ Yet, that same year, GTE was charging

to its "800" number services.⁵⁰ Similarly, providers of simple name, address, and telephone number data charge as little as one cent per listing.⁵¹

Given such abuses by LECs, it is imperative that a "reasonable rate" be defined as one based on incremental cost. In the long run, incremental costs reflect the true economic cost

one key point. I have consistently sought to assure that in determining what constitutes a reasonable rate under this bill, the most significant factor should be the incremental cost of delivering that listing to the requesting party.

In light of the above, adoption of incremental cost would prevent LECs from abusing their power and effectuate Congress' intent.

V. CONCLUSION

The FCC must implement Section 222(e) within 15 months. In so doing, it should ensure that the price charged per listing is based on the incremental cost. This accords with Congressional intent and will prevent LECs from continuing to abuse their control over subscriber lists.

EXHIBIT LIST

- Exhibit 1 Floor Statement of Representative Joe Barton
(Feb. 1, 1996)
- Exhibit 2 Motion of US West For Permission To File Brief
Amicus Curiae in BellSouth Advertising & Pub. v.
Donnelley Information Pub. (March 2, 1987)
- Exhibit 3 Floor Statement of Representative Bill Paxon
(Feb. 6, 1996)
- Exhibit 4 Affidavit of A.C. Parsons, then-President and CEO
of Southwestern Bell Yellow Pages (Dec. 18, 1987)
- Exhibit 5 Letter from Paul Grauer, President of Wilson
Telephone Co. & Ridenour and Knobbe (March 5,
1986)
- Exhibit 6 Letter from Burel Schnaberg, President/CEO of USA
Western Directories, Inc. to Carol Hill, Ass'n of
Directory (Publishers (March 13, 1996)
- Exhibit 7 Affidavit of Frank Noverr, President of Noverr
Publishing, Inc. (Aug. 21, 1991)
- Exhibit 8 Telephone Company Prices for Subscriber Listings

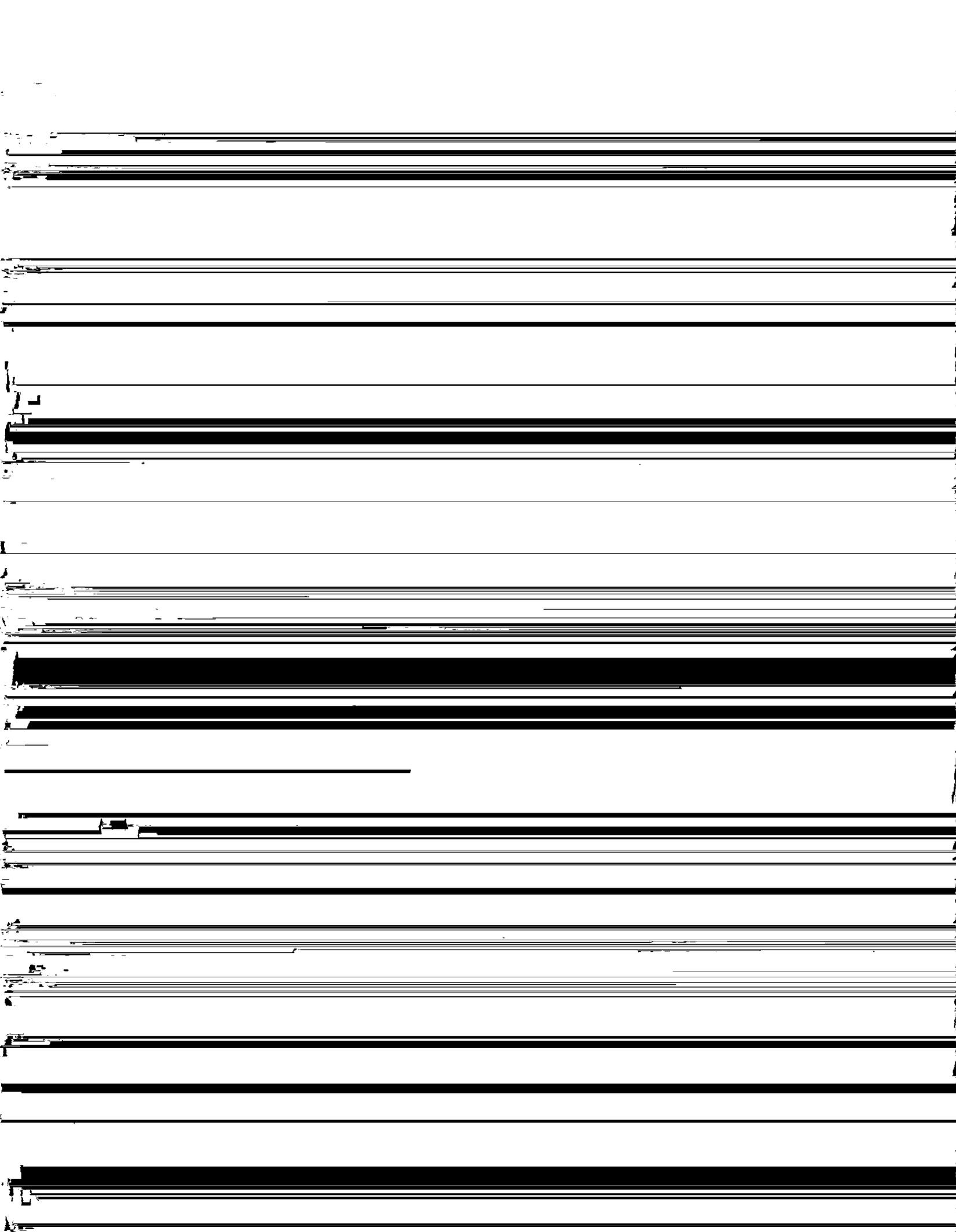


EXHIBIT 1



United States
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Congressional Record

PROCEEDINGS AND DEBATES OF THE 104th CONGRESS, SECOND SESSION

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No. 14

House of Representatives

CONFERENCE REPORT ON S. 652,
TELECOMMUNICATIONS ACT OF
1996

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Speaker, I want to also express my support to the leadership on both sides of the aisle that have pushed this legislation. Special thanks to my good friend, JACK

opens up seamless interactive communications for all Americans, and I would urge an "aye" vote on the bill.

Mr. Speaker, section 702 of the bill adds a new section 222(e) to the Communications Act which would prohibit any provider of local telephone service from charging discriminatory and/or unreasonable rates, or setting discrimi-