EX PARTE OR LATE FILED

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000
FACSIMILE: (202) 662-6291

GERARD J. WALDRON
DIRECT DIAL NUMBER
(202) 662-5360
DIRECT FACSIMILE NUMBER
(202) 778-5360
gwaldron@cov.com

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE: 44-171-495-5655
FACSIMILE: 44-171-495-3101

KUNSTLAAN 44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-549-5230
FACSIMILE: 32-2-502-1598

May 5, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: CC Docket No. 96-98 and CC Docket No. 96-115

Dear Ms. Salas:

It has come to my attention that the enclosed filing was listed in the *Ex parte* Notice of May 4, 1999 as being filed in Docket No. 96-98. This *ex parte* filing should be in Docket No. 96-115 and not in Docket No. 96-98.

If you have any questions, please contact the undersigned.

Sincerely,

Gerard J. Waldron

Gerard J. Waldron

Enclosure

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000
FACSIMILE: (202) 662-6291

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KUNSTLAAN 44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-549-5230
FACSIMILE: 32-2-502-1598

April 22, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Dear Ms. Salas:

Evan Marwell, President of INFONXX, Lois Pines, and the undersigned, counsel to the company, met with Chairman Kennard and Jordan Goldstein of the Common Carrier Bureau; Commissioner Furchtgott-Roth and Kevin Martin; and Commissioner Ness and Linda Kinney to urge the Commission to move promptly to adopt pro-competitive rules implementing Section 222(e), as added by the Telecommunications Act of 1996. As we stated, in instituting such rules, the Commission will have an opportunity to take the important technology-neutral, pro-competitive, and pro-consumer step of ensuring that competitive directory assistance (DA) providers are granted access to subscriber listing information ("SLI ") under the same terms and conditions granted to the major CLECs which are providing that service. In prior filings, INFONXX, a competitive DA provider, has outlined the workings of the competitive DA market and explained why the best reading of Section 222(e) requires this result. In this letter, we wish to underscore the technological, competitive, and consumer imperatives for taking this important step.

Consumers Gain Access to Subscriber List Information in Multiple Formats.

Historically, customers have accessed directories of subscriber listing information through one of two means: (1) written publications; or (2) live operators who disseminate or provide information in response to a specific inquiry. Both segments of directory publishing – written directories and directory assistance – have witnessed the introduction of competition, but both have been and continue to be hampered by Incumbent Local Exchange Carrier (ILEC) policies designed to prevent competitors from gaining equal access to the subscriber listing information. As ILECs have recognized, such information is "vital to the publishing industry" and by raising prices of access, "telephone companies are able to leverage their monopoly position in the telephone

service area into the competitive directory market." Great Western Directories, Inc. v. Southwestern Bell Telephone Co., 63 F.3d 1378, 1386 (5th Cir. 1995). More recently, a third mode of providing directory information has emerged: the development of national directory services available on the Internet – i.e., published electronically. The ILECs' entry into this market has also raised concerns about their ability to leverage their market power to create an unfair playing field, leading to an antitrust suit against a group of ILECs who are cooperating in this endeavor.[1]

Recognizing that anticompetitive "leverage" of monopoly power due to the ILECs' role as the repository of subscriber listing information (SLI) would frustrate the 1996 Act's vision of full and fair competition in all markets, Congress passed Section 222(e), which provides a national mandate for non-discriminatory and reasonable access to SLI by directory publishers "in any format." Section 222(e) states in relevant part:

> 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. Sec. 222(e) (emphasis added). With respect to the facilitation of competition in the DA market, the two key issues facing the Commission are (1) whether DA providers constitute a "publish[er of] directories in any format" and, (2) if so, what terms and conditions for the receipt of access to such data would be "non-discriminatory."

The Commission Must Apply Tools of Statutory Construction That Support Inclusion of DA Providers Within Section 222(e).

As we explained in our prior filing, it is well settled that publishing can occur orally as well as in written form.[2] Particularly where Congress requires that publishers of "any format" be granted access to the data, the Commission cannot construe "publisher"

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[1] GTE New Media Services v. Ameritech Corp., 21 F. Supp. 2d 27 (D.D.C. 1998) (finding jurisdiction existed over GTE's claim that the RBOCs illegally combined and conspired to monopolize the Internet Yellow Page market).

[2] See, e.g., Webster's New World Dictionary 1087 (3d coll. ed. 1988) (defining "publish" as "to make publicly known; announce, proclaim, divulge or promulgate"); 2 Compact Edition of the Oxford Dictionary 1561-62 (1971) (explaining that one "publishes" information by making it "generally known," or by "tell[ing]," or "mak[ing] generally accessible or available for acceptance or use"); Black's Law Dictionary 1233 (6th ed. 1990) (to "publish" information is "to utter" it); Gertz v. Welch, 418 U.S. 323, 332 (1974) (both a newspaper (in print) and a broadcaster (in oral form) can commit libel by "publish[ing] defamatory falsehoods about an individual.").

as limited to those providing directory information in a written format. Such a narrow ruling would improperly fail to give full effect to the precise words that Congress used in crafting this provision.

In interpreting this provision, standard tools of statutory construction direct the Commission to examine how Congress used the same term in the same piece of legislation.[3] The term "publishing" appears elsewhere in the 1996 Act, principally in another addition to Title II, Section 274--"Electronic Publishing By Bell Operating Companies". In that section, Congress defines "electronic publishing" broadly:

> The term "electronic publishing" means the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any or more of the following: news (including sports); entertainment [and a list of other categories of information].

Clearly, "electronic publishing" is one possible version of "publishing in any format". Accordingly the Commission should incorporate the description of the activity Congress used in defining "publishing" – namely, disseminating or providing of information -- into its analysis of Section 222(e). Following that step, then the Commission will determine that a person who disseminates or provides information in any format is a publisher. Competitive DA providers disseminate information in response to a specific inquiry orally, as opposed to electronically, and that mode of dissemination should qualify as another version of "publishing in any format." Accordingly, the Commission should interpret Section 222(e) to grant all publishers of directories -- whether in written, electronic, or oral form -- access to the SLI.

The Commission's Interpretation of Section 222(e) Should Be Technologically Neutral.

The possibility of granting access to SLI only to certain publishers, say those publishing written or electronic directories, would be a mistake on technological as well as legal grounds. In particular, electronic directories, like those made available over the Internet, operate in an identical manner to directory assistance provided orally: both respond to specific requests for information. And with the advent of voice recognition technology, electronic directories will soon be able to ask for and distribute subscriber listing information in an audio form. Thus, a policy that privileges electronic publishing

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[3] The general rule is that the same words used twice in the same act have the same meaning. Gustafson et al., v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995) (The "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning."). This rule has special applicability where Congress contemporaneously uses the same term. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (The rule that "a legislative body generally uses a particular word with a consistent meaning in the same context ... certainly makes the most sense when the statutes were enacted by one same legislative body at the same time").

over directory assistance would, in effect, encourage directory competition over the Internet and not over the telephone – even if the distribution of the information was through essentially the same format. Given that the large majority of subscribers lack access to the Internet, this policy would not only be arbitrary, but it would also reinforce the divide between the information haves (those with Internet access) and the information have-nots (those who lack such access).

The Commission Should Promote Competition in the DA Business By Granting SLI Access to Competitive DA Providers At the Same Terms That The Major CLECs Receive Such Access.

In its recent Notice of Proposed Rulemaking in response to the Supreme Court's remand of the local competition rules on unbundled access to network elements under Section 251, the Commission stated that the unbundling requirement addresses the availability of alternate sources of wholesale inputs "necessary" to provide local telecommunications service.[4] One of the elements now being re-considered is the forced unbundling of operator services/directory assistance (OS/DA). Ideally, there will eventually be a widespread proliferation of "carriers' carriers" who are willing and able to provide competitive providers with an alternative to the incumbent's OS/DA. This development, however, is far less likely to occur without pro-competitive access policies that enable competitive DA companies like INFONXX to succeed in their aim to become such carriers.

At present, there are generally no more than three companies in a given market that can provide operator services on a competitive basis: the incumbent LEC, AT&T, and MCIWorldcom. To provide operator services on a competitive basis with these companies, a company must have two things: (1) the proper facilities, know-how, and personnel; and (2) access to the SLI on the same terms as the major competitors in the market. Although INFONXX and other competitive DA companies are able to employ the first to their advantage, they cannot hope to compete where cost-based access to SLI is given only to the incumbent and the major CLECs (AT&T and MCI). To cure this problem, and to ensure that wholesale competition can thrive in the OS/DA market as envisioned by the 1996 Act, the Commission should require not only that competitive DA providers are granted access to SLI under Section 222(e), but that nondiscriminatory access means access given on the same terms and conditions that it is given to the similarly situated major CLECs who are providing an identical service.

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[4] In Re Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, Second Further Notice of Proposed Rulemaking, at 6 (April 16, 1999) (available at www.fcc.gov).

Consumers Will Benefit From Equal Access For Competitive DA Providers By Reducing The Millions Of Wrong Numbers Consumers Suffer Each Year.

Perhaps most significantly, the lack of equal access for competitive DA providers leaves consumers with the same complaints that they would have about inaccurate information received from written or electronic directories: the time and expense of dialing wrong numbers. Clearly, the goal of implementing Section 222(e) should be to not merely facilitate new directories in any technology or full and fair competition that would lead to the emergence of carriers' carriers, but also to ensure that consumers receive accurate subscriber listing information.

One of the duties that local telephone companies have been charged with is to ensure that the database of telephone numbers is kept accurate and current. This responsibility, which came with their historic position as a franchise monopoly, ensures that all subscribers on the telephone network are reachable and can reach other subscribers. In a world of competitive telephony, this position must not be allowed to disadvantage those consumers who are inclined to choose an alternate provider (or a provider that opts for an alternate carriers' carrier).

Without equal access to the SLI for DA providers, consumers will continue to suffer sub-par service because they (or their carrier) choose a supplier other than the incumbent. In 1999, for example, INFONXX predicts that, on account of the unavailability of non-discriminatory SLI access to DA providers, *consumers will receive some 40 million wrong numbers this year.*[5] And these consumers will also be paying artificially inflated rates, as the lack of non-discriminatory access to competitive DA providers substantially raises their costs. Moreover, in a wireless environment, this phenomenon of inflated costs presents consumers with a double-hit: not only are consumers paying more, but they are forced to stay on the phone longer to get the requested number, leading to an additional $17 million of airtime costs borne by consumers each year.

Finally, it is important to highlight that the fact that the major CLECs/IXCs have been provided access does not mean that consumers will benefit to anywhere near the same extent that they would in a world of full and fair competition. Since 1992, for example, the price of a long distance directory assistance call from the major interchange carriers -- who are also the major CLECs -- has risen from $0.55 per call to $1.40 per call,

[5] This number is arrived at by taking the estimate of approximately 400 million directory assistance calls that will be handled by competitive providers this year (of which INFONXX will handle approximately 100 million). Using the industry average rate of accurate listings, which between 88-90%, we arrive at the figure of 40 million wrong numbers per year. As the industry's quality leader, INFONXX actually achieves a higher accuracy rate – between 93-95% -- and thus INFONXX alone will receive (and distribute) approximately 5 million wrong numbers when American consumers call 411 this year.

despite falling long distance rates. In contrast, INFONXX charges only $0.45 for such a call.

Conclusion

The Commission should adopt rules under Section 222(e) that make clear that (1) DA providers constitute "a publisher of directories in any format"; and (2) "non-discriminatory" access for DA providers means that they must get the data on the same terms and conditions as similarly situated competitors (i.e., the major CLECs). As such rules merely require the Commission to exercise its interpretive discretion in a sound manner, we hope that it will not delay this important step any longer than absolutely necessary.

This letter is being filed pursuant to Rule 1.1206. If you have any questions, please contact the undersigned.

Sincerely,

Gerard J. Waldron
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, D.C. 20044
(202) 662-5360

Counsel to INFONXX

April 22, 1999

cc: Chairman William Kennard
Mr. Jordan Goldstein
Commissioner Susan Ness
Ms. Linda Kinney
Commissioner Harold Furchtgott-Roth
Mr. Kevin Martin

CERTIFICATE OF SERVICE

On April 22, 1999, a copy of these comments were delivered by hand to the following persons:

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Room 8-B201
445 12th Street, S.W.
Washington, D.C. 20554

ATTN: Tom Power

The Honorable Susan Ness
Federal Communications Commission
Room 8-B115
445 12th Street, S.W.
Washington, D.C. 20554

ATTN: Linda Kinney

The Honorable Harold Furchtgott-Roth
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20544

ATTN: Kevin Martin

The Honorable Michael K. Powell
Federal Communications Commission
Room 8-A204A
445-12th Street, S.W.
Washington, D.C. 20554

ATTN: Kyle Dixon

The Honorable Gloria Tristani
Federal Communications Commission
Room 8-C302
445-12th Street, S.W.
Washington, D.C. 20554

ATTN: Paul Gallant

Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

William A. Kehoe, III
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, S.W.
12th Street Lobby
Counter TW-A325
Washington, D.C. 20554

Robert Atkinson
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Carol E. Mattey
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Barbara E. D'Avilar

Barbara E. D'Avilar