Before the Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended	)	CC Docket No. 99-273

THIRD REPORT AND ORDER in CC Docket No. 96-115,
SECOND ORDER ON RECONSIDERATION of the
Second Report and Order in CC Docket No. 96-98, and
NOTICE OF PROPOSED RULEMAKING in CC
Docket No. 99-273

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By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth approving in part, dissenting in part and issuing a statement.

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APPENDIX B -- LIST OF PARTIES (CC Docket No. 96-98) 1

I. INTRODUCTION

In passing the Telecommunications Act of 1996 (1996 Act),[1] Congress sought "to provide for a pro-competitive, de-regulatory national policy framework" that would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."[2] Two components of that framework are section 222(e) of the Communications Act,[3] which requires carriers that provide telephone exchange service to provide subscriber list information to requesting directory publishers "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions,"[4] and section 251(b)(3) of that Act, which requires, among other things, that local exchange carriers (LECs) permit competing providers of telephone exchange service and telephone toll service "nondiscriminatory access to . . . directory assistance and directory listing."[5] Both of these sections address third party rights to obtain telephone exchange service subscribers' names, addresses, and telephone numbers from LECs. To ensure that our policies implementing these statutory requirements are consistent, this item addresses subscriber list information issues arising under section 222(e),[6] directory listings and directory assistance issues arising under section 251(b)(3),[7] and issues arising out of the convergence of directory publishing and directory assistance.[8]

Subscriber list information, which includes listed subscribers' names, addresses, and telephone numbers as well as headings under which businesses are listed in the yellow pages, is the foundation of the directory publishing business, a business that generates annual

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. §§ 151 *et seq*.). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[2] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (*Joint Explanatory Statement*).

[3] 47 U.S.C. § 222(e).

[4] *Id.*

[5] 47 U.S.C. § 251(b)(3).

[6] *See* part II, *infra*.

[7] *See* part III, *infra*.

[8] *See* part IV, *infra*.

revenues of over $12 billion.[9] Although most directory publishing revenue presently comes from the sale of advertising for printed yellow pages directories,[10] many companies are now offering electronic yellow pages over the Internet. According to one estimate, the revenues from these and more advanced Internet directories will surpass those from printed directories by 2010.[11]

Telecommunications carriers acquire subscriber list information when they initiate service to local telephone exchange service customers or change that service. In enacting section 222(e), Congress recognized that the LECs had "total control" over subscriber list information.[12] Congress found that some LECs had exploited this control by, among other practices, refusing to sell subscriber list information to potential competitors, charging excessive and discriminatory prices for subscriber list information, or imposing unreasonable conditions, such as requiring independent directory publishers to purchase listings only on a statewide basis.[13] Section 222(e) attempts to address these and other practices by requiring that each "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."[14] In enacting this provision,

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[9] *See* Stephanie Mehta, *Look Out (Thud!) -- It's an All-Out Phone War*, Wall St. J., June 10, 1999, at B1 (*Mehta Article*) (1998 revenues of $12.0 billion and projected 1999 revenues of $12.6 billion); Information Access Co., *YP Industry to Reach $12.07 Billion in 1998*, 4 Media Daily No. 5, 1998 WL 9942824 (Mar. 23, 1998) (1997 revenues of $11.36 billion); Jared Sandberg, *GTE Says Baby Bells, Netscape, Yahoo! Formed Internet Yellow Pages Cartel*, Wall St. J., Oct. 7, 1997, at B6 (*Sandberg Article*) (1997 revenues of $11.5 billion).

[10] *See* Information Access Co., *Yellow Pages Providers Account for a Fraction of Web Ad Market*, 12 Electronic Advertising & Marketplace Rep., No. 5, 1998 WL 9867098 (Mar. 10, 1998) (*Web Ad Market Article*) (1997 revenues of $21.8 million for Internet yellow pages providers).

[11] *Sandberg Article*, *supra* note 9; *see also Web Ad Market Article*, *supra* note 10 (annual Internet yellow pages revenues projected to reach $164.9 million by 2000).

[12] *E.g.*, H. Rep. No. 104-204(1), 104th Cong., 1st Sess., 89 (1995) (*1995 House Report)*; *see also* H. Rep. No. 103-559(1), 103d Cong., 2d Sess., 60 (1994) (*1994 House Report*) (stating, in relation to a provision that was basis for what ultimately became section 222(e), that LECs have total control over subscriber list information); ADP Comments at 2-3 (LECs' control over subscriber list information enabled them to achieve a 93.6 percent share of the yellow pages directory market in 1995).

[13] *1995 House Report*, *supra* note 12, at 89; S. Rep. No. 103-367, 103rd Cong., 2d Sess., 97 (1994) (*1994 Senate Report*) (conduct described in text that "hamper[s] the development of competitive directory markets"). A directory publisher is independent to the extent it is not an incumbent LEC, an incumbent LEC affiliate, or an entity that publishes directories on a LEC's behalf.

[14] 47 U.S.C. § 222(e).

Congress' goals included preventing unfair LEC practices and encouraging the development of competition in directory publishing.[15]

Having received "information regarding difficulties faced by independent telephone directory publishers" in obtaining timely subscriber list information on a nondiscriminatory basis from LECs,[16] the Commission invited comment in a *Notice of Proposed Rulemaking* (*Notice*) on what regulations or procedures, if any, are needed to implement the 1996 Act's subscriber list information provisions.[17] In response to the *Notice*, independent directory publishers assert that, despite the enactment of section 222(e), LECs continue to engage in unfair and anticompetitive subscriber list information practices and therefore urge the Commission to adopt implementing rules.[18]

We recognize that the ability of independent directory publishers to improve customer service and to develop new products, including more advanced Internet directories, is dependent on telecommunications carriers' understanding and complying with their obligations under section 222(e). Based upon the record in this proceeding, we implement section 222(e) by promulgating more specific standards regarding carriers' obligations under this provision. These standards, as set forth below in the *Third Report and Order* in CC Docket No. 96-115, will benefit consumers and advertisers by promoting the development of a directory publishing industry characterized by innovation, customer service, and vigorous competition, as Congress envisioned.

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[15] *See Joint Explanatory Statement*, *supra* note 2, at 205 (subscriber list information provision guarantees independent publishers access to subscriber list information at reasonable and nondiscriminatory rates, terms, and conditions from any provider of local telephone service); *1995 House Report*, *supra* note 12, at 89 (subscriber list information provision "meets the needs of independent publishers for access to subscriber data"); *see also 1994 Senate Report*, *supra* note 13, at 97 (provision that was basis for what ultimately became section 222(e) "is intended to prohibit unfair practices by local exchange carriers and encourage competition").

[16] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513, 12532, n.71 (1996) (*Notice*) (*citing* Letter from Philip L. Verveer *et al.*, Willkie Farr & Gallagher to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau, FCC (filed Apr. 4, 1996) (*Willkie Farr April 1996 Letter*)). Appendix A lists the parties filing comments and replies in CC Docket No. 96-115 as well as the short names this *Third Report and Order* uses to refer to those parties. Appendix B provides similar information with regard to the petitions for reconsideration or clarifications in CC Docket No. 96-98 that this item addresses.

[17] *Notice*, 11 FCC Rcd at 12531-32, ¶¶ 43-46.

[18] *See, e.g.*, ADP Comments at 4-5.

In the *Local Competition Second Report and Order*,[19] the Commission promulgated rules and policies to require incumbent LECs to provide competitors with access to the incumbent LECs' networks sufficient to create a competitively neutral playing field for new entrants consistent with section 251(b)(3). Among these rules, the Commission required incumbent LECs to provide nondiscriminatory access to directory assistance and directory listings to ensure that customers of all LECs would have access to accurate directory assistance information. As the Commission stated in the *Local Competition Second Report and Order*, dialing parity, nondiscriminatory access, network disclosure, and numbering administration issues are critical issues for the development of local competition.[20] The Commission noted that potential competitors in the local and long distance markets face numerous operational barriers to entry notwithstanding their legal right under the Act to enter such markets. In the *Local Competition Second Report and Order*, the Commission adopted rules to implement the dialing parity, nondiscriminatory access, numbering administration, and network disclosure requirements of the 1996 Act to benefit consumers by making some of the strongest aspects of LEC incumbency -- the local dialing, telephone numbers, operator services, directory assistance, and directory listing -- available to all competitors on an equal basis.[21]

In this *Second Order on Reconsideration*, we resolve specific issues regarding the nondiscriminatory access obligations of LECs under section 251(b)(3) raised in Petitions for Reconsideration or Clarification filed in response to the *Local Competition Second Report and Order* in CC Docket No. 96-98.[22] We also seek comment on additional issues arising out of

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[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Area Code Relief Plan for Dallas and Houston Ordered by the Public Utilities Commission of Texas, and Administration of the North American Numbering Plan*, Second Report and Order, and Memorandum Opinion and Order, CC Docket No. 96-98, 11 FCC Rcd 19392, (1996) (*Local Competition Second Report and Order*), *vacated in part sub nom. People of the State of California v. Federal Communications Commission,* 124 F.3d 934 (8th Cir. 1997), *rev'd*, *AT&T Corp. v. Iowa Util. Bd.*, 119 S.Ct 721 (1999) (*AT&T v. Iowa Util. Bd.).*

[20] *Local Competition Second Report and Order*, 11 FCC Rcd at 19399, ¶ 3.

[21] *Id.*

[22] In a separate order we will address petitioners' requests that we review our rulings concerning numbering administration under section 251(e)(1) of the Act, 47 U.S.C. § 251(e)(1), dialing parity under section 251(b)(3) of the Act, 47 U.S.C. § 251(b)(3), and network disclosure under section 251(c)(1) of the Act, 47 U.S.C. § 251(c)(1). On July 19, 1999, the Commission released an order denying the petition for reconsideration of the *Local Competition Second Report and Order* filed by Beehive Telephone Company, Inc. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Area Code Relief Plan for Dallas and Houston Ordered by the Public Utilities Commission of Texas, and Administration of the North American Numbering Plan*, First Order on Reconsideration, CC Docket No. 96-98, FCC 99-170, 1999 WL 507245 (1999).

developments in, and the convergence of, directory publishing and directory assistance, in the *Notice of Proposed Rulemaking* in CC Docket No. 99-273, below.

The *Third Report and Order* in CC Docket No. 96-115 establishes rules to implement section 222(e) in a way that should further Congress' goals of preventing unfair LEC practices and encouraging the development of competition in directory publishing. Our actions in this *Order* include:

- We conclude that section 222(e) obligates all telecommunications carriers, including competitive LECs, to provide subscriber list information regarding their telephone exchange service customers to requesting directory publishers. We also conclude that section 222(e) does not obligate a carrier to provide subscriber list information of customers of other LECs. An incumbent LEC therefore need not act as a clearinghouse for providing subscriber list information to directory publishers, except to the extent a State commission so requires.

- We conclude that carriers must provide requesting directory publishers with updates to subscriber list information reflecting changes in telephone exchange service. We also conclude that section 222(e) does not require a carrier to provide the names or addresses of subscribers with unlisted or unpublished numbers to independent directory publishers, but we are prepared to take action under other statutory provisions if carriers provide their own, but not competing directory publishers, with these names and addresses.

- We conclude that the nondiscrimination requirement in section 222(e) obligates a carrier subject to that section to provide subscriber list information to requesting directory publishers at the same rates, terms, and conditions that the carrier provides the information to itself, its directory publishing affiliate, or another directory publisher.

- We conclude that, to the extent its internal systems permit, a carrier that receives at least thirty days advance notice must provide subscriber list information according to the delivery schedule, at the level of unbundling, and in the format the directory publisher requests. We further conclude, however, that a carrier need not change its internal systems in order to accommodate requests for subscriber list information from a directory publisher.

- We conclude that $0.04 per listing constitutes a presumptively reasonable rate for base file subscriber list information and that $0.06 per listing constitutes a presumptively reasonable rate for updated subscriber list information that carriers provide directory publishers. We do not preclude a carrier from charging subscriber list information rates different than these presumptively reasonable rates. However, any carrier whose rates exceed either of these rates should be prepared to provide cost data and all other relevant

information justifying the higher rate in the event a directory publisher files a complaint regarding that rate pursuant to section 208 of the Communications Act.

In the *Second Order on Reconsideration* in CC Docket No. 96-98, we address issues regarding nondiscriminatory access obligations:

- We affirm our requirements that LECs offer access to telephone numbers, operator services, directory assistance, and directory listings that is equal to the access that the LEC provides to itself and that the providing LEC shall continue to bear the burden of proof that it is offering nondiscriminatory access.

- We require each LEC to provide access to adjunct features related to the provision of operator services and directory assistance services, and preclude LECs from negotiating exclusive contracts with third party vendors of such adjunct features that would prevent competing providers from negotiating licensing agreements with the vendors for access to their services.[23]

- We decline to change our branding requirements concerning LECs' obligations to rebrand the traffic of interconnecting carriers and resellers,[24] and, further, reaffirm that the benefits of this obligation are to be extended to all "competing providers of telephone exchange service and telephone toll service," including resellers.[25] We conclude that any failure to rebrand the competitor's traffic is presumptively discriminatory and that the burden will be on the providing LEC to demonstrate that it is technically infeasible for it to arrange its network architecture to allow it to brand competitor's traffic.

- We clarify that, upon request, a LEC shall provide access to its directory assistance services, including directory assistance databases, and to its directory listings in any format the competing provider specifies, if the LEC's internal systems can accommodate that format. In addition, LECs must supply updates to the requesting LEC in the same manner as the original transfer and at the same time that it provides updates to itself. We also delete as redundant our definition of "directory listings," and conclude that names and addresses of subscribers with unlisted information must be shared among LECs.

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[23] Adjunct features, described in part III.C, *infra*, include rating tables or customer information databases, which are necessary to allow competing providers full use of these directory assistance services.

[24] Call branding is the process by which an operator services or directory assistance provider identifies itself audibly and distinctly to the consumer at the beginning of a telephone call, before the consumer incurs any charge for the call. *See* part III.D, *infra*.

[25] 47 U.S.C. § 251(b)(3).

In the *Notice of Proposed Rulemaking* in CC Docket No. 99-273, we address issues arising out of the interplay between section 222(e) and section 251(b)(3). In particular,

- We invite comment on issues relating to the development of Internet directories, including whether section 222(e) entitles directory publishers to obtain subscriber list information for use in those directories.

- We invite comment on whether and how we may extend nondiscriminatory access to listing information to directory assistance providers that are neither telephone exchange service providers or telephone toll service providers.

- We invite comment on issues relating to the development of national directory assistance, including whether all LECs providing that service must provide nondiscriminatory access to nonlocal listings pursuant to section 251(b)(3).

II. THIRD REPORT AND ORDER

A. Background

1. Statutory Provisions

Section 222(e) sets forth the requirements for the provision of subscriber list information. Specifically, section 222(e) requires each "telecommunications carrier that provides telephone exchange service" to "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."[26] Section 222(f)(3) defines subscriber list information as:

> any information -- (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.[27]

Section 3(47) defines "telephone exchange service" as:

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[26] 47 U.S.C. § 222(e).

[27] 47 U.S.C. § 222(f)(3).

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.[28]

2. Directory Publishing

As the statutory definition makes clear, subscriber list information includes the listed names, addresses, and telephone numbers of telephone exchange service subscribers as well as headings under which businesses are listed in the yellow pages. Carriers obtain this information "quite easily" during the order-taking process for telephone exchange service.[29] Typically, individuals or businesses wishing to obtain telephone exchange service provide their names and addresses to a carrier, which in turn assigns them telephone numbers and, for many businesses, yellow pages headings. Many LECs maintain computerized subscriber list information databases. Those LECs that maintain computerized subscriber list information databases update their databases as individuals and businesses start or stop telephone exchange service, change the number of lines they receive, request unlisted status, or add new listings for existing lines.

Directory publishers use subscriber list information to publish a wide variety of directories. The most familiar are white and yellow pages directories that incumbent LECs publish, either directly or through affiliates or third parties. White pages directories provide, alphabetically by name, the names, addresses, and telephone numbers of subscribers receiving telephone exchange service within particular geographic areas that do not elect to have their numbers unlisted. Yellow pages directories provide the names, addresses, and telephone numbers of businesses receiving telephone exchange service within particular geographic areas as well as advertisements for individual businesses. These directories include headings that direct users to groups of listings for businesses that provide similar products or services (e.g., automobiles, restaurants, and the like) and to the advertising that accompanies those listings. Subscriber list information can be published either on paper or in many other formats, including, but not limited to, magnetic tape and optical disk.[30]

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[28] 47 U.S.C. § 153(47).

[29] *Feist Publication v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (*Feist*).

[30] *See* Florida Public Service Commission, Petition and Complaint of Florida Independent Directory Publishers to Amend Directory Publishers Database Service Tariff of BellSouth

Many independent directory publishers are small, entrepreneurial businesses.[31] ADP, a trade association representing independent directory publishers, states that its members publish more than 2,200 telephone directories serving communities throughout the United States.[32] These directories include area-wide directories that cover the service territories of multiple incumbent LECs as well as niche directories that cover much smaller areas or that appeal to particular ethnic groups.[33] Some independents publish foreign language directories for areas within the United States.[34]

In most States, directory publishers, including independents, obtain subscriber list information from LECs pursuant to contracts. In Florida, Kentucky, Louisiana, and Mississippi, however, BellSouth offers subscriber list information to directory publishers via tariffs.[35] The California Commission and the New York Commission regulate the provision of subscriber list information to directory publishers by carriers subject to their jurisdiction.[36] A directory publisher, in addition, may use subscriber list information copied from published directories without infringing any copyrights for those directories.[37]

Telecommunications, Order No. PSC-97-0535-FOF-TL, 13 (issued May 9, 1997) (*Florida Commission 1997 Decision*).

[31] Letter from David R. Goodfriend, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at 1 (filed June 2, 1998) (*ADP June 2, 1998 Letter)*.

[32] *See* ADP Comments at 1-2; *ADP June 2, 1998 Letter*, *supra* note 31, at 1.

[33] *See Feist*, 499 U.S. at 342-43 (area-wide directory); *Great Western Directories, Inc. v. Southwestern Bell Tel. Co.*, 63 F.3d 1378, 1383 (5th Cir. 1995) (*Great Western v. Southwestern Bell)*, *superseded in part on other grounds*, 74 F.3d 613 (5th Cir. 1996), *cert. dismissed*, 117 S.Ct. 26 (1996) (niche directory); *ADP June 2, 1998 Letter*, *supra* note 31, at 1 (ethnic directories).

[34] *See Key Publications Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2d Cir. 1991) (yellow pages directory with listings in both English and Chinese).

[35] Letter from Michael F. Finn, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at 1 (filed May 20, 1998) (*ADP May 20, 1998 Letter*).

[36] California Public Utilities Commission, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-043 (Jan. 23, 1997) (*California Commission 1997 Decision)*; New York Public Service Commission, *Order Regarding Directory Database Issues*, Case 94-C-0095 *et al.* (July 19, 1998).

[37] *Feist*, 499 U.S. at 362 (the selection, coordination, and arrangement of a white pages directory does not satisfy the minimum constitutional standards for copyright protection); *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.*, 999 F.2d 1436, 1446 (11th Cir. 1993), *cert. denied*, 510 U.S. 1101 (1994) (*BellSouth v. Donnelley*) (copying and then using in a

A directory publisher that obtains subscriber list information from a carrier typically receives an "initial load" of that information that provides, as of a given date, the carrier's subscriber list information that the publisher wishes to include in one or more directories.[38] The publisher may also receive a "refresh" service that provides that subscriber list information as of a later date, or an "update" service that provides only the changes to that information occurring between specified dates.[39] LECs transmit subscriber list information to directory publishers electronically, on magnetic tape, or on paper, among other means.[40]

directory the name, address, telephone number, and business type of a yellow pages directory does not constitute copyright infringement).

[38] *See Great Western v. Southwestern Bell*, 63 F.3d at 1383 n.1.

[39] *See id.* (update service); Louisiana Public Service Commission, *Revision to Directory Publishers Database Service (DPDS) Tariff to Include the Option of a Monthly Refresh File*, Commission's Staff Prehearing Statement, Docket No. U-21760 (filed May 11, 1998) (refresh service). For convenience, we use the term "base file" services to refer collectively to initial load and refresh services. As used in the *Third Report and Order*, update services include "new connect" services that provide only subscriber list information regarding new telephone exchange service subscribers.

[40] ADP Comments at Ex. 3, p. 3; Letter from Michael F. Finn, Counsel for ADP, to William F. Caton, Acting Secretary, FCC (filed Nov. 19, 1996) (*ADP Nov. 19, 1996 Letter*).

3. Commission Proceedings

Shortly after passage of the 1996 Act, the Commission sought comment on a number of subscriber list information issues in response to the problems that independent directory publishers claimed to encounter in obtaining subscriber list information.[41] These issues included: (1) what regulations, if any, are necessary to clarify the type and categories of information that must be made available under section 222(e);[42] (2) what regulations or procedures may be necessary to implement the requirement that subscriber list information be provided "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions;"[43] (3) in what format should subscriber list information be provided and how it should be unbundled;[44] and (4) what safeguards may be necessary to ensure that a person seeking subscriber list information is doing so for the specified purpose of "publishing directories in any format."[45]

In the *CPNI Report and Order*, we concluded that we should address separately the specific questions raised in the record regarding subscriber list information.[46] We stated, however, that immediately upon passage of the 1996 Act, LECs became obligated to disclose subscriber list information to directory publishers at nondiscriminatory and reasonable rates, terms, and conditions pursuant to section 222(e).[47] We also stated that a LEC's failure to discharge this duty may, depending on the circumstances, constitute both a violation of section

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[41] *See Willkie Farr April 1996 Letter*, note 16 *supra*.

[42] *Notice*, 11 FCC Rcd at 12531-32, ¶ 44.

[43] *Id.* at 12532, ¶ 45.

[44] *Id.*

[45] *Id.* at 12532, ¶ 46. This *Notice* also sought comment on customer proprietary network information (CPNI) issues. We addressed those issues in a August 7, 1996, Report and Order and a February 26, 1998, Report and Order and Further Notice. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information,* CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Report and Order*); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers,* CC Docket No. 96-115, Report and Order, 11 FCC Rcd 9553 (1996), *on recon.* FCC 99-223 (released Sept. 3, 1999), *CPNI Report and Order vacated sub nom. U S WEST v. FCC*, No. 98-9518 (10th Cir., decided Aug. 18, 1999).

[46] *CPNI Report and Order*, 13 FCC Rcd at 8072, ¶ 10.

[47] *Id.*

222(e) and an unreasonable practice in violation of section 201(b) of the Communications Act.[48] In this *Third Report and Order*, we address more fully telecommunications carriers' obligations to disclose subscriber list information under section 222(e).

B. Commission Authority

1. Background

In the *Notice*, the Commission sought comment on the scope of its authority with respect to the subscriber list information under section 222(e).[49] In particular, because section 222(e) applies to carriers providing telephone exchange service, which is a local service, the Commission sought comment regarding the respective federal and State roles in ensuring that subscriber list information is made available under nondiscriminatory and reasonable rates, terms, and conditions, as section 222(e) requires.[50] No party challenges the Commission's authority to implement section 222(e). ADP asserts that the Commission has authority to adopt regulations implementing section 222(e), and that the State public utility commissions should not be permitted to impose inconsistent regulations.[51] YPPA maintains that the Commission should not promulgate specific rules implementing section 222(e), but states that the Commission has authority to adjudicate complaints alleging violations of that provision.[52]

2. Discussion

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48 *Id.* (*citing* 47 U.S.C. § 201(b)).

49 *Notice*, 11 FCC Rcd at 12523, ¶ 19.

50 *Id.*

51 ADP Comments at 13-14.

52 *Compare* YPPA Comments at 2-3 (implementing rules are not necessary) *with* YPPA Reply at 2 (statute makes clear that a publisher may file a complaint with the Commission alleging section 222(e) violations) & Letter from Albert Halprin *et al.*, Counsel for YPPA, to Magalie Roman Salas, Secretary, FCC, at 4 (filed Feb. 27, 1998) (*YPPA Feb. 27, 1998 Letter*) (supporting the rights of directory publishers to file section 222(e) complaints with the FCC); *see also* Vitelco Comments at 2-4 (urging that the Commission clarify certain aspects of section 222(e)); ALLTEL Reply at 5 (Commission may police departures from section 222(e)'s nondiscrimination standard through the complaint process); GTE Reply at 11 (supporting YPPA's comments and reply); USTA Reply at 7 (Commission need not promulgate implementing regulations).

No party has disputed our authority to promulgate regulations implementing section 222(e) pursuant to section 4(i), 201(b), and 303(r) of the Communications Act.[53] Our discussion, therefore, will address the scope of that authority.

Congress stated in section 222(e) that the requirements of that provision are applicable to any "telecommunications carrier that provides telephone exchange service."[54] Congress directed such carriers, which provide primarily intrastate service in their capacity as providers of telephone exchange service,[55] to make their subscriber list information available to those requesting it, under the terms set forth in the statute, for the purpose of publishing directories. Congress did not intimate that only some limited portion of subscriber list information derived from any interstate component of local service would be subject to the requirements of section 222(e). Any such restriction would undermine, and effectively negate, this provision. Rather, section 222(e) expressly extends the reach of section 222(e) to *any* subscriber list information gathered by a carrier providing telephone exchange service "in its capacity as a provider of such service."[56] We thus conclude that section 222(e) addresses the provision of subscriber list information, by a telephone exchange service carrier, to all persons that will use subscriber list information to publish directories, without regard to whether those listings are derived from the intrastate service offered by those carriers or from their interstate service (if any).[57]

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[53] 47 U.S.C. §§ 154(i), 201(b), 303(r); *AT&T v. Iowa Util. Bd.*, 119 S.Ct. at 729-31; *see also Direct Media Corp. v. Camden Telephone and Telegraph Co.*, 989 F. Supp. 1211, 1219-20 (S.D. Ga. 1997) (holding that section 201(b) provides the Commission with authority to prescribe the necessary rules and regulations to carry out section 222(e)).

[54] 47 U.S.C. § 222(e).

[55] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21926 ¶ 38 (1996) (*Non-Accounting Safeguards Order*) (stating that telephone exchange service is primarily an intrastate service), *on recon.*, 12 FCC Rcd 2297 (1997), *recon. pending*, *petition for summary review in part denied and motion for voluntary remand granted sub nom. Bell Atlantic v. FCC*, No. 97-1067, 1997 WL 307161 (D.C. Cir. filed Mar. 31, 1997), *petition for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *on remand*, 12 FCC Rcd 8653 (1997), *order on remand aff'd sub nom. Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

[56] 47 U.S.C. § 222(e).

[57] Because Congress has expressly extended the reach of section 222(e) to all subscriber list information a carrier gathers in its capacity as a provider of telephone exchange service, section 2(b) of the Communications Act, 47 U.S.C. § 152(b), does not preclude our regulation of the carrier's provision of such listings to directory publishers. *See Iowa Util. Bd.*, 119 S.Ct. at 730-31; *cf. Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 376 (1986) (observing that Congress can give

C. Need for Commission Regulation

In the *Notice*, the Commission requested comment on what regulations, if any, are necessary to implement the requirement that subscriber list information be provided "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions."[58] The Commission tentatively concluded that regulations interpreting and specifying in greater detail a carrier's obligations under section 222(e) would be useful.[59] Certain LECs and YPPA argue against implementing regulations because they claim the statute is clear on its face.[60] ADP and MCI, on the other hand, favor implementing regulations to ensure that carriers meet their statutory obligations.[61]

We conclude that our clarification and particularization of the obligations imposed on carriers by section 222(e) would be useful. The record reflects conflicting views among the parties as to the meaning of the statutory language and, in particular, as to the application of statutory terms, such as "timely" and "reasonable," to specific situations. The record also makes clear that these disputes may have prevented full realization of Congress' goals of preventing unfair carrier practices in relation to subscriber list information and encouraging the development of competition in directory publishing.[62] We therefore conclude

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the Commission authority to prescribe intrastate depreciation practices by rewriting the Communications Act).

[58] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

[59] *Id.* at 12522, ¶ 16.

[60] *E.g.*, ALLTEL Comments at 6 (implementing rules are neither mandated by the Act nor required at this time); NYNEX Comments at 22 (questionable whether implementing regulations are necessary or appropriate); YPPA Comments at 5 (statutory language and Conference Committee and House Commerce Committee Reports make Congressional intent clear); GTE Reply at 11 (statutory language is clear); USTA Reply at 7 (implementing rules are unnecessary); Letter from Albert Halprin *et al.*, Counsel for YPPA, to William F. Caton, Acting Secretary, FCC (filed Mar. 4, 1997) (*YPPA Mar. 4, 1997 Letter*) (statute does not require Commission to promulgate implementing rules).

[61] *E.g.*, ADP Reply at 4-5 (Commission regulations are necessary to keep LECs from continuing to leverage their monopoly control over subscriber list information into the directory publishing market and to allow the public to reap the benefits of competition in directory publishing); MCI Reply at 14-15 (extensive implementing regulations are needed); Letter from Michael F. Finn, Counsel for ADP, to William F. Caton, Acting Secretary, FCC, at 2 (filed Sept. 18, 1997) (*ADP Sept. 18, 1997 Letter*) (absent implementing rules, section 222(e) will be ineffective).

[62] *See Joint Explanatory Statement*, *supra* note 2, at 205 (subscriber list information provision guarantees independent publishers access to subscriber list information at reasonable and nondiscriminatory rates, terms and conditions from any provider of local telephone service); *1995*

that our clarification and particularization of section 222(e)'s requirements is necessary to achieve Congress' goals.[63]

D. Applicability to Particular Carriers

1. Background

Section 222(e) expressly extends to each "telecommunications carrier that provides telephone exchange service" and gathers subscriber list information "in its capacity as a provider of such service."[64] In the *Notice*, the Commission tentatively concluded that section 222(e) requires all telecommunications carriers, including interexchange carriers and cable operators, to meet the requirements of section 222(e) to the extent they provide telephone exchange service.[65]

2. Discussion

Based on the express statutory language, we conclude that not only LECs, but all telecommunications carriers, including interexchange carriers, cable operators, and other competitive LECs, must satisfy the statutory obligations set forth in section 222(e) to the extent they provide telephone exchange service.[66] Accordingly, all telecommunications carriers must

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House Report, *supra* note 12, at 89 (subscriber list information provision "meets the needs of independent publishers for access to subscriber data"); *see also 1994 Senate Report*, *supra* note 13, at 97 (provision that became section 222(e) "is intended to prohibit unfair practices by local exchange carriers and encourage competition").

[63] *E.g.*, ADP Reply at 5 (despite passage of section 222(e), various LECs refuse to provide directory publishers with subscriber list information, or provide it only on a bundled basis and at excessive rates); Letter from Michael F. Finn, Counsel for ADP, to William F. Caton, Acting Secretary, Federal Communications Commission (filed Dec. 12, 1997) (*ADP Dec. 12, 1997 Letter*) (alleging that some LECs refuse to sell listings, that others earn excessive profits or otherwise fail to comply with section 222(e)); *ADP Nov. 19, 1996 Letter*, *supra* note 40 (documenting particular LECs' practices); *see also* MCI Reply at 13 (Commission regulations are necessary to ensure that subscriber list information is provided to all competitors under the same rates, terms, and conditions).

[64] 47 U.S.C. § 222(e).

[65] *Notice*, 11 FCC Rcd at 12531, ¶ 43.

[66] *See*, *e.g.*, ADP Comments at 16-17 (Commission should construe term "telecommunications carrier" in section 222(e) broadly); ALLTEL Comments at 6 (section 222(e) applies not only to LECs, but also to other telecommunications carriers); Ameritech Comments at 17 (section 222(e) applies to all carriers furnishing local telephone service); California Commission Comments at 9 (interpreting section 222(e) as applying to any telecommunications carrier to the extent it provides telephone exchange service would promote equal access, competition, and nondiscrimination); CBT Comments at 11-

provide subscriber list information gathered in their capacity as providers of telephone exchange service to any person upon request for the purpose of publishing directories.[67] This obligation extends to competitive LECs, since they gather subscriber list information in their capacity as providers of telephone exchange service.[68] As we determine in part II.F, below, however, the obligation to provide a particular telephone subscriber's subscriber list information extends only to the carrier that provides that subscriber with telephone exchange service.

The only additional issue raised in the record regarding the applicability of section 222(e) concerns commercial radio mobile service (CMRS) providers. Mobilemedia and PCIA contend that CMRS providers are not subject to section 222(e) because the statutory definition of LEC excludes them.[69] We reject this argument. By its terms, section 222(e) applies to each "telecommunications carrier that provides telephone exchange service" regardless of whether the carrier is classified as a LEC.[70] CMRS carriers are telecommunications carriers under the 1996 Act;[71] and, as the Commission determined in the *Local Competition First Report*

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12 (all telecommunications carriers, including interexchange carriers, cable operators, and resellers must be required to make subscriber list information available for directory publishing); MCI Comments at 21 (Congress intended section 222(e) to apply to any providers of telephone exchange service); YPPA Comments at 3 (same).

[67] 47 U.S.C. § 222(e).

[68] *See YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 4 (section 222(e) obligates competitive LECs to provide subscriber list information to requesting directory publishers).

[69] PCIA Comments at 4-5 (CMRS providers do not provide telephone exchange service and thus should not be required to make their subscriber list information available upon request); *see* MobileMedia Reply at 3-4 (supports PCIA position). Section 3(26) of the Act defines "local exchange carrier" as "any person that is engaged in the provision of local exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of commercial mobile service under section 332(c), except to the extent the Commission finds that such service should be included in the definition of such term." 47 U.S.C. § 163(26).

[70] *See* 47 U.S.C. § 222(e).

[71] *See* 47 U.S.C. §§ 153(43), (44), (46) (defining "telecommunications," "telecommunications carrier," and "telecommunications service," in a way that includes CMRS providers); *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8355, ¶ 8 (1996), *recon.* 12 FCC Rcd 7236 (1997), *further recon.* 13 FCC Rcd 16090 (1998), *appeals pending sub nom. Bell Atlantic NYNEX Mobile Inc. v. FCC*, No. 97-9551 (10th Cir. filed May 30, 1997) & *U S WEST, Inc. v. FCC*, No. 97-9518 (10th Cir. filed April 24, 1997); Second Report and Order, 12 FCC Rcd 12281 (1997), *recon. pending*; Third Report and Order, 13 FCC Rcd 11701 (1998).

and Order, cellular, broadband personal communications service, and covered specialized mobile radio carriers provide telephone exchange service.[72]

Our conclusion that CMRS providers are subject to section 222(e) to the extent they provide telephone exchange service does not necessarily mean that they must provide information regarding their customers to directory publishers. Instead, section 222(e) requires carriers to provide information to requesting directory publishers only to the extent it falls within the definition of subscriber list information in section 222(f)(3). Under that definition, subscriber list information excludes any information that a carrier or its affiliate has not "published, caused to be published, or accepted for publication in any directory format."[73] A CMRS provider therefore need not provide subscriber list information regarding its telephone exchange customers to requesting directory publishers, except to the extent the CMRS provider or its affiliate publishes that information, causes it to be published, or accepts it for publication in any directory format.[74]

E. Definition of Subscriber List Information

1. Overview

Section 222(f)(3) defines subscriber list information as "the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service) or any combination of such listed names, numbers, addresses, or classifications . . .

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[72] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15998-600, ¶¶ 1012-15 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) & *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *affirmed in part, reversed in part, and remanded sub nom. AT&T v. Iowa Util. Bd.*, 119 S.Ct at 726-38, *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), *Third Order on Reconsideration and Further Proposed Rulemaking*, 12 FCC Rcd 12460 (1997) (*Local Competition Third Reconsideration Order*), *further recon. pending*. Section 52.1(c) of our rules, 47 C.F.R. § 52.1, defines covered specialized mobile radio.

[73] 47 U.S.C. § 222(f)(3)(B).

[74] Under the current called-party pays pricing structure of many wireless services, many wireless subscribers may not want their subscriber list information published in directories or otherwise released, particularly if such publication would result in additional incoming calls charged to the subscribers. We note that nothing in this item precludes wireless subscribers from having their numbers listed in directories.

that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format."[75] In this section, we address issues arising under this definition.

2. Primary Advertising Classifications

a. Definition

The phrase "primary advertising classifications" is not explicitly defined in the Act, but is qualified by the parenthetical "as such classifications are assigned at the time of the establishment of such service."[76] In the *Notice*, the Commission sought comment on the meaning of the phrase "primary advertising classifications."[77]

We conclude, consistent with what appears to be a uniform usage within the directory publishing industry, that the phrase "primary advertising classification" as used in section 222(f)(3) refers to the principal business heading under which a business subscriber chooses to be listed in the yellow pages.[78] We also conclude, that "such service" in section 222(f)(3) refers to telephone exchange service. This is consistent with section 222(e), in which "telephone exchange service" antecedes "such service."

Under the definition of subscriber list information in section 222(f)(3), subscriber list information includes primary advertising classifications only if they are "assigned at the time of the establishment" of telephone exchange service. Neither the statute nor its legislative history specifically addresses the meaning of this phrase. The commenters agree that primary advertising classifications are "assigned at the time of the establishment" of telephone exchange service whenever the carrier itself assigns yellow pages headings.[79] Since carriers clearly cause these headings to be published, section 222(f)(3) includes them within the definition of subscriber list information to the extent they are principal business headings under which business subscribers choose to be listed in the yellow pages. Accordingly, section 222(e)

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[75] 47 U.S.C. § 222(f)(3).

[76] 47 U.S.C. § 222(f)(3)(A).

[77] *Notice*, 11 FCC Rcd at 12531, ¶ 44.

[78] *E.g.*, ADP Comments at 17; Ameritech Comments at 17-18; Sprint Comments at 6; YPPA Comments at 4. *But see* CBT Comments at 13 (because CBT keeps no permanent record of yellow pages headings of its customers, the Commission should interpret primary advertising classification as referring only to the classification of a subscriber as residential or business).

[79] *See*, *e.g*, ADP Comments at 17; Ameritech Comments at 18; NYNEX Comments at 18; YPPA Comments at 4.

requires the carrier to provide these principal business headings to directory publishers upon request.

The commenters disagree, however, whether a primary advertising classification falls within the definition of subscriber list information when a carrier's directory publishing affiliate assigns the yellow pages headings. Several carriers, as well as YPPA, maintain that carriers need not provide directory publishers with primary advertising classifications assigned by directory publishing affiliates because those classifications are not "assigned at the time of the establishment" of telephone exchange service.[80] ADP, in contrast, contends that tariffs typically obligate carriers to furnish yellow pages listings as part of telephone exchange service to businesses and that carriers should not be absolved of their obligation to provide primary advertising classifications when their affiliates complete the listing process.[81]

We conclude that section 222(e) does not require a carrier to provide independent directory publishers with primary advertising classifications assigned by the carrier's affiliate or a third party, unless a tariff or state requirement obligates the carrier to provide yellow pages listings as part of telephone exchange service to businesses. When the carrier neither assigns primary advertising classifications nor is required to provide yellow pages listings as part of telephone exchange service to businesses, the primary advertising classifications are not "assigned at the time of the establishment of [telephone exchange] service . . . ." Those classifications accordingly fall outside the definition of subscriber list information.[82] When the carrier neither assigns yellow pages headings nor is obligated to provide yellow pages listings as part of telephone exchange service to businesses, however, the carrier in most instances still classifies as a business customer each telephone exchange service subscriber that the carrier's publisher will include in a yellow pages directory. We agree with those commenters that argue that, in those circumstances, this classification as a business customer constitutes the subscriber's primary advertising classification.[83] Such carriers therefore must provide this classification to requesting directory publishers.

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[80] *See, e.g*, NYNEX Comments at 18 (section 222(e) does not apply to information a sales representative gathers after the establishment of service); PacTel Comments at 19 (any interpretation that would require disclosure of yellow pages headings that a directory publisher develops after the establishment of service would violate statutory and common law trade secret protections); YPPA Comments at 4 (primary advertising classification includes neither information that a yellow pages sales representative gathers after the establishment of service nor additional yellow pages headings that a business may request).

[81] ADP Comments at 18.

[82] 47 U.S.C. § 222(f)(3).

[83] CBT Comments at 13; SBC Comments at 16-17; U S WEST Reply at 15.

In contrast, when a tariff or state requirement obligates the carrier to provide yellow pages listings as part of telephone exchange service to businesses, telephone exchange service in fact is not established until the primary advertising classification is assigned, even if an affiliate or third party performs the assignment. Because the classification is necessary to fulfill a tariff or state obligation to furnish a yellow pages listing to each business customer receiving telephone exchange service and the carrier causes the classification to be published, the classification falls within the statutory definition of subscriber list information.[84]

We need not determine that we have jurisdiction over LECs' directory publishing affiliates, as ADP urges, in order to require carriers to provide to requesting directory publishers primary advertising classifications in the limited circumstances described in the preceding paragraph.[85] Instead, we conclude that where a tariff or State requirement obligates the carrier to provide yellow pages listings as part of telephone exchange service to businesses, the carrier must provide that classification to requesting directory publishers. In these circumstances, the assignment of a primary advertising classification is a necessary step in the establishment of telephone exchange service to businesses. The carrier's decision to have an affiliate or third party perform that step does not absolve the carrier of its obligation to provide those classifications to requesting directory publishers in accordance with section 222(e).

We recognize that some carriers, that will have to provide primary advertising classifications to requesting directory publishers under our interpretation of sections 222(e) and 222(f)(3), may not presently keep a record of those classifications. These carriers need not recreate any primary advertising classification assigned prior to the effective date of this *Third Report and Order*.[86] We expect, however, that these carriers will provide requesting directory publishers with any classifications assigned on or after that effective date, in accordance with the procedures set forth in part II.G.2, below.

b. Relationship with Electronic Publishing

Section 274 of the Act imposes structural and transactional requirements on the provision of "electronic publishing" by the Bell Operating Companies (BOCs). These

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[84] 47 U.S.C. § 222(f)(3).

[85] *Compare* Letter from Michael F. Finn, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at 8-9 (filed Dec. 30, 1997) (*ADP Dec. 30, 1997 Letter*) (Commission may exercise authority over LECs' directory publishing affiliates to the extent necessary to ensure compliance with section 222(e)) *with YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 6 (suggestion that the Commission exercise jurisdiction over LEC-affiliated publishers flies in the face of the statute).

[86] *See* Letter from Michael J. Barry, Director Public Policy, Ameritech, to Magalie Roman Salas, Secretary, FCC, at 2-3 (filed May 21, 1999) (*Ameritech May 21, 1999 Letter*).

requirements apply only to the extent a BOC's activities fall within the definition of "electronic publishing" in section 274(h) of the Act. Under section 274(h)(1), that definition includes, among other things, "the dissemination, provision, publication, or sale to an unaffiliated entity or person of . . . advertising . . . ." except to the extent specified in section 274(h)(2).[87] Under section 274(h)(2)(I), electronic publishing does not include, however, "[t]he provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising."[88] In the *Notice*, the Commission invited comment on whether publishers of electronic yellow pages engage in electronic publishing when they use advertising classifications to help users locate information.[89] The Commission tentatively concluded that the provision of subscriber list information does not fall within the statutory definition of electronic publishing, because "primary advertising classification" in section 222(e) is used differently than "advertising" in section 274(h)(2)(I).[90]

Consistent with the comments on this issue, we conclude that "primary advertising classification" in section 222(e) and "advertising" in section 274(h)((2)(I) have different meanings.[91] Primary advertising classifications are headings in a yellow pages directory that direct users to groups of listings for businesses providing similar products or services (e.g., automobiles, restaurants, and the like) and to the advertising that accompanies those listings. Unlike advertising, those classifications are not intended to promote a particular company, product, service, or viewpoint, which is the hallmark of advertising. As a consequence, the provision of primary advertising classifications as part of a service does not preclude it from being "directory assistance that provides names, addresses, and telephone numbers and does not include advertising" within the meaning section 274(h)(2)(I) and thus does not transform directory assistance into "electronic publishing" within the meaning of section 274(h).[92] A BOC therefore may disseminate primary advertising classifications "by means of its or any of its affiliates' basic telephone service" without meeting the structural and transactional requirements set forth in section 274.[93]

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87 47 U.S.C. § 274(h)(1).

88 *Id.*; *see* 47 U.S.C. § 274(h)(2)(I).

89 *Notice*, 11 FCC Rcd at 12531, ¶ 44.

90 *Id.*

91 Ameritech Comments at 18 ; CBT Comments at 13; NYNEX Comments at 21; SBC Comments at 17; YPPA Comments at 4.

92 *See* 47 U.S.C. § 274(h)(2)(I).

93 47 U.S.C. § 274(a); *see also* 47 U.S.C. § 274(b)-(d) (setting forth requirements for the BOCs' electronic publishing operations).

3. Unpublished and Unlisted Information

a. Background

The definition of subscriber list information in section 222(f)(3) includes "information . . . identifying the listed names of subscribers . . . or any combination of such listed names . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format."[94] In the *Notice*, the Commission sought comment on what regulations, if any, are necessary to clarify the type and categories of information that must be made available under this definition.[95]

b. Discussion

Based on the references to "listed" and "published" information in section 222(f)(3), several commenters argue that carriers need not disclose unlisted or unpublished information to directory publishers, even for the sole purpose of delivering directories to subscribers with unlisted or unpublished telephone numbers.[96] ADP and MCI disagree. MCI states that independent directory publishers need the names of subscribers with unlisted or unpublished numbers to ensure that those names are excluded from their directories.[97] ADP stresses how important the ability to deliver directories to all telephone subscribers, including those with unlisted and unpublished numbers, is to directory publishing competition.[98] ADP maintains that, to the extent a carrier provides its directory publishing affiliate with the addresses of subscribers with unlisted or unpublished numbers to facilitate the delivery of directories, independent directory publishers also should be able to obtain those addresses for the same purpose.[99]

Because the statutory definition of subscriber list information specifically excludes unpublished and unlisted information, we conclude that section 222(e) does not require

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94 47 U.S.C. § 222(f)(3).

95 *Notice*, 11 FCC Rcd at 12531-32, ¶ 44.

96 CBT Comments at 12, n.12; NYNEX Comments at 21; Sprint Comments at 6; YPPA Comments at 4.

97 MCI Reply at 15.

98 ADP Reply at 12; Letter from Michael F. Finn, Counsel for ADP, to William Caton, Acting Secretary, FCC, at 1-2 (filed Jan. 30, 1997) (*ADP Jan. 30, 1997 Letter*).

99 ADP Reply at 12; Letter from Michael F. Finn, Counsel for ADP, to William Caton, Acting Secretary, FCC, at 1 (filed Jan. 16, 1997) (*ADP Jan. 16, 1997 Letter*); *ADP Nov. 19, 1996 Letter*, *supra* note 40, at 3.

carriers to provide the names or addresses of subscribers with unlisted or unpublished numbers to independent publishers.[100] We recognize, however, that section 222(e) does not prohibit carriers from providing such information to independent publishers. We also recognize that obtaining the names and address of subscribers with unlisted or unpublished numbers from carriers may be the most direct and least costly way for independent directory publishers to ensure that their directories do not list those subscribers. Independent publishers also may need the addresses of subscribers with unlisted or unpublished numbers to deliver directories to those subscribers on a timely basis and thereby attract businesses that want to maximize access to their advertisements. Carriers, however, may wish to gain a competitive advantage by providing their own, but not competing, directory publishers with information regarding subscribers with unlisted or unpublished numbers. Depending on the circumstances, such practices may be unreasonable or unreasonably discriminatory within the meaning of sections 201(b) and 202(a) of the Communications Act.[101] We will be prepared to take action in the future, if problems occur in this area.[102]

4. Updated Subscriber List Information

When a person or business starts or stops telephone exchange service, changes the number of lines it receives, requests unlisted status, or adds new listings for existing lines, the carrier updates its subscriber list information database.[103] ADP states that some carriers refuse to provide this updated information to directory publishers.[104] ADP argues that the language and legislative history of section 222(e) make clear that Congress intended to require carriers to make updated listing information available to directory publishers.[105] USTA and Vitelco argue

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[100] 47 U.S.C. § 222(f)(3); *see Local Competition Second Report and Order*, 11 FCC Rcd at 19460, ¶ 141. We note that, in contrast to updated subscriber list information, *see* part II.E.4,*infra*, unpublished and unlisted information has not been "accepted for publication" within the meaning of section 222(f)(3)(B).

[101] *See* 47 U.S.C. §§ 201(b), 202(a).

[102] In part III.F, *infra*, we discuss access to information regarding subscribers with unlisted or unpublished numbers under section 251(b)(3) of the Act.

[103] *E.g.*, ADP Comments at 3; Letter from Michael F. Finn, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at 1-2 (filed Mar. 10, 1998) (*ADP Mar. 10, 1998 Letter*).

[104] *ADP Jan. 16, 1997 Letter*, *supra* note 99, at 2; *ADP Dec. 30, 1997 Letter*, *supra* note 85, at 4.

[105] *ADP Nov. 19, 1996 Letter*, *supra* note 40, at 2.

that the Communications Act does not require carriers to provide subscriber list information more than once for each directory or edition thereof that is published.[106]

Although USTA and Vitelco do not articulate a basis for their argument, we find that it implicitly assumes either that: (1) updates fall outside the statutory definition of subscriber list information; or (2) even if updates fall within that definition, a carrier may discharge its obligation under section 222(e) to provide subscriber list information to requesting directory publishers "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions" by providing subscriber list information no more than once for each directory edition. We address the first of these propositions here and the second in part I.G, below. Concluding that both propositions are incorrect, we reject USTA's and Vitelco's argument.

Section 222(f)(3)(B) includes within the definition of subscriber list information subscriber names, telephone numbers, addresses, and primary advertising classifications "that the carrier or an affiliate *has . . . accepted for publication* in any directory format."[107] This language makes clear that updates fall within the statutory definition of subscriber list information. For instance, when an individual who does not already receive telephone exchange service orders that service from a carrier, the customer tells the carrier his or her name and address, the number of lines being ordered, and other pertinent information. The carrier then assigns the customer one or more telephone numbers. If the customer does not ask to be unlisted, this order taking and assignment sets into motion a process that will result in the publication in a directory of the new subscriber's name, address, and telephone number or numbers. We conclude that this information is "*accepted for publication*" within the meaning of section 222(f)(3) once the carrier agrees to provide telephone exchange service to an individual or business.

We recognize, of course, that the statutory definition of subscriber list information refers to "the *listed* names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications . . . ."[108] We conclude that this reference to "*listed*" information does not exclude information from the definition of subscriber list information that has not yet been, but will be, published in a directory. Any other conclusion would make the statutory phrase "*accepted for publication*" in section 222(f)(3)(B) mere surplusage. Indeed, section 222(f)(3)(B) distinguishes listings that a carrier "*has published [or] caused to be published*" in a directory from those it "*has . . . accepted for publication*."[109]

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106 USTA Comments at 6; Vitelco Comments at 3.

107 47 U.S.C. § 222(f)(3)(B) (emphasis added).

108 47 U.S.C. § 222(f)(3)(A) (emphasis added).

109 47 U.S.C. § 222(f)(3)(B).

Because, as a practical matter, a carrier or an affiliate has either "published" or "caused to be published" any subscriber's name that has been published, we conclude that the statutory phrase "accepted for publication" must refer to listings that have not yet been published. We therefore also conclude that the statutory definition of subscriber list information includes updates that a carrier "has . . . accepted for publication," but not yet published.

We believe that Congress intended the statutory definition of subscriber list information to include updates that a carrier "has . . . accepted for publication," but not yet published. Both the Senate and the House stated that the subscriber list information provisions were intended to ensure that independent directory publishers "are able to purchase published or to-be-published subscriber listings and *updates* from carriers on reasonable terms and conditions."[110] Both the Senate and the House also stated that those provisions would give directory publishers "the ability to purchase listings[] and *updates* . . . ."[111] The House stated further that subscriber list information "includ[es] information for recently connected customers" and that the provision that became section 222(e) would prohibit carriers from refusing "to sell listings or *updates*."[112]

Finally, given Congress' goal of encouraging the development of competition in directory publishing,[113] the inclusion of updates within the statutory definition of subscriber list information is not surprising. Updated subscriber list information is critical to the success of a directory publishing operation.[114] A directory publisher typically will obtain an "initial load" of subscriber list information from a carrier that provides the carrier's subscriber list information as of a given date.[115] This information requires reformatting and other processing before it can be published in a directory. As that happens, the carrier is continuously updating its subscriber list information database to reflect the addition of new telephone exchange service subscribers as well as any changes in the information regarding existing subscribers. This updated information

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[110] *1995 House Report*, *supra* note 12, at 89 (emphasis added); *1994 Senate Report*, *supra* note 13, at 97 (emphasis added) (addressing proposed statutory language identical to that now in section 222(e)).

[111] *1995 House Report*, *supra* note 12, at 89 (emphasis added); *1994 Senate Report*, *supra* note 13, at 97 (emphasis added).

[112] *1995 House Report*, *supra* note 12, at 89 (emphasis added).

[113] *See* note 15, *supra*, and accompanying text.

[114] *See*, *e.g.*, ADP Comments at 21-22; ADP Reply at 4; *cf.* YPPA Comments at 11 (because "freshness" of information is important to directory publishers, carriers should make updates to subscriber list information available on a periodic basis").

[115] *See Great Western v. Southwestern Bell*, 63 F.3d at 1383 n.1.

is essential to ensure that the directory is as complete and accurate as possible as of its publication date.

In addition, directory publishers use updated subscriber list information to distribute directories to new residential and business telephone subscribers and to sell yellow pages advertising to new business subscribers.[116] New residents, for example, are likely to rely heavily upon the yellow pages, and new businesses in particular require yellow pages advertising.[117] Without updated subscriber list information, independent directory publishers would reach a more limited audience than would carriers' directory publishing operations and therefore would be less able to compete effectively.[118] We thus conclude that excluding updated subscriber list information from the statutory definition of subscriber list information would have been inconsistent with the Congressional purposes behind section 222(e).

5. Subscribers with Multiple Telephone Numbers

Many telephone subscribers have multiple telephone numbers listed in white or yellow pages directories. ADP indicates that some carriers provide to their directory publishing affiliates telephone numbers for these subscribers that the carriers do not provide to independent directory publishers.[119] We conclude that, for subscribers that have multiple telephone numbers, a carrier must provide requesting directory publishers with each telephone number that it has published, caused to be published, or accepted for publication in a directory. Those numbers fall within the statutory definition of subscriber list information.[120]

Some carriers provide customers, such as large corporations, that have multiple listings for their places of business or employees, with directories containing those listings. We conclude that these directories fall outside the statutory definition of subscriber list information to the extent they are not made available or sold to the public. In these circumstances, the carrier

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[116] *Id.*; *see also Great Western v. Southwestern Bell*, 63 F.3d at 1390 n.31 (testimony that "updates are essential for the independents to call on new businesses and to distribute new directories"). In part II.J.4, *infra*, we conclude that directory publishers may obtain subscriber list information to solicit yellow pages advertising.

[117] ADP Comments at 22.

[118] *See* ADP Reply at 6.

[119] Letter from Michael F. Finn, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at attachments (filed Apr. 7, 1998) (*ADP Apr. 7, 1998 Letter*).

[120] *See* 47 U.S.C. § 222(f)(3) (definition includes listed "subscribers' telephone numbers . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format").

has not published the directories, caused them to be published, or accepted them for publication within the meaning of section 222(f)(3).

6. Other Information

MCI contends that the Commission should require carriers to provide directory publishers with certain information in response to subscriber list information requests. This information includes lists of the "NPA-NXXs relating to the listing records being provided," the "[c]ommunity [n]ames expected to be associated with" those NPA-NXXs, and the "[i]ndependent [c]ompany names and their associated NPA-NXXs" for which listing records are being provided.[121] YPPA argues that the requested information lies outside the statutory definition of subscriber list information.[122]

MCI makes no attempt to explain why the information it requests falls within the definition of subscriber list information in section 222(f)(3) or otherwise might have to be provided to independent directory publishers under section 222(e).[123] We therefore cannot conclude on the record before us that carriers must disclose that information to requesting directory publishers.

F. Subscriber List Information Obtained from Competitive LECs

Section 222(e) requires each telecommunications carrier that provides telephone exchange service to provide subscriber list information "gathered in its capacity as a provider of such service" to requesting directory publishers.[124] The parties to this proceeding dispute whether this requirement extends to incumbent LECs with regard to subscriber list information that they obtain from competitive LECs pursuant to section 251(b)(3) of the Act.[125] That section requires, in pertinent part, each LEC to provide competing providers of telephone exchange

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[121] MCI Comments at 22 & Attachment A. Under the North American Numbering Plan, telephone numbers consist of ten digits in the form NPA-NXX- XXXX, where N may be any number from 2 to 9 and X may be any number from 0 to 9. Numbering plan areas (or NPAs) are known commonly as area codes. The second three digits of a telephone number are known as the NXX code. Typically, the NXX code identifies the central office switch to which the telephone number had been assigned or central office code.

[122] YPPA Reply at 5.

[123] *See* MCI Comments at 22 & Attachment A.

[124] 47 U.S.C. § 222(e).

[125] 47 U.S.C. § 251(b)(3).

service with "nondiscriminatory access to . . . directory listing . . . ."[126] ADP asserts that incumbent LECs receive subscriber list information from competitive LECs pursuant to section 251(b)(3) as part of the incumbent LECs' provision of telephone exchange service. ADP claims that section 222(e) therefore obligates incumbent LECs to provide the competitive LECs' subscriber list information to requesting directory publishers.[127] YPPA maintains that section 222(e) gives independent directory publishers the right to obtain a competitive LECs' subscriber list information directly from the competitive LECs and that the Commission lacks statutory authority to compel incumbent LECs to provide competitive LECs' subscriber list information to directory publishers.[128]

We conclude that the obligation under section 222(e) to provide a particular telephone subscriber's subscriber list information extends only to the carrier that provides that subscriber with telephone exchange service. The language of section 222(e) makes clear that a carrier need not provide subscriber list information to requesting directory publishers pursuant to that section unless the carrier "gathered" that information "in its capacity as a provider of [telephone exchange] service."[129] Under the statutory definition of "telephone exchange service," a carrier acts in this capacity only to the extent it "*furnish[es] to subscribers intercommunicating service* of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or . . . comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[130] This reference to "*furnish[ing] to subscribers intercommunicating service*" establishes that a carrier acts "in its capacity as a provider of [telephone exchange] service" only to the extent it provides telephone exchange service to subscribers of that service. When a LEC provides "nondiscriminatory access to . . . directory listing . . . ." under section 251(a)(3), it is not providing telephone exchange service to subscribers of that service. Instead, as the language of section 251(a)(3) makes clear, the LEC is providing a service -- directory listing -- to "competing providers of telephone exchange service and telephone toll service."[131]

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126 *Id.*

127 *ADP Dec. 30, 1997 Letter*, *supra* note 85, at 7.

128 *YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 4-5; *see also* Letter from Stephen L. Earnest, Attorney, BellSouth, to Magalie Roman Salas, Secretary, FCC, at 2-3 (filed Oct. 28, 1998) (*BellSouth Oct. 28, 1998 Letter*).

129 47 U.S.C. § 222(e).

130 47 U.S.C. § 153(47) (emphasis added).

131 47 U.S.C. § 251(b)(3).

We note that our conclusion that the obligation under section 222(e) to provide a particular telephone subscriber's subscriber list information extends only to the carrier that provides that subscriber with telephone exchange service does not preclude an incumbent LEC or other entities from acting as a clearinghouse for providing subscriber list information to directory publishers. We reject, however, for the reasons stated above, the argument that we have authority under section 222(e) to require incumbent LECs to provide competitive LECs' subscriber list information to directory publishers.[132] To the extent State law permits, State commissions are free to require incumbent LECs and competitive LECs to enter into cooperative arrangements for the provision of subscriber list information to directory publishers.

G.Provision of Subscriber List Information

1. Overview

The *Notice* sought comment on what regulations or procedures may be necessary to implement the statutory requirements that telecommunications carriers provide subscriber list information to requesting directory publishers "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions."[133]

2. Discussion

ADP asserts that despite the enactment of section 222(e), some carriers refuse to make subscriber list information, including updates, available to directory publishers.[134] Such failures violate section 222(e), which obligates each telecommunications carrier to "provide subscriber list information gathered in its capacity as a provider of [telephone exchange] service . . . to any person upon request for the purpose of publishing directories in any format."[135]

We conclude, consistent with several commenters' positions, that the nondiscrimination requirement, as set forth in section 222(e), obligates each carrier that gathers subscriber list information in its capacity as a provider of telephone exchange service to provide

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[132] *See ADP Apr. 7, 1998 Letter*, *supra* note 119, at 1; *ADP Dec. 30, 1997 Letter*, *supra* note 85, at 7 & Att. E.

[133] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

[134] *See*, *e.g.*, ADP Comments at 4; *ADP Jan. 16, 1997 Letter*, *supra* note 99, at 2; Letter from Michael F. Finn, Counsel for ADP, to William F. Caton, Acting Secretary, FCC, at 2 (filed Feb. 24, 1997) (*ADP Feb. 11, 1997 Letter*); *ADP Dec. 30, 1997 Letter*, *supra* note 85, at 4.

[135] 47 U.S.C. § 222(e).

that information to requesting directory publishers at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation, its directory publishing affiliate, or another directory publisher.[136] To ensure that independent directory publishers will be able to determine the rates, terms, and conditions under which a carrier provides subscriber list information for its own directory publishing operations, we require each carrier that is subject to section 222(e) to make available to requesting directory publishers any written contracts that it has executed for the provision of subscriber list information for directory publishing purposes to itself, an affiliate, or an entity that publishes directories on the carrier's behalf. In addition, to the extent any of a carrier's rates, terms, and conditions for providing subscriber list information for those operations are not set forth in a written contract, the carrier must keep a written record of, and make available to requesting directory publishers, those rates, terms, and conditions. Upon request, the carrier shall also provide these contracts and this information to this Commission. These requirements should ensure that a carrier's directory publishing operations enjoy no competitive advantages over independent directory publishers based on the carrier's control over subscriber list information.

We also conclude that the non-discrimination requirement in section 222(e) does not prohibit all variations in the rates, terms, and conditions under which a carrier provides subscriber list information to directory publishers.[137] We therefore do not preclude a carrier from attempting to show, in the event a complaint filed pursuant to section 208 of the Communications Act alleges that the carrier has violated this requirement, that specific factors, such as differences in the costs of providing subscriber list information to particular directory publishers, warrant differences in the rates, terms, and conditions under which the carrier provides that information to those publishers.[138]

ALLTEL and U S WEST suggest interpretations of section 222(e) under which a carrier would only have to refrain from discriminating between its own and independent

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[136] *See, e.g.*, ALLTEL Comments at 6 (nondiscrimination requirement means that LEC-affiliated publishers and independent publishers should receive subscriber list information services or data "at the same level, in the same form, at the same time and at the same price"); Ameritech Comments at 18 (carrier should offer the same subscriber list information products and prices to all directory publishers); NYNEX Comments at 22 (carriers should make the same information available on the same terms and conditions, including price and frequency, as they make the information available to their own directory publishers); *cf.* SBC Reply at 14 n.51 (nondiscriminatory means that like publishers with like requests will be sold listings on the same or similar rates, terms, and conditions).

[137] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22004-05, ¶ 212 (concluding that nondiscrimination requirement in section 272(c)(1) of the Communications Act does not preclude, for example, rate differentials that reflects differences in the costs of supplying different customers).

[138] *See id.*

directory publishers in order to comply with that section.[139] We reject those interpretations. In addition to requiring nondiscrimination, section 222(e) requires carriers to provide subscriber list information to requesting directory publishers "on a timely and unbundled basis" and "under . . . reasonable rates, terms, and conditions."[140] We conclude that the statutory terms "timely," "unbundled," and "reasonable" have meanings independent from that of the statutory term "nondiscriminatory." Had Congress intended the terms to have the same meaning, there would have been no need to include the timeliness, unbundling, and reasonableness requirements in section 222(e). We therefore emphasize that not only must carriers treat all directory publishers on a nondiscriminatory basis, as set forth in paragraph 0, but carriers also must provide to all requesting directory publishers subscriber list information "on a timely and unbundled basis" and "under . . . reasonable rates, terms, and conditions."[141]

The record in this proceeding does not provide a sufficient basis for defining all the standards that a carrier must meet in order for the terms and conditions under which it provides subscriber list information to be considered "reasonable" within the meaning of section 222(e). We therefore decline to specify comprehensive reasonableness standards at this time.[142] We conclude, however, that a carrier would be acting unreasonably if the terms and conditions under which it provides subscriber list information were to restrict a directory publisher's choice of directory format.[143] Any such restriction would be inconsistent with the requirement in section 222(e) that carriers make subscriber list information available to directory publishers "under . . . reasonable . . . terms[] and conditions . . . for the purpose of publishing directories *in any format*."[144]

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[139] ALLTEL Comments at 6 (section 222(e) requires only that LEC affiliated publishers and independent publishers receive subscriber list information services or data "at the same level, in the same form, at the same time and at the same price"); ALLTEL Reply at 4-5 (under section 222(e), carriers "must only supply subscriber list information to independent publishers on the same terms and conditions as it is supplied to the affiliated publisher"); U S WEST Reply at 13 (a carrier need only provide subscriber list information to third parties "in the same format and with the same information as that provided to its white pages publishing operation").

[140] 47 U.S.C. § 222(e).

[141] *Id.*

[142] In part II.H, *infra*, we address the requirement that subscriber list information rates be reasonable.

[143] *See* Letter from Michael F. Finn, Counsel for ADP, to William F. Caton, Acting Secretary, FCC, at 4-5 (filed Apr. 2, 1998) (*ADP Apr. 2, 1998 Letter*) (describing one carrier's attempt to prohibit CD-ROM and computer diskette directories).

[144] 47 U.S.C. § 222(e) (emphasis added); *ADP Apr. 2, 1998 Letter*, *supra* note 143, at 4.

ADP encourages us to define "timely" because, it claims, many carriers fail to respond to requests for subscriber list information for weeks and, in some instances, months.[145] ADP suggests that "timely" means within twenty days of a directory publisher's request for subscriber list information.[146] We believe, however, that thirty days advance notice is necessary to give carriers sufficient time to fill most requests for subscriber list information for directory publishing purposes and should not disrupt any directory publishing schedule. We are concerned, in addition, that carriers may not be able to accommodate some requests for subscriber list information within thirty days. We also do not want to prevent a directory publisher from giving carriers additional time to fill requests for subscriber list information when that is consistent with the publisher's schedule. We therefore conclude that, for all requests for subscriber list information, a carrier must provide subscriber list information at the time specified by the directory publisher, provided that the directory publisher has given at least thirty days advance notice and the carrier's internal systems permit the request to be filled within that time frame.[147] We will monitor implementation of this requirement and adjust the thirty-day notice period if circumstances warrant.

ADP alleges that, despite the unbundling requirement in section 222(e), some carriers continue to require directory publishers to purchase more listings than they want at considerable additional expense.[148] USTA argues that the unbundling requirement does not obligate carriers to sort or otherwise manipulate listings on demand.[149] We conclude that section 222(e) precludes a carrier from bundling listings that the carrier is able to sell separately.[150] In enacting section 222(e), Congress expressed concern that some carriers had required directory publishers to purchase listings in addition to those the requesting publisher had determined were most likely to suit its needs.[151] Consistent with the legislative history, we require carriers to

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[145] ADP Comments at 22; ADP Reply at 10-11.

[146] ADP Comments at 2; ADP Reply at 10-11. We note that no party to this proceeding suggested an alternative notice period.

[147] For purposes of the deadlines set forth in this subpart, the first day of a period is the first business day after the carrier receives the request for subscriber list information.

[148] ADP Comments at 21-22.

[149] Letter from Lawrence E. Sarjeant, Vice President Regulatory Affairs & General Counsel, USTA, to Magalie Roman Salas, Secretary, FCC, at 2 (filed Jan. 14, 1999) (*USTA Jan. 14, 1999 Letter*).

[150] *See Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996) (referring to the practice of selling one or more cable channels separately from other cable channels as "unbundling").

[151] *1995 House Report, supra* note 12, at 89 (some LECs "have imposed unreasonable conditions such as requiring that the listings be purchased only on a statewide basis . . . ."); *1994 Senate*

unbundle subscriber list information, including updates, on any basis requested by a directory publisher that the carrier's internal systems can accommodate. A carrier whose internal system can accommodate a directory publisher's request for particular listings thus will have to provide only those listings. In unbundling subscriber list information for directory publishers, however, the carrier shall not disclose customer proprietary network information, such as information relating to telephone exchange service subscribers' usage patterns, except as permitted by sections 222(c) and (d) of the Act.[152] A carrier, in addition, must not require directory publishers to purchase any product or service other than subscriber list information as a condition of obtaining subscriber list information.[153]

MCI contends that carriers must make updated subscriber list information available to directory publishers on a daily basis as well as on other regularly recurring bases, such as weekly, monthly, quarterly, and annually.[154] YPPA argues some carriers may not be able to make updates available on a daily basis.[155] Consistent with the standards set forth in paragraphs 0 and 0, above, we conclude that, upon request, a carrier must provide subscriber list information on any periodic basis that the carrier's internal systems can accommodate. Because many carriers provide updated subscriber list information to their directory publication or directory assistance operations on a daily basis,[156] this approach will allow directory publishers to receive subscriber list information regarding many telephone exchange service subscribers on a daily basis, as MCI urges. Requiring a carrier to provide subscriber list information only on the periodic basis that the carrier uses for its own directory publishing operations, as a

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Report, *supra* note 13, at 97 (same); *see also* ADP Comments at 21 (carriers should not be able to force directory publishers to purchase subscriber list information for areas other than those the directory publisher requests); SBC Comments at 17, n.16 ("a publisher should be able to obtain subscriber list information separately for residences or business, new or existing listings, listings by geographic area such as NXX or area code, or other criteria, so long as technically feasible and economically reasonable").

[152] 47 U.S.C. §§ 222(c)-(d). Although the Commission adopted implementing rules, (*CPNI Report and Order*, 13 FCC Rcd at 8079-8200, ¶¶ 21-203; 47 C.F.R. §§ 64.2001-64.2009), they were recently vacated by the United States Court of Appeals for the Tenth Circuit. *U S WEST v. FCC*, *supra* note **Error! Bookmark not defined.**.

[153] *USTA Jan. 14, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 2.

[154] MCI Comments at 22 & Attachment A; *see also* ADP Reply at 5 (carriers must make subscriber list information available on at least a weekly basis); YPPA Comments at 11 (carriers should make updates available "on a periodic basis").

[155] YPPA Comments at 11.

[156] In part IV, *infra*, we discuss the relationship between directory publication and directory assistance.

nondiscrimination standard would mandate, would not recognize variations in directory publishing schedules. Restricting directory publishers to the periodic basis that the carrier uses for its own directory publishing operations thus would be inconsistent with the requirement that carriers provide subscriber list information on a "timely . . . basis."[157] For instance, an independent publisher that updates its directories every six months might need to receive subscriber list information more often than a carrier affiliate that publishes yearly.

We reject USTA's and Vitelco's argument that the Communications Act does not mandate that carriers provide subscriber list information more than once for each directory or edition thereof that is published.[158] Section 222(e) requires that carriers provide subscriber list information gathered in their capacity as providers of telephone exchange service to "*any person upon request* for the purpose of publishing directories in any format."[159] This statutory language makes clear that a directory publisher may obtain subscriber list information repeatedly, as long as that information will be used for directory publishing purposes. As discussed elsewhere in this *Third Report and Order*, directory publishers use updated subscriber list information for at least two directory publishing purposes: to ensure that their directories are as complete and as accurate as possible as of the publication date; and to solicit advertisers for yellow pages directories.[160] Limiting directory publishers to obtaining subscriber list information only once per directory edition would make it difficult, if not impossible, for them to accomplish these purposes. Because section 222(e) contains no such limitation, but instead makes clear that a directory publisher may obtain subscriber list information "upon request," we conclude that USTA's and Vitelco's argument lacks merit.

These requirements should accommodate most requests for subscriber list information for directory publishing purposes without imposing undue burdens on any carrier and thus should be of particular benefit to small directory publishers and carriers. We, of course, do not preclude a directory publisher from requesting that a carrier provide subscriber list information on any given schedule. Nor do we preclude a directory publisher from requesting that a carrier unbundle subscriber list information, including updates, on bases other than those that a carrier's internal system can accommodate. If the carrier's systems cannot accommodate the delivery schedule or the level of unbundling requested by a directory publisher, the carrier must inform the directory publisher of that fact, tell the publisher which delivery schedules or

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157 47 U.S.C. § 222(e).

158 USTA Comments at 6; Vitelco Comments at 3. We also discuss USTA's and Vitelco's argument in part II.E.4, *supra*, where we determine that updates to subscriber list information fall within the statutory definition of subscriber list information.

159 47 U.S.C. § 222(e) (emphasis added).

160 *See* parts II.E.4, *supra*, and II.J.4, *infra*.

unbundling levels can be accommodated, and adhere to the schedule or unbundling level the publisher chooses from among those available. The carrier must provide this information within thirty days of when it receives the publisher's request. If this process results in the provision of listings in addition to those the directory publisher requested, the carrier may impose charges for, and the directory publisher may publish, only the requested listings. These requirements will prevent a carrier from profiting from shortcomings in its internal systems and a directory publisher from profiting from requesting fewer listings than it intends to publish.

We recognize, of course, that the costs a carrier incurs in responding to requests for subscriber list information may vary, depending on the delivery schedules and levels of bundling requested, among other factors.[161] In part II.H.5, below, we recognize that a carrier may recover these additional costs from a directory publisher.

We also recognize that multiple or conflicting requests for subscriber list information could overburden a carrier's internal systems. If a carrier finds that it cannot accommodate all of a group of such requests within the time frames specified above, the carrier shall respond to those requests on a nondiscriminatory basis.[162] The carrier shall inform each affected directory publisher of the conflicting requests within thirty days of when it receives the individual publisher's request. Within that thirty-day period, the carrier also shall inform each affected directory publisher how it intends to resolve the conflict and the schedule on which it intends to provide subscriber list information to each publisher.

The requirements set forth above attempt to reconcile directory publishers' needs with our desire not to impose any unnecessary burdens on carriers. In particular, we decline at this time to require carriers to modify their internal systems so they can accommodate each particular delivery schedule or level of unbundling that a directory publisher might find useful. We recognize, of course, that this approach may lead to disputes between carriers and directory publishers regarding the capabilities of the carriers' internal subscriber list information systems. In any such dispute, the burden will be on the carrier to show that its internal systems cannot accommodate the directory publisher's requests.

MCI proposes that we require carriers to provide notice of changes in their subscriber list information as those changes occur.[163] To the extent changes in subscriber list information reflect customers' decisions to cease having particular telephone numbers listed, notice of the changes is necessary to enable directory publishers to avoid listing those numbers.

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[161] For example, a carrier whose internal systems permit it to perform specialized sorts may incur additional data processing costs in responding to requests for such sorts.

[162] 47 U.S.C. § 222(e).

[163] MCI Comments at 22.

We therefore require carriers to provide requesting directory publishers with notice of changes in subscriber list information in this limited circumstance. We decline to require notice of other types of changes in subscriber list information because we are not convinced that the benefits would exceed the costs. Except where subscribers request that previously listed numbers cease to be listed, notice of changes in subscriber list information would seem to serve no purpose other than to inform directory publishers of the need to request updated subscriber list information regarding particular subscribers from carriers. Directory publishers are well aware that carriers' subscriber list information databases change on an ongoing basis. To the extent changes do not involve customer requests that their numbers cease to be listed, we believe that publishers will request periodic subscriber list information updates from carriers rather than relying on any notice of changes in that information, which would have to be followed by requests for updates.[164] Except where subscribers request that previously listed numbers cease to be listed, we conclude that the benefits of a notice requirement likely would be minimal and do not warrant requiring carriers to incur the costs of providing directory publishers with notice of changes in subscriber list information.

[164] *See* para. 0, *supra*.

H.Reasonable Rates

1. Background

Section 222(e) requires that telecommunications carriers provide subscriber list information to requesting directory publishers "under . . . reasonable rates."[165] In the *Notice*, the Commission sought comment on the regulations or procedures necessary to implement this statutory requirement.[166] YPPA and several incumbent LECs contend that a subscriber list information rate is "reasonable" only if it fairly compensates the carrier for the cost of gathering and maintaining the listings, the cost of providing them to the directory publisher, and the value of the listings themselves.[167] These parties urge that the Commission adopt no pricing rules for subscriber list information in this proceeding.[168] ADP maintains that the Commission should establish benchmark rates of $0.04 per listing for base file subscriber list information that a carrier provides a directory publisher and $0.06 per listing for services that update that information.[169] These benchmarks, according to ADP, would establish the maximum rates a carrier could charge a directory publisher for subscriber list information, absent a showing that the benchmarks would not allow the carrier to recover its costs of providing subscriber list information plus a reasonable profit.[170]

2. Overall Approach

After reviewing the language of section 222(e), its legislative history, the broader statutory scheme, and Congress' policy objectives, we conclude that $0.04 per listing is a

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165 47 U.S.C. § 222(e).

166 *Notice*, 11 FCC Rcd at 12532, ¶ 45.

167 *E.g.*, GTE Comments at 18-19; YPPA Comments at 8; ALLTEL Reply at 4; SBC Reply at 14; Sprint Reply at 10.

168 *E.g.*, ALLTEL Comments at 6; USTA Reply at 7; YPPA Comments at 5.

169 Letter from Philip L. Verveer et al., Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at 15-19 (filed Mar. 30, 1999) (*ADP Mar. 30, 1999 Letter*); Letter from Michael F. Finn, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at 2-3 (filed Sept. 17, 1998) (*ADP Sept. 17, 1998 Letter*) (urging a $0.04 per listing benchmark for subscriber list information that carriers, other than rural telephone companies, provide directory publishers); Letter from S. Jenell Trigg *et al.*, Assistant Chief Counsel for Telecommunications, Office of Advocacy, U.S. Small Business Administration, to Magalie Roman Salas, Secretary, FCC, at 3 (filed Sept. 17, 1998) (*SBA Sept. 17, 1998 Letter*) (same).

170 *ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 18-19.

presumptively reasonable rate for base file subscriber list information and that $0.06 per listing is a presumptively reasonable rate for updated subscriber list information that carriers provide directory publishers. Our presumption of reasonableness will apply regardless of the format in which the publisher intends to publish the subscriber list information and regardless of the number of times the publisher intends to publish that information.

We do not preclude a carrier from charging subscriber list information rates different than the presumptively reasonable rates, as long as the prices are consistent with the other requirements of section 222(e), including the requirement that subscriber list information rates be nondiscriminatory. However, any carrier whose rates exceed either of these rates should be prepared to provide cost data and all other relevant information justifying the higher rate in the event a directory publisher files a complaint regarding that rate pursuant to section 208 of the Communications Act. Absent credible and verifiable data showing that the carrier's costs, including a reasonable profit, exceed the applicable presumptively reasonable rate, the Bureau or the Commission, depending on the circumstances, shall conclude that the rate is unreasonable and award damages accordingly.

The Bureau or the Commission, depending on the circumstances, will use all available enforcement mechanisms, including potentially the Accelerated Docket procedures, to expedite resolution of subscriber list information rate disputes that cannot be resolved without regulatory intervention.[171] We emphasize that any carrier charging a subscriber list information rate exceeding either of the presumptively reasonable rates should be prepared to submit cost data supporting that rate in the event a directory publisher files a complaint challenging that rate. These data must comply with the requirements set forth in part II.H.6, below.

3.Cost Structure

As indicated previously,[172] many LECs maintain computerized subscriber list information databases. The LECs update these databases as individuals and businesses start or stop telephone exchange service, change the number of lines they receive, request unlisted status, or add new listings for existing lines. LECs typically provide requesting directory publishers with either "base file" subscriber list information or "updates" to that information.[173] LECs

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[171] *See Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report & Order, 13 FCC Rcd 17018 (1998) (*Formal Complaints Second Report and Order*).

[172] *See* part II.A.2, *supra*.

[173] See note 39, *supra*, for definitions of these terms.

generally transmit subscriber list information to directory publishers electronically, on magnetic tape, or on paper.[174]

Incumbent LECs allege that they incur a number of different kinds of costs in providing subscriber list information to directory publishers. As discussed below, these costs can be grouped into three broad categories: (1) the incremental costs incurred in responding to individual requests for subscriber list information; (2) some allocation of the costs of a carrier's database operations, which support and are common to numerous services, including the provision of subscriber list information to directory publishers ("common costs"); and (3) some allocation of overheads.[175]

According to the various incumbent LECs, the incremental costs of responding to individual subscriber list information requests include such costs as those incurred in taking and scheduling orders for such information and ensuring that the orders are properly filled, the cost of downloading the requested subscriber list information from the database (which may involve computer operator time, processing time, and programming time), the cost of the magnetic tape or paper on which the subscriber list information will be transmitted, and mailing costs.[176] We note that some of these costs may be spread over multiple downloads. For example, an incumbent LEC that provides updated subscriber list information to directory publishers on a daily basis does not take a new order or reprogram its computer each time it transmits a daily update. Similarly, if additional directory publishers request daily or monthly updates that the carrier's internal system can accommodate, only *de minimis* additional computer operator or processing time should be required to produce the updates. Based on the record, we would

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[174] *See* part II.A.2, *supra*.

[175] Where multiple products or services are supplied by the same facility or productive operation, and the proportion of the different products or services can be varied, the costs of that facility or operation are said to be "common." Such costs may be common either to all services a firm provides or to a subset of those services (such as the provision of subscriber list information to multiple entities). In contrast, where the same facility or operation produces two or more products or services that economically can only be produced in fixed proportions, the cost of the facility or operation is said to be "joint." *See* 1 Alfred E. Kahn, The Economics of Regulation: Principles and Institutions 77-80 (1970); 1 Alfred E. Marshall, Principles of Economics 389-90 (9th ed. 1932). Despite differences in technical definition, the phrase "joint cost" is frequently used as a synonym for "common cost."

[176] *See*, *e.g.*, Letter from George L. Frazier, Regulatory Relations, Southern Bell, to Walter D'Haeseleer, Florida Pub. Serv. Comm'n, at Att., p. 4 (Feb. 8, 1993) (*BellSouth Feb. 8, 1993 Letter*) (*reproduced in ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at Att B) (BellSouth's estimated cost per download for base file subscriber list information is $113.68 or $0.003 per listing).

expect the incremental costs of generating a download to be fairly low.[177] We also would expect, in almost all instances, that the incremental cost of adding an additional listing to a given download is virtually zero.

Incumbent LECs argue that their subscriber list information-related costs also include substantial allocations of common costs and overheads. More specifically, the incumbent LECs argue that subscriber list information rates should allow them to recover the costs of installing, maintaining, and programming the computers that store subscriber list information databases, and the costs of ensuring that those databases are up-to-date and accurate.[178] The incumbent LECs also argue that their subscriber list information rates should include an allocation of other costs, such as personnel costs, maintenance and administrative costs, as well as a return on investment. We note that the costs of the personnel and plant that are used in providing subscriber list information to directory publishers are common costs because these personnel and plant may be shared with additional activities. For example, the computers on which an incumbent LEC's subscriber list information database resides may also be used to provide subscriber list information to non-publishers or to perform functions unrelated to directory publishing. The incumbent LEC thus would need to buy and maintain the computers even if it did not provide subscriber list information to directory publishers.[179] Moreover, by their very nature, these common costs should remain relatively constant regardless of the number of directory publishers that request subscriber list information, and regardless of the number of directory listings those publishers request.

Given the *de minimis* incremental cost of adding a listing, the low incremental cost per download, and the comparatively large contributions to common costs and overheads, it becomes difficult to identify a specific cost per listing for subscriber list information. More specifically, even if one specified the exact amount of contribution to common costs and overheads, the per listing cost would vary depending on the number of listings sold to directory publishers and other non-publishers.

4. Method for Determining "Reasonableness"

The parties to this proceeding present sharply contrasting methodologies for determining what are "reasonable" subscriber list information rates. At one extreme, ADP and MCI urge incremental cost methodologies and provide data suggesting that subscriber list

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[177] *See id. See also ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 21-22.

[178] *See*, *e.g.*, Letter from Michael J. Barry, Director Public Policy, Ameritech, to Magalie Roman Salas, Secretary, FCC, at 4-5 (filed Apr. 28, 1999) (*Ameritech Apr. 28, 1999 Letter*).

[179] *See* para. 0, *infra*.

information rates should be significantly below $0.01 per listing.[180] Other parties contend that subscriber list information rates should be set through "competitive market" negotiations, a process that could result in significantly higher prices.[181] Finally, YPPA and several incumbent LECs argue that a subscriber list information rate is reasonable only if it allows the carrier to recover its costs plus the value of the listings themselves.[182] We address first the question whether section 222(e) requires that one of these particular methodologies, or any other particular methodology, be used in evaluating subscriber list information rates.

To resolve this question, we look first to the text of the statute. In requiring that subscriber list information rates be "reasonable," Congress was using a word previously used in numerous statutes, including the Communications Act, to describe the desired end result of a ratemaking process.[183] ADP argues that Congress' use of "reasonable" in section 222(e) mandates that subscriber list information rates be based on costs and urges that we use an incremental cost methodology.[184] In making these arguments, ADP does not claim that the statutory language itself requires that subscriber list information rates be based on costs.[185] Instead, ADP maintains that the Commission has a long history of using costs for calculating reasonable rates and that courts have repeatedly referred to costs as the basis for establishing reasonable rates. ADP asserts that we must presume that Congress was aware of this administrative and judicial history. ADP contends that Congress' failure to specify in section 222(e) that reasonable subscriber list information rates may be based on a non-cost methodology

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[180] *E.g.*, ADP Comments at 19-21; ADP Reply at 9-10 (alleging incremental costs of 0.01 and 0.003 per listing for SBC and BellSouth, respectively); *ADP May 20, 1998 Letter*, *supra* note **Error! Bookmark not defined.**, at 2; *see also* MCI Comments at 23 (arguing that subscriber list information should be priced no greater than the total service long run incremental cost). *But see* YPPA Reply at 7 (contending that the Commission must explicitly reject incremental costs as the only required basis for pricing subscriber list information); *YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 2 (incremental costs have nothing to do with reasonable pricing).

[181] CBT Comments at 12; *see BellSouth Oct. 28, 1998 Letter*, *supra* note 128, at Att. B, p. 3 (the market, rather than a regulatory body, should set subscriber list information prices); *cf. ADP Apr. 2, 1998 Letter*, *supra* note 143, at 2 (alleging that CBT proposed prices totalling $1.35 per listing in negotiations with an independent directory publisher).

[182] *E.g.*, GTE Comments at 18-19; YPPA Comments at 8.

[183] *See*, *e.g.*, 16 U.S.C. § 824d(a) ("just and reasonable" electrical rates); 47 U.S.C. § 201(b) ("just and reasonable" charges for interstate or foreign communication by wire or radio); 47 U.S.C. § 623(b) ("reasonable" cable rates); *see also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

[184] Letter from Michael F. Finn, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at Att. (filed Apr. 13, 1998) (*ADP Apr. 13, 1998 Letter).*

[185] *See id.*

means that a subscriber list information rate is reasonable only if it is based on costs, which ADP would determine using an incremental cost methodology.[186]

YPPA and several carriers argue, in contrast, that the Commission must permit subscriber list information rates that compensate the carrier for the value of the listings themselves as well as the costs of gathering and maintaining the listings and providing them to the directory publisher.[187] These parties make no claim that the statutory language mandates a specific method for determining reasonableness. Instead, they point out that the *1995 House Report* states that a reasonableness requirement for subscriber list information rates "would ensur[e] that the telephone companies that gather and maintain [subscriber list information] are fairly compensated for the value of the listings."[188] Although it is not clear what was meant by the term "value," adoption of a value-based methodology arguably would allow carriers to charge higher prices for certain kinds of subscriber list information, such as updates, and for certain kinds of uses, such as for publishing in multiple directories and in CD-ROMs. The prices carriers would charge could depend on the demand for these kinds of orders or on the revenue the subscriber list information generates for a directory publisher, rather than on the carriers' subscriber list information-related costs.[189] We note, however, that YPPA and the carriers have suggested no method by which the Commission might measure the value that subscriber list information would have in a competitive market. We also note that, if there were a competitive market for subscriber list information with many firms able to provide identical listings, it is not clear that the market would generate price discrimination with different prices based on the value of that information.[190]

We reject the arguments that the 1996 Act requires that subscriber list information rates be based on either an incremental cost or a value-based methodology. As an initial matter, the statutory language does not state that subscriber list information rates must be cost-based, value-based, or even set in accordance with any particular methodology. Because the statutory language on its face does not require any particular methodology for determining reasonableness, we look to the broader statutory scheme, its legislative history, and the

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[186] *See id.* at Att., pp. 1-11.

[187] *E.g.*, GTE Comments at 18-19; YPPA Comments at 7-8; ALLTEL Reply at 4; SBC Reply at 14; Sprint Reply at 10; Letter from Joel Bernstein, Counsel for YPPA, to Magalie Roman Salas, Secretary, FCC, at 2 (*YPPA Mar. 31, 1999 Letter*).

[188] YPPA Reply at 7 (*citing 1995 House Report*, *supra* note 12, at 89).

[189] Letter from Joel Bernstein, Counsel for YPPA, to Magalie Roman Salas, Secretary, FCC, at 3 n.7 (filed May 20, 1999) (*YPPA May 20, 1999 Letter*) (suggesting that a rate equal to two percent of a directory publisher's revenue would not be unreasonable for base file subscriber list information).

[190] *See*, *e.g.*, Carlton & Perloff, *Modern Industrial Organization*, 435 (2d ed. 1994).

underlying policy objectives stated by Congress to determine Congressional intent. Section 222(e) was enacted as part of the 1996 Act. As mentioned previously, Congress intended that Act "to provide for a pro-competitive, de-regulatory national policy framework" that would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."[191] We believe that this broad statutory goal provides a framework against which we should evaluate any approach for determining reasonable rates for carrier provision of subscriber list information to directory publishers.

The legislative history identifies two specific goals in relation to subscriber list information rates: the directory publishers' interest in obtaining subscriber list information at prices that facilitate competition in directory publishing; and the carriers' interest in obtaining fair compensation for their subscriber list information.[192] For instance, in passing a provision identical to section 222(e), the Senate was specifically concerned with prohibiting unfair LEC practices and encouraging competition in directory publishing.[193] The House wished to prohibit carriers from using their "total control" over subscriber list information to charge unreasonable rates, while "ensuring that the telephone companies that gather and maintain [subscriber list information] are fairly compensated for the value of the listings."[194] The legislative history, however, does not further illuminate what is a reasonable subscriber list information rate, or explain how we should assess whether a particular rate would facilitate competition in directory publishing while fairly compensating the providing carrier.

We reject ADP's proposal that subscriber list information rates should only allow for the recovery of the incremental costs of providing that information to directory publishers. As discussed above, the incremental costs are very low relative to the common costs and

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[191] *Joint Explanatory Statement*, *supra* note 2, at 1.

[192] *E.g.*, *Joint Explanatory Statement*, *supra* note 2, at 1; *1995 House Report*, *supra* note 12, at 89; *1994 Senate Report*, *supra* note 13, at 97.

[193] *1994 Senate Report*, *supra* note 13, at 97 (provision that was the basis for what ultimately became section 222(e) "is intended to prohibit unfair practices by local exchange carriers and encourage competition").

[194] *1995 House Report*, *supra* note 12, at 89. *But see 1994 House Report*, *supra* note 12, at 60 ("[r]easonable terms and conditions include, but are not limited to, the ability to purchase listings and updates . . . at a reasonable price based on incremental cost"); 142 Cong.Rec. H1160 (1996) (Statement of Rep. Barton in revision and extension of remarks) ("most significant factor" in determination of what constitutes a "reasonable" price for subscriber list information "should be the actual, or incremental cost of providing the listing to the independent publisher"); 142 Cong. Rec. E184-03 (1996) (Statement of Rep. Paxon in extension of remarks) ("in determining what constitutes a reasonable rate under [section 222(e)], the most significant factor should be the incremental cost of delivering [subscriber list information] to the requesting party).

overheads. Moreover, we recognize that, in setting rates, this Commission generally allows a contribution to common costs and overheads. We see no reason to depart from this long-standing practice in this area.

We also reject the idea that incumbent LECs be allowed to charge either whatever they want or value-based prices for subscriber list information. Congress enacted section 222(e) to correct a perceived failure in the market for subscriber list information. All directory publishers require timely and complete access to accurate subscriber list information in order to compete effectively. Because LECs obtain subscriber list information "quite easily" during the order-taking process for telephone exchange service,[195] they have immediate and total access to "a uniquely complete and current body of listing information" for their customers.[196] This access helps incumbent LECs, which dominate the provision of telephone exchange service as well as the directory publishing industry, ensure that their directories are complete and up-to-date when published, and delivered to each newly connected telephone exchange service subscriber.[197] Incumbent LECs' directory publishers also use subscriber list information to identify new businesses in order to target them for specific yellow pages marketing efforts.[198]

Alternative providers of subscriber list information, in contrast, generally must rely on sources, such as published directories, that do not include many of the listings in carrier databases. As individuals and businesses start or stop telephone exchange service, published directories become inaccurate over time.[199] Other potential sources of listing information, such as Chambers of Commerce and marketing list providers, either rely on published directories or do not include many of the residential and business listings in a geographic area.[200] Directory

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[195] *See* part II.A.2, *supra* (*quoting Feist*, 499 U.S. at 340).

[196] ADP Comments at Ex. 1, p. 2 (Dec. 18, 1987 affidavit of Southwestern Bell Yellow Pages former President and CEO A.C. Parsons); *see also 1995 House Report*, *supra* note 12, at 89.

[197] ADP Comments at Ex.1, pp. 2-3 (Dec. 18, 1987 affidavit of Southwestern Bell Yellow Pages former President and CEO A.C. Parsons). In *Application of WorldCom, Inc.& MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, CC Docket No. 97-211, 1998 WL 611053, at ¶ 168, the Commission determined that incumbent LECs have at least a 94 percent market share of the telephone exchange service in every geographic market and that, in many places, the incumbent LEC's market share equals or approaches 100 percent.

[198] ADP Reply at 6.

[199] Letter from Theodore Whitehouse, Counsel for ADP, to Magalie Roman Salas, Secretary, FCC, at Att., p. at 8 (filed Dec. 11, 1998) (*ADP Dec. 11, 1998 Letter*); ADP Comments, at Ex.1, p. 2 (Dec. 18, 1987 affidavit of Southwestern Bell Yellow Pages former President and CEO A.C. Parsons).

[200] *See ADP Dec. 11, 1998 Letter*, *supra* note **Error! Bookmark not defined.**, at Att., pp. 9-10.

publishers that rely on these sources cannot publish directories that are as accurate and complete as those incumbent LECs and their affiliates publish. These directory publishers also are unable to ensure that newly connected subscribers receive directories and that newly connected businesses are targeted for yellow pages marketing because they do not have ready access to information about new customers.[201] Subscriber list information obtained from non-carrier sources thus is not a close substitute for LEC-provided subscriber list information.

We reject CBT's position that "competitive market" negotiations will be sufficient to ensure reasonable subscriber list information rates as well as similar proposals that would permit carriers to exploit their control over subscriber list information.[202] We find that Congress would not have seen a need to enact a requirement in section 222(e) that subscriber list information rates be reasonable had it merely intended to allow carriers to charge rates identical to those charged in the absence of Congressional intervention.[203] Subscriber list information obtained from sources other than the carriers' databases, such as published directories and commercial lists, are inferior substitutes and are not likely to constrain sufficiently LEC pricing for subscriber list information. We conclude that relying on negotiations would not further Congress' goals of promoting competition in directory publishing and fairly -- as opposed to excessively -- compensating carriers for the subscriber list information they provide directory publishers.[204]

We also reject YPPA's and certain incumbent LECs' argument that subscriber list information rates should include an increment above cost to reflect the "value" of that information.[205] In so arguing, these parties rely on a statement in the *1995 House Report* that a reasonableness requirement for subscriber list information rates "would ensur[e] that the telephone companies that gather and maintain [subscriber list information] are fairly

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[201] ADP Comments at Ex.1, pp. 2-4 (Dec. 18, 1987 affidavit of Southwestern Bell Yellow Pages former President and CEO A.C. Parsons).

[202] *See*, *e.g.*, CBT Comments at 12; *BellSouth Oct. 28, 1998 Letter*, *supra* note 128, at Att. B, p. 3.

[203] *See ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 12-13; *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (recognizing that prevailing contract prices for natural gas do not necessarily result in just and reasonable rates).

[204] *1995 House Report*, *supra* note 12, at 89. *See generally Farmers Union Central Exchange v. FERC,* 734 F.2d 1486, 1508 (D.C.Cir.) (*Farmers Union II*), *cert. denied*, 469 U.S. 1034 (1984) ("It is of course elementary that market failure and the control of monopoly power are central rationales for the imposition of rate regulation") (*citing* S. Breyer, Regulation and Its Reform 15-16 (1982)).

[205] *E.g.*, GTE Comments at 18-19; YPPA Comments at 8; ALLTEL Reply at 4; SBC Reply at 14; Sprint Reply at 10.

compensated for the value of the listings."[206] That report does not suggest, however, that rates that enable carriers to recover their incremental costs of providing subscriber list information plus a reasonable allocation of common costs and overheads would not fairly compensate carriers for the value of subscriber list information.[207] Given that Congress enacted section 222(e) to redress a market failure, we do not believe that the passing reference to "value" in the *1995 House Report* was intended to allow LECs with unique control and access to accurate subscriber list information to recover compensation in excess of incremental costs and a reasonable allocation of common costs and overheads through their subscriber list information rates.[208] Instead, we find that *Report* and the legislative history behind section 222(e) consistent with the view that carriers should charge rates equal, or similar, to those that would be charged if there were a competitive market for subscriber list information.

We reject, in addition, YPPA's argument that carriers should be permitted to charge higher rates for subscriber list information just because the independent publisher intends to use them in multiple directories, just as a software manufacturer may charge extra for a software program that the customer installs on multiple computers. Unlike software developers, carriers cannot obtain copyright protection for subscriber list information that has been published in their own directories.[209] Allowing carriers to charge a directory publisher additional amounts for republishing subscriber list information would be unfair to independent directory publishers, as it would force those publishers to pay more to use information that other publishers, including the carriers' own publishing operations, could use without charge. We therefore find YPPA's analogy to the software industry unpersuasive.

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[206] YPPA Reply at 7 (*citing 1995 House Report*, *supra* note 12, at 89).

[207] We note that the value of a product or service equals the price at which it can be sold. As prices converge toward costs in a competitive market, value also converges toward cost.

[208] We note that the *1995 House Report* does not repeat language in the *1994 House Report* stating that "[r]easonable terms and conditions include, but are not limited to, the ability to purchase listings and updates . . . at a reasonable price based on incremental cost." *Compare 1995 House Report*, *supra* note 12, at 89 *with 1994 House Report*, *supra* note 12, at 60. We do not find this aspect of the legislative history particularly illuminative. At the most, the differences between these *Reports* suggest that the House Committee may have been unsure whether rates based on incremental costs would be fair to carriers. Had the House Committee in 1995 intended to restrict our choice of ratemaking methods, it would have been far more explicit.

[209] *Feist*, 499 U.S. at 362 (the selection, coordination, and arrangement of a white pages directory does not satisfy the minimum constitutional standards for copyright protection); *BellSouth v. Donnelley*, 999 F.2d at 1446 (copying and then using in a directory the name, address, telephone number, and business type of a yellow pages directory does not constitute copyright infringement).

Finally, we note that courts have consistently held that statutory language similar to the language of section 222(e) leaves agencies free to "devise methods of regulation capable of equitably reconciling diverse and conflicting interests."[210] Indeed, the Supreme Court has held that an agency may, within a zone of reasonableness, "employ price functionally in order to achieve relevant regulatory purposes" including the protection of consumer interests.[211] The Supreme Court has further held that, within this zone, an agency may even require producers having different costs to charge identical rates and producers providing identical commodities to charge different rates.[212] Given this judicial history, we cannot conclude that the language of section 222(e) requires that subscriber list information rates be based on any particular ratemaking methodology, much less the incremental cost or value-based approaches parties to this proceeding urge.

In the absence of explicit instructions from Congress, our task is to choose an approach that will, in our judgment, best further Congress' goals in enacting section 222(e). We conclude that subscriber list information rates should allow LECs to recover their incremental costs of providing subscriber list information to directory publishers plus a reasonable allocation of common costs and overheads. Basing rates on costs should promote the development of a competitive directory publishing market, while fairly compensating carriers for the subscriber list information they provide directory publishers. To minimize burdens on carriers, independent directory publishers, and the Commission, we will not adopt an elaborate ratemaking process with respect to subscriber list information rates. Instead, we determine below presumptively reasonable rates that we conclude, based on the evidence in the record, should in the majority of cases achieve Congress' goals. These rates are on a per listing basis because LECs typically sell subscriber list information to directory publishers on that basis. A carrier that believes that these rates will not permit it to recover its costs of providing subscriber list information to directory

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[210] *Permian Basin Area Rate Cases*, 390 U.S. at 767; *see FERC v. Pennzoil Producing*, 439 U.S. 508, 517 (1979) (just and reasonable standard does not require rigid adherence "'to a cost-based determination of rates . . . .'") (*quoting Mobil Oil Corp. v. FPC*, 417 U.S. 283, 308 (1974); *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1560 (D.C. Cir. 1993); *compare Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) ("designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors") *with Permian Basin Area Rate Cases*, 390 U.S. at 769-70 (just and reasonable standard in Natural Gas Act coincides with the applicable constitutional standards).

[211] *Permian Basin Area Rate Cases*, 390 U.S. at 797-98.

[212] *Compare id.* at 769 ("[n]o constitutional objection arises from the imposition of maximum prices merely because 'high cost operators may be more seriously affected . . . than others") *with id.* at 797-98 (holding that the just and reasonable standard in 15 U.S.C. § 717d(a) does not preclude an agency from "requir[ing] differences in price for simultaneous sales of gas of identical quality, if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress").

publishers may charge higher rates. In the event of a challenge from a directory publisher, however, the carrier must provide credible and verifiable cost data justifying the higher rates.

5.Presumptively Reasonable Rates

We now turn to the determination of presumptively reasonable rates for subscriber list information that carriers provide directory publishers. We first examine the cost data in the record, which consists of data regarding Ameritech's, BellSouth's, Bell Atlantic's, SBC's, and U S WEST's operations. The data appear to include in most instances allocations of common costs and overheads, as defined above.[213]

- The U S WEST data comes from an ex parte letter in which US WEST provides the results of its March 1999 revision of a prior examination of its subscriber list information-related costs. This letter states that U S WEST's estimated subscriber list information-related costs are between $0.015 and $0.02 per listing for both base file subscriber list information and updates to those files.[214]

- The Bell Atlantic data comes from Bell Atlantic's January 1999 filing with the New York Public Service Commission (New York Commission) in response to the New York Commission's directive that Bell Atlantic establish cost-based rates for the provision of subscriber list information to directory publishers.[215] That filing indicates that Bell Atlantic's cost of providing base file subscriber list information is $0.0305 per listing.[216]

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[213] *See* para. 0, *supra*. We note that the Southwestern Bell Telephone Company (SWBT) data as well as the data regarding BellSouth's base file subscriber list information costs do not appear to include overheads.

[214] Letter from Elridge A. Stafford, Executive Director-Federal Regulatory, U S WEST, to Magalie Roman Salas, Secretary, FCC, at 1 (filed Mar. 17, 1999) (*U S WEST Mar. 17, 1999 Letter*). Prior to this revision, U S WEST had estimated costs of $0.04 per listing for base file information and $0.06 per listing for updates. Letter from Elridge A. Stafford, Executive Director-Federal Regulatory, U S WEST, to Magalie Roman Salas, Secretary, FCC, at Att. (filed Mar. 11, 1999) (*U S WEST Mar. 11, 1999 Letter*).

[215] The New York Commission required that subscriber list information rates be set at forward-looking incremental costs. *Universal Regulatory Framework Competition*, Case No. 94-C-0095, Order Resolving Petitions for Rehearing and Clarification, 1999 WL 107421, at *7 (N.Y. PSC 1999).

[216] Letter from Sandra Thorn, General Counsel, New York Telephone, to Debra Renner, Acting Secretary New York Pub. Serv. Comm'n, at Att, p. 54 (Jan. 19, 1999) (*Bell Atlantic Jan. 19, 1999 Letter*) (*reproduced in ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at Att F).

- The Ameritech data comes from an ex parte letter in which Ameritech provides the results of a cost study performed in 1996 in response to an Indiana Utility Regulatory Commission (Indiana Commission) decision regarding the exchange of base file subscriber list information among carriers participating in extended area arrangements.[217] This letter states that Ameritech's long-run incremental cost of providing white pages listing information to carriers is $0.11 per listing.[218] Ameritech submitted information on how it calculated this amount, subject to a request for confidential treatment.[219]

- The BellSouth data comes from a cost study BellSouth performed in 1993 for a proceeding before the Florida Public Service Commission (Florida Commission). That study states that BellSouth's "incremental" cost of providing base file subscriber list information is $0.003 per listing.[220] After considering that study, the Florida Commission observed that a rate of $0.04 per listing for base file subscriber list information "will allow [BellSouth] to recover the cost of providing the service and will provide appropriate contribution."[221] In addition, in an ex parte letter, BellSouth maintains that its cost of providing updates "far exceeds" $0.06 per listing, with the claimed cost per listing amount submitted under a claim of confidentiality.[222]

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[217] *Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 4. *See also Extended Area Service*, Cause No. 40097, 1996 WL 481197, *10 (Indiana Util. Reg. Comm'n 1996) (*Indiana Extended Area Service Decision*) (requiring that exchanges of listing information between carriers be priced at long-run incremental cost).

[218] An extended area arrangement permits telephone subscribers in one exchange area to call subscribers in another exchange area without incurring toll charges.

[219] *Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 4. This *Third Report and Order* addresses neither Ameritech's requests for confidentiality nor the BellSouth request described in the text accompanying note 222, *infra*.

[220] *BellSouth Feb. 8, 1993 Letter*, *supra* note 177, at Att, p. 3. We note that this cost figure appears to include a portion of the common costs that BellSouth would include in its subscriber list information rates.

[221] *BellSouth Telecommunications, Inc.*, Order No. PSC-93-0485-FOF-TL, 141 PUR 4th 520 (Fl. Pub. Serv. Comm'n 1993) (abstract of decision) (*Florida Commission 1993 Decision*).

[222] Letter from Ben G. Almond, Vice President-Federal Regulatory, BellSouth, to Magalie Roman Salas, Secretary, FCC, at Att., p.2 (filed May 3, 1999) (*BellSouth May 3, 1999 Letter*).

- The SBC information comes from a cost study Southwestern Bell Telephone Company (SWBT) performed in 1988 that indicates that costs of providing base file subscriber list information of less than $0.01 per listing.[223]

ADP has proposed that a rate of $0.04 per listing should be viewed as presumptively reasonable for base file subscriber list information. Based on the preponderance of the evidence in the record in this proceeding, we conclude that a rate of $0.04 per listing should allow most carriers to recover the incremental costs of providing base file subscriber list information to directory publishers and provide a reasonable contribution to those carriers' common costs and overheads. Four of the five carriers for which we have cost data indicate that their cost of providing base file subscriber list information to directory publishers is less than $0.04 per listing. Most of these cost studies are relatively recent (or were recently revised), and were undertaken to determine the cost of providing subscriber list information to directory publishers.

Although the precise methodologies the carriers used in determining these average costs are not before us, each carrier's data are consistent with our understanding that the incremental costs of generating a download are fairly low.[224] Each carrier's cost data indicate that the carrier's incremental costs are well below $0.04 per listing.[225] Indeed, two these carriers' cost data indicate that base file subscriber list information costs less than $0.01 per listing to provide.[226] This implies that, for most carriers, a rate of $0.04 per listing should provide reasonable contributions to common costs and overheads.

Prices for commercial lists support our conclusion that a rate of $0.04 per listing would enable carriers to recover their incremental costs of providing base file subscriber list

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[223] *ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at Ex. C, p. 3. Although ADP assumes that SWBT was calculating its incremental costs of providing subscriber list information, this cost figure appears to appears to include common costs as defined above. *See id*. at 6 & Ex. C, p. 3;

[224] *See* para. 0, *supra*.

[225] Each of the cost estimates in the record appears to cover the carrier's of incremental costs of providing subscriber list information to directory publishers. *See*, *e.g.*, *BellSouth Feb. 8, 1993 Letter*, *supra* note 177, at Att, p. 3 (costs of $0.003 per listing BellSouth's provision of base file subscriber list information); *ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 6 (costs of less than $0.01 per listing for SBC's provision of base file subscriber list information). We note that Ameritech's includes many common cost items, as defined in part H.3, *supra*, within what it describes as its long run incremental costs. *See Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 4-5.

[226] *See* note 224, *supra*.

information to directory publishers plus reasonable contributions to common costs and overheads. The process involved in maintaining and distributing subscriber list information is quite similar to the process of producing and distributing commercial lists. As indicated above, buyers (i.e., directory publishers) do not consider commercially available lists to be a close substitute for subscriber list information, because commercially available lists are typically outdated for purposes of publishing directories.[227] We would expect, however, the costs of providing such information to the buyer to be similar, because they both involve pulling names and related information from a database.[228] Many commercial list providers sell direct marketing information similar to subscriber list information at prices of around $0.04 per listing, according to a recent issue of SRDS *Direct Marketing List Source*.[229] Residential lists such as Lighthouse List's Consumers and Homeowners, and Resnet, have a base price of $0.035 per listing, while ABLE Consumer/Residents, American Family Consumer, and US Phonebase lists have a base price of $0.04 per listing.[230]

Ameritech has submitted the results of a cost study, which it presents as demonstrating that its cost of providing base file subscriber list information is $0.11 per listing. While we cannot discuss the details of the study here, since they were submitted under a claim of confidentiality, we do not believe Ameritech's cost estimate of $0.11 is credible, for several reasons. First, Ameritech's estimate is much larger than those submitted regarding other carriers, and Ameritech has given us no reason to believe its costs are significantly different from those of other LECs.[231] Second, we observe that Ameritech has chosen to make available its residential

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[227] *See* para 0, *supra*.

[228] We note that commercial list providers' costs are likely to be higher than carriers' costs, since carriers obtain subscriber list information "quite easily" during the order-taking process for telephone exchange service. *See Feist*, 499 U.S. at 340.

[229] SRDS *Direct Marketing List Source* is a catalog of lists used for direct marketing purposes. SRDS is an acronym for Standard Rate and Data Service.

[230] We note that Ameritech, Bell Atlantic, Cincinnati Bell, and U S WEST offer subscriber list information lists (without telephone numbers) on this market for $0.055 to $0.065 per listing for residential lists, and $0.06 to $0.075 per listing for business lists. These carriers charge $0.015 to $0.02 extra for telephone numbers. These prices are sometimes lower than what these carriers charge independent directory publishers. We do not use these prices as proxies for cost-based competitive market prices for subscriber list information, however, since we have no basis to determine whether they are cost-based. Instead, these prices reflect the completeness and accuracy of carrier databases, compared with other sources of names, addresses, and phone numbers, and hence reflect the carriers' unique, monopoly-derived control over subscriber list information. SRDS *Direct Marketing List Source*, at 495, 521, 2300-01, & 2320 (Feb. 1999).

[231] We note that Ameritech claims that its subscriber list information product is of a higher quality than the standard product other LECs provide, and therefore deserves a higher rate. *See Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 1-3. Independent directory publishers dispute this

subscriber list information in the commercial list market for only $0.075 per listing.[232] This casts doubt on Ameritech's assertion that its cost of providing subscriber list information to directory publishers is $0.11 per listing, as we would expect Ameritech to be selling this information in the commercial list market at a rate that would enable it to recover its costs, including some profit.[233] Finally, Ameritech's estimate includes large allocations of common costs and overheads. Therefore, Ameritech may be attempting to place disproportionate costs on directory publishers.[234]

Based on the record in this proceeding, we therefore agree with ADP that a rate of $0.04 per listing is presumptively a reasonable rate for base file subscriber list information.

We also conclude that a rate of $0.06 per listing should allow most carriers to recover the incremental costs of providing updated subscriber list information to directory publishers and reasonable contributions to those carriers' common costs and overheads. An additional $0.02 per listing may be necessary to compensate carriers for any additional costs of providing updates. This higher presumptively reasonable rate also is consistent with the fact that carriers generally provide updates to directory publishers in quantities smaller than those in which the carriers provide base file subscriber list information. Since ADP proposes a rate of $0.06 per listing for updates, we find it appropriate to set the presumptively reasonable rate for

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claim. *See*, *e.g.*, Letter from Bradley R. Kruse, Corporate Counsel, McLeodUSA, to Magalie Roman Salas, Secretary, FCC, at 1-2 (filed May 26, 1999) (*McLeodUSA May 26, 1999 Letter*). While we do not resolve this dispute in this *Third Report and Order*, the existence of this dispute provides an additional reason for not relying on Ameritech's submission in determining presumptively reasonable rates for subscriber list information carriers provide directory publishers.

[232] SRDS *Direct Marketing List Source*, *supra* note 230, at 2300.

[233] We have already noted that there are no close substitutes to subscriber list information, suggesting that this profit could be substantial. This price of $0.075 also implies that a large contribution to common costs was included in Ameritech's cost estimate of $0.11, since we would expect that the price of $0.075 that it charges on the list market more than covers its incremental costs.

[234] In addition, we note that the Ameritech data were prepared in response to an Indiana Commission decision addressing inter-carrier provision of subscriber list information. We cannot be certain that these data accurately reflect the cost of providing subscriber list information to directory publishers. *Indiana Extended Area Service Decision*, *supra* note 178, at *10 (stating that Indiana Commission decision does not apply to rates carriers charge non-carriers for subscriber list information). Ameritech has not shown that its incremental costs do not differ for orders from non-carriers, or that a different allocation of common costs would not be appropriate for its provision of subscriber list information to all directory publishers. Indeed, Ameritech states that it "does not possess a cost study that encompasses all of the appropriate costs of supplying [subscriber list information]." *Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 4.

updates at $0.06 per listing without resolving whether an update rate closer to $0.04 per listing also would advance Congress' goals in relation to subscriber list information.

The presumptive figure of $0.06 per listing is based on the assumptions that (1) a carrier's allocations of common costs and overheads should not vary significantly according to whether a directory publisher requests updated, rather than base file, subscriber list information;[235] and (2) a carrier's incremental costs of providing subscriber list information should not significantly vary with the type of subscriber list information requested.[236] For instance, we would expect a carrier to have similar order-taking processes for base file and updated subscriber list information. The costs of downloading and shipping the data on paper, magnetic tape, or other transmission medium also would not vary depending on whether base file or updated subscriber list information is being transmitted. While some LECs may incur data processing costs in providing updated subscriber list information that they do not incur in providing base file subscriber list information, there is evidence in the record that many LECs' computer systems already have the capability of selecting and downloading subsets of their subscriber list information databases.[237] Thus, these additional programming and processing

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[235] The common costs should not vary significantly because carriers use the same databases to support their base file and updated subscriber list information operations. The overheads do not vary because, by their nature, these costs do not increase or decrease depending on a carrier's subscriber list information-related activity. *See*, *e.g.*, *Christopher C. Pflaum, Competitive Issues Relating to Subscriber List Information, at 10 (June 1996) (reproduced in* ADP Comments at Att. 11) ("Virtually all of the costs associated with the acquisition, compilation, and maintenance of listings are costs that would have to be incurred whether or not the telephone company itself produced directories; they are integral to maintaining the infrastructure of the telephone company"); *U S WEST Mar. 17, 1999 Letter*, *supra* note 214, at 1 (cost range of $.015 to $.02 per listing for both base file and updated subscriber list information.

[236] *See*, *e.g.*, Letter from Sal Gonzalez, President, the little Yellow Pages, to Magalie Roman Salas, Secretary, FCC, at 2 (filed Mar. 5, 1999) (*Little Yellow Pages Mar. 5, 1999 Letter)* (costs of extracting updates do not vary significantly from costs of extracting base file subscriber list information); *Letter from Mark D. Maynard, Senior Operations Manager--Directory, Time Warner Telecom,* to R. Lawrence Angove, ADP, at 1 (filed Mar. 4, 1999) (*Time Warner Mar. 4, 1999 Letter)* ("[T]he costs associated with processing [Time Warner's subscriber list information] is so nominal as to be impossible to quantify. Assuming that Time Warner had all its directory listing information in an electronic file, there would be no appreciable difference in the cost of supplying a publisher with an entire listing file . . . or with daily updates); Petition of MCI Telecommunications Corp. for Arbitration of Directory Assistance Listings Issues under Federal Telecommunications Act of 1996, Docket No. 19075, Arbitration Award, (Pub. Util. Comm'n of Texas Aug. 13, 1998) (difference of $0.0003 per listing in volume-sensitive costs between base file and updated listing information).

[237] *Little Yellow Pages Mar. 5, 1999 Letter*, *supra* note 236, at 2; *Time Warner Mar. 4, 1999 Letter*, *supra* note 236, at 1.

costs should not be significant, to the extent they exist at all.[238] We therefore conclude that the overall incremental cost of providing updates should not be much higher than the cost of providing base file subscriber list information. The additional $0.02 cents per listing that ADP proposes is reasonable and should easily cover these additional costs, for larger volumes of updates.

Only two carriers submitted data regarding their update costs. U S WEST claims that its cost of providing updated subscriber list information is between $0.015 and $0.02 per listing, the same range as for its base file information.[239] In contrast, BellSouth argues that the cost of providing updates "far exceeds" $0.06 per listing.[240] BellSouth, however, provides no explanation of why its incremental costs or common cost allocations for updates would be significantly higher than its corresponding costs for base file subscriber list information.[241] Based on the very limited evidence before us, we conclude that in most circumstances the presumptively reasonable rate proposed by ADP of $0.06 per listing will cover the incremental costs of providing updates and provide reasonable contributions to the carrier's common costs and overheads.

We are concerned, however, that the rates that we deem presumptively reasonable may not always permit a LEC to recover all of the incremental costs, plus a reasonable share of common costs and overheads, involved in providing small quantities of listings to a directory publisher. That is, if the carrier has been asked to perform specialized sorts or provide updates that involve only a few listings, it may incur costs that are not recovered by the per listing rates of $0.04 and $0.06.[242] We are also concerned that per listing rates of $0.04 and $0.06 may not

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[238] *Little Yellow Pages Mar. 5, 1999 Letter*, *supra* note 236, at 2; *Time Warner Mar. 4, 1999 Letter*, *supra* note 236, at 1; *see also* BellSouth Feb. 8, 1993 Letter, *supra* note 177, at Att, p. 5 ($2.30 in data processing costs per central office file). We note that carriers are not expected to change their internal systems so they can provide subscriber list information according to schedules or at unbundling levels they cannot already accommodate. *See* part II.G, *supra*.

[239] *U S WEST Mar. 17, 1999 Letter*, *supra* note 214, at 1.

[240] *BellSouth May 3, 1999 Letter*, *supra* note 222, at Att, p. 2. The data BellSouth provided regarding its update costs consists of BellSouth's estimate of the per listing cost of providing updates, submitted under claim of confidentiality. No details or evidence were provided to support this number. *See id.* at Att., Ex. D (redacted copy).

[241] *See BellSouth May 3, 1999 Letter*, *supra* note 222, *passim*.

[242] Bell Atlantic notes that for a base listing of 50,000 listings with a 20 percent annual churn rate, there would be fewer than 40 changes per day to report. At $0.06 per update this would yield only $2.40 per day to cover the fixed costs involved for each day's extraction and transmission of updates. Letter from Joseph J. Mulieri, Director, Government Relations -- FCC, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, at 4 (filed Apr. 20, 1999) *(Bell Atlantic Apr. 20, 1999 Letter*).

adequately compensate some high-costs carriers even for downloads involving large numbers of listings. In these, relatively rare cases, higher rates would be appropriate. Any carrier that chooses to charge a rate in excess of $0.04 per listing for base file or $0.06 per listing for updated subscriber list information should bear the burden of establishing in a complaint proceeding that this rate would not enable it to recover its costs.[243]

For the reasons stated above, we conclude that, in most circumstances, rates of $0.04 and $0.06 per listing will enable carriers to recover the incremental costs of providing subscriber list information to directory publishers and provide reasonable contributions to the carriers' common costs and overheads. Because these rates are cost-based, they also should promote the development of a competitive directory publishing market. We therefore conclude that they are presumptively reasonable.

Having presumptively reasonable rates of $0.04 and $0.06 per listing should reduce the regulatory costs to carriers and directory publishers. Carriers will not have to provide detailed cost studies, except in complaint proceedings. Moreover, to the extent that carriers charge the presumptively reasonable rates, independent directory publishers will not have to incur the expense of filing complaints. Setting forth in this proceeding our views on what rates are presumptively reasonable should reduce regulatory and litigation costs to carriers, independent directory publishers, and this Commission.

6.Complaint Procedures

We recognize that the presumptions we establish here might not accommodate all the circumstances in which the cost of subscriber list information might vary. We therefore do not preclude carriers from charging, or directory publishers from seeking, rates different from those we determine are presumptively reasonable in this *Third Report and Order*. In certain circumstances, the actual cost per listing could be higher than the presumptively reasonable rates we set forth above. For instance, for some smaller carriers a rate of $0.04 per listing may not be enough to cover the costs associated with providing base file listings, since the number of listings involved could be small. In these situations, carriers presumably would be able to justify

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Of course, how large those fixed costs are will depend on the medium of transmission. Electronic transmission of updates is likely to cost less than paper or magnetic tape delivery.

[243] Carriers may wish to set a minimum charge per download to ensure that they recover the fixed costs associated with a download. We do not have sufficient evidence in this proceeding to declare what is a presumptive rate for such a minimum charge. Carriers that set a minimum charge should be ready to provide credible and verifiable data that such a minimum charge reflects the cost of providing a download, in the event a complaint is lodged with the Commission.

a higher rate or minimum charge.[244] In another portion of this *Order*, we conclude that we have authority under section 208 of the Communications Act to adjudicate complaints regarding compliance with section 222(e).[245] In any future federal subscriber list information rate proceeding, the burden of proof will be on the carrier to the extent it charges a rate above the presumptively reasonable rates.

We will rely on the section 208 complaint process to ensure that subscriber list information rates are reasonable. In the event a directory publisher files a complaint regarding a carrier's subscriber list information rates, the carrier must present a cost study providing credible and verifiable cost data to justify each challenged rate. This cost study must clearly and specifically identify and justify:

a. Incremental Costs. Each specific function the carrier performs solely to provide subscriber list information to the complainant; and the incremental costs the carrier incurs in performing each of these specific functions.[246]

b. Common Costs. The cost the carrier incurs in creating and maintaining its subscriber list information database and the methods the carrier uses to allocate that cost among supported services.[247]

c. Overheads. Any other costs the carrier incurs to support its provision of subscriber list information to the complainant; the other activities those costs support; and the methods the carrier uses to allocate those costs.

d. Other Information. The projected average number of listings the carrier provides to directory publishers and, if applicable, to other entities in a year; the rate of return on investment and depreciation costs the carrier uses in calculating its subscriber list information rates; and any other information necessary to make clear the carrier's costing process.

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[244] *Bell Atlantic Apr. 20, 1999 Letter*, *supra* note 242, at 4. In this context, a minimum charge would require a directory publisher to pay at least a predetermined amount regardless of the number of listings requested.

[245] *See* parts III.A, *supra*, & III.C, *infra*.

[246] These costs should exclude all costs that the carrier would not have incurred but for its provision of subscriber list information to the complainant.

[247] These costs should exclude all costs that the carrier would not have incurred but for its need to create and maintain a database containing subscriber list information.

The carrier should provide this information separately for both base file and updated subscriber list information if the complainant challenges both types of rates. We also expect the carrier to describe how its methods for allocating common costs compare to those the carrier uses in other contexts. In the absence of cost data showing that the carrier's costs exceed the presumptively reasonable rates, the Bureau or the Commission, depending on the circumstances, shall find in favor of the plaintiff, and award damages accordingly.

We conclude that the approach adopted above provides the most efficient means of ensuring that subscriber list information rates are reasonable.[248] This approach will enable parties to turn resources that would otherwise be expended to litigate subscriber list information rates to competing based on the quality of the products provided to consumers.[249]

I. Subscriber List Information Formats

In the *Notice*, the Commission sought comment on "the format in which [subscriber list] information should be provided."[250] Although the commenters propose a wide variety of formats,[251] several commenters suggest that the Commission should not impose formatting requirements that burden carriers or constrain technology.[252]

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[248] *ADP Mar. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 17.

[249] In part II.G, *supra*, we address the requirement that subscriber list information rates be nondiscriminatory.

[250] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

[251] *E.g.*, ADP Comments at 18 (camera-ready format and, if the carrier is able, an electronic medium); CBT Comments at 12 (format that the carrier uses to produce white pages listings); ITAA Comments at 11 ("conventional machine-readable" format); MCI Comments at 22 (electronic format); YPPA Comments at 12 (hard copies, magnetic tapes, computer diskettes, or other electronic storage means, but the carrier should not have to expend resources to place the information in a particular electronic format); IIA Reply at 2 (in any format requested, as long as the carrier already uses that format).

[252] *E.g*, ALLTEL Comments at 7 (the Commission should not require LECs to re-engineer their data processing systems to provide listings in a form not normally maintained by the carrier); CBT Comments at 12 (unless a carrier and directory publisher agree otherwise, carrier should provide subscriber list information in the format the carrier uses to produce white pages listings); YPPA Comments at 12 (a carrier should not be required to perform additional engineering, programming or work, or expend additional resources to place the information in a particular electronic format). *But see* ITAA Comments at 11 (in view of the abundance of available database software, LECs should not encounter any difficulty in delivering subscriber list information in conventional machine-readable form).

We require each carrier to provide subscriber list information gathered in its capacity as a provider of telephone exchange service to a directory publisher in the format the publisher specifies, if the carrier's internal systems can accommodate that format. If the carrier's systems cannot accommodate the requested format, the carrier must inform the directory publisher of that fact and tell the publisher which formats it can accommodate as well as the date by which it can accommodate the publisher's request in each of these formats. The carrier must provide this information within thirty days of when it receives the publisher's request. The carrier also must provide the requested subscriber list information in the format the publisher selects from among those available and, unless the publisher requests a later date, by the date the carrier stated for that format. This approach will minimize burdens on both directory publishers and carriers, by allowing each directory publisher to request the format that it is likely to find most useful while making it unnecessary for the carrier to incur substantial costs to reformat subscriber list information for directory publishers. It also will allow directory publishers and carriers to change formats as technology advances.[253]

In any dispute regarding a carrier's ability to provide subscriber list information in a particular format, the burden will be on the carrier to show that its internal systems cannot accommodate the format the directory publisher requests.[254]

J. Directory Publishing Purposes

1. Background

Section 222(e) gives directory publishers a right to obtain subscriber list information "for the purpose of publishing directories in any format."[255] In the *Notice*, the Commission sought comment on what safeguards may be necessary to ensure that a person seeking subscriber list information is doing so for the specified "purpose of publishing directories in any format."[256] The Commission also sought comment on how and to what extent a telecommunications carrier subject to section 222(e) requirements may require a person or entity requesting subscriber list information to certify that it will be used only for directory

[253] We note that in part III.E, *infra*, we conclude that, under section 251(b)(3) of the Act, a providing LEC must provide directory assistance database information in any format the requesting LEC provider specifies, if the LEC's internal systems can accommodate that format.

[254] *See* para. 0, *supra*.

[255] 47 U.S.C. § 222(e).

[256] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

publishing purposes.[257] The Commission asked whether requests for subscriber list information should be in writing or whether they could be made orally.[258]

2. Safeguards

Subscriber list information is used for many purposes other than directory publishing. These include traditional directory assistance services as well as the preparation of direct marketing lists. We conclude that carriers may take reasonable steps, as specified below, to ensure that a person requesting subscriber list information pursuant to section 222(e) intends to use it only for directory publishing purposes.[259]

As several commenters suggest, we conclude that carriers may require directory publishers to certify that they will use subscriber list information obtained pursuant to section 222(e) only for directory publishing purposes.[260] While MCI expresses concern that carriers will demand certifications as an anticompetitive tactic, the record in this proceeding does not show that concern to be well-founded.[261]

The certification may be either oral or written, at the carrier's option.[262] Since directory publishers generally obtain subscriber list information through written contracts, a written certification should not impose any additional burden on directory publishers. We decline to prescribe the precise wording of any certification, as ADP suggests, because such a step appears unnecessary at this time.[263]

We also decline to adopt YPPA's proposal that we permit a carrier to refuse to disclose subscriber list information when the carrier reasonably believes a directory publisher

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257 *Id.* at 12532, ¶ 46.

258 *Id.*

259 We note that in part IV.A.3, *infra*, we invite comment on whether an entity that obtains directory assistance data pursuant to section 251(b)(3) may use them for directory publishing or other purposes.

260 *See, e.g.*, ADP Comments at 23; PacTel Comments at 19; SBC Comments at 18.

261 *Compare* MCI Comments at 23 *with* ADP Comments at 23-25 (reasonable certifications permissible).

262 *E.g.*, ADP Comments at 23; SBC Comments at 18.

263 *See* ADP Comments at 23-24.

will use that information for purposes other than, or in addition to, directory publishing.[264] YPPA suggests that, in this circumstance, the carrier should not need to disclose subscriber list information unless and until we were to rule against the carrier in response to a complaint under section 208 of the Communications Act.[265] This approach would require a directory publisher to undergo the expense of filing and prosecuting a complaint prior to obtaining subscriber list information in the event that the carrier from which the information is sought concludes that the publisher will use that information for purposes other than directory publishing. Because the need to file and prosecute such complaints would delay the directory publisher's receipt of subscriber list information, this approach would be inconsistent with the requirement that directory publishers receive that information "on a timely . . . basis."[266] If disputes regarding subscriber list information usage arise, the carrier may seek a determination that it need not provide subscriber list information to a particular person that the carrier believes will use the information for purposes other than directory publishing. Pending resolution of such a dispute, the carrier shall continue to provide subscriber list information to the directory publisher absent an order to the contrary.[267] This approach should minimize burdens on directory publishers, including those that are small businesses, and is consistent with Congress' intent that carriers not use their control over subscriber list information to impede competition in directory publishing.

3. Updating Previously Purchased Subscriber List Information

ADP contends that directory publishers should be allowed to purchase updated subscriber list information and modify previously purchased listing information based upon the updates.[268] We agree. In requiring that each carrier provide subscriber list information "on a[n] . . . unbundled basis . . . to any person upon request for the purpose of publishing directories,"[269] Congress made clear that directory publishers could purchase updated listings without having to repurchase other subscriber list information as long as the updated listings would be used for directory publishing purposes.[270] A directory publisher typically will obtain

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[264] YPPA Comments at 12; YPPA Reply at 9.

[265] YPPA Comments at 12; YPPA Reply at 9.

[266] 47 U.S.C. § 222(e).

[267] Absent an order permitting such action, the withholding of subscriber list information from a directory publisher will constitute a rule violation even if the carrier ultimately prevails on the merits.

[268] ADP Comments at 21-22.

[269] 47 U.S.C. § 222(e).

[270] *See 1995 House Report*, *supra* note 12, at 89 (emphasis added); *1994 Senate Report*, *supra* note 13, at 97 (emphasis added).

an "initial load" of subscriber list information from a carrier that provides the carrier's subscriber list information as of a given date.[271] This information requires reformatting and other processing before it can be published in a directory. As the directory publisher performs this reformatting and other processing, the carrier continuously updates its subscriber list information databases to reflect the addition of new telephone exchange service subscribers as well as any changes in the information regarding existing subscribers. Requiring a directory publisher to repurchase a carrier's entire subscriber list information database each time the publisher wishes to update its own database would increase the difficulties many independent publishers face.[272] This is because the directory publisher either would have to reformat and process the listings in the new database so that it could be substituted for the old database, or somehow identify all the differences between the two databases and use them to update the old database.[273]

4. Obtaining Advertisers

New or newly relocated businesses often purchase yellow pages advertising in order to attract customers. Directory publishers affiliated with carriers use updated subscriber list information to identify these new businesses in order to target them for specific yellow pages marketing efforts.[274] ADP contends that independent directory publishers should be able to use subscriber list information obtained pursuant to section 222(e) to do the same.[275] Vitelco maintains that the plain meaning of the statutory phrase "for the purpose of publishing directories" excludes the use of subscriber list information to sell yellow pages advertising. Vitelco asserts that directory publishers can use subscriber list information obtained from other sources, such as Chambers of Commerce, to sell advertising and that it would burden small carriers to provide marketing assistance to directory publishers.[276]

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[271] *See Great Western v. Southwestern Bell*, 63 F.3d at 1383 n.1.

[272] Arrangements under which a directory publisher repurchases a carrier's entire subscriber list information database are referred as "refresh" services. In contrast, an "update" service provides only the changes to that information occurring between specified dates.

[273] We note that a carrier need only unbundle subscriber list information to the extent its internal systems permit. *See* part II.G, *supra*.

[274] ADP Reply at 6.

[275] ADP Reply at 6 & Att. 1, p. 2; *see* MCI Comments at 23-24 (carrier obtaining subscriber list information for the purpose of publishing a directory ought to be able to use that information for any purpose, including marketing); SBC Comments at 18 (directory publishing encompasses the sale of directory advertising); *cf.* Ameritech Comments at 19 (Ameritech makes updated subscriber list information available to directory publishers so they can use it to support their sales efforts).

[276] Vitelco Comments at 2-3.

We reject Vitelco's arguments. Neither the Communications Act nor the legislative history defines the phrase "for the purpose of publishing directories." Vitelco appears to assume that this statutory phrase encompasses only the actual printing and distribution of directories. Directory publishers, however, engage in additional activities "for the purpose of publishing directories." We conclude that these activities include the marketing of directory advertising to businesses.[277] As mentioned previously,[278] most directory publishing revenues are advertising revenues, so the marketing of directory advertising is essential to the process of publishing directories. Absent such marketing, the publisher would have no directory to print or distribute.[279] We therefore conclude that the statutory phrase "for the purpose of publishing directories" encompasses the use of subscriber list information to solicit yellow pages advertising.

YPPA argues that companies should be prohibited from using subscriber list information obtained pursuant to section 222(e) to market local telephone services.[280] We agree. Directory publishers do not market local telephone services "for the purpose of publishing directories." The provision of local telephone services is a separate activity from the publishing of directories. We therefore conclude that the statutory phrase "for the purpose of publishing directories" does not contemplate the use of subscriber list information to market local telephone services.

K. Enforcement

In the *Notice*, the Commission sought comment on what procedures, if any, are required to implement section 222(e).[281] Several parties argue that we have authority under section 208 of the Communications Act to adjudicate complaints regarding compliance with section 222(e).[282] Vitelco contends that we lack such authority because the provision of

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[277] *See* ADP Comments at Ex. 3, p. 6 (Memorandum of U S WEST, Inc. and Landmark Publishing Co. as Amic[i] Curiae, in *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.*, Case No. 85-3233-CIV (So. D. Fla. filed Mar. 2, 1987)) (steps encompassed within publishing of directories include solicitation of advertisements, marketing, graphics, printing, distribution); *Great Western v. Southwestern Bell*, 63 F.3d at 1390 (relying on testimony that directory publishers need updated subscriber list information to develop sales leads).

[278] *See* part I, *supra*.

[279] SBC Comments at 18.

[280] YPPA Reply at 9-10.

[281] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

subscriber list information is not a common carrier activity.[283] Vitelco maintains that State commissions, rather than the Commission, therefore should enforce section 222(e).[284]

We reject Vitelco's argument. Section 208(a) authorizes the Commission to adjudicate complaints from "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . . ."[285] This statutory language makes clear that a section 208 complaint must meet two conditions: the complaint must concern an act or omission by a common carrier subject to the Communications Act; and the complaint must allege that the act or omission violates a duty that the Communications Act imposes on common carriers.

A complaint alleging a violation of section 222(e) would meet both of these conditions. Section 222(e) imposes obligations on each "telecommunications carrier that provides telephone exchange service."[286] Because telephone exchange service is a common carrier service under the Act,[287] a complaint meets the first condition if it concerns an act or omission by such a carrier. In addition, because section 222(e) imposes specific obligations on each such carrier,[288] a complaint meets the second condition if it alleges that the carrier's act or omission contravenes section 222(e).

In part II.H, *supra*, we set forth specific requirements for complaint proceedings regarding subscriber list information rates carriers charge directory publishers. Because the Commission has otherwise comprehensive procedural rules for complaint proceedings,[289] we

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[282] *E.g.*, ADP Comments at 14-15; ALLTEL Reply at 5 (departures from nondiscrimination standard in section 222(e)(5) "may be policed by the commission under the section 208 complaint process"); YPPA Reply at 2 (statute makes clear that directory publishers may file subscriber list information complaints under section 208); *YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 4.

[283] Vitelco Comments at 4-5.

[284] *Id.* at 5.

[285] 47 U.S.C. § 208(a).

[286] 47 U.S.C. § 222(e).

[287] *See* 47 U.S.C. §§ 153(10), (47).

[288] *Id.* (requiring the carrier to "provide subscriber list information gathered in its capacity as a provider of [telephone exchange] 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").

[289] *See* 47 C.F.R. §§ 1.1711 *et seq.*

decline to adopt additional requirements specifically for complaints arising under section 222(e), as ADP urges.[290]

III. SECOND ORDER ON RECONSIDERATION

A. Definition of the Term "Nondiscriminatory Access"

We now turn to requests that we reconsider or clarify requirements adopted in the *Local Competition Second Report and Order* to ensure that LECs provide "competing providers of telephone exchange service and telephone toll service" with "nondiscriminatory access to . . . directory assistance, and directory listing" in accordance with section 251(b)(3) of the Communications Act.[291] Neither the statutory language nor our implementing rules allow requesting LECs to use listing information obtained pursuant to section 251(b)(3) to publish telephone directories.[292] Section 222(e) of the Act governs the provision of listing information that will be used in publishing directories. In part II, above, we adopt rules implementing section 222(e). To the extent that a requesting LEC wishes to publish its own directories, the manner in which it may use another LEC's listing information, and the compensation that the requesting LEC must pay to the providing LEC for the right to use that information in publishing a directory, is governed by section 222(e) and our rules implementing that section. As we discuss below, we also seek comment today on whether sections 222(e), 251(b)(3), or other portions of the Communications Act permit competing directory assistance providers that do not themselves provide either telephone exchange access or telephone toll service nondiscriminatory access to LEC listing information.[293]

1. Background

In the *Local Competition Second Report and Order*, the Commission concluded that the term "nondiscriminatory access" as used in section 251(b)(3) of the Act means that a LEC that provides telephone numbers, operator services, directory assistance, and/or directory listing (i.e., the providing LEC) must permit competing providers to have access to those services that: (a) does not discriminate between or among requesting carriers in rates, terms, and

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290 *See* ADP Reply at 14 & Att. 1, p. 2.

291 47 U.S.C. § 251(b)(3).

292 We note that in part IV.A.3, *infra*, we invite comment on whether an entity that obtains directory assistance data pursuant to section 251(b)(3) may use them for directory publishing or other purposes.

293 *See* part IV, *infra*.

conditions of access; and (b) is equal to the access that the providing LEC gives itself.[294] The Commission reasoned that any standard that would allow a LEC to offer access inferior to that enjoyed by that LEC itself would be inconsistent with Congress' intention of establishing competitive, deregulated markets for all telecommunications services.[295]

2. Discussion

Ameritech requests that the Commission reconsider its conclusion that the term "nondiscriminatory access" in section 251(b)(3) requires that each LEC offer access equal to that which the LEC provides to itself. Rather, Ameritech contends that the Act requires access that is merely nondiscriminatory among requesting carriers.[296] Ameritech states that if Congress had intended that providing LECs be required to supply access equal to that which they supply to themselves, it would have set forth such a requirement in clear and unambiguous language, as it did in other sections of the 1996 Act.[297] Ameritech argues that its interpretation of Congressional intent is correct because LECs do not provide access to telephone numbers, operator services, directory assistance, and directory listings to themselves but rather provide these functions as an "integral part of the service that the local exchange carriers provide to their customers."[298] Ameritech asserts that the State commissions have extensive rules governing these services, and those rules, as well as the competitive marketplace, are sufficient to ensure that these services will be provided in an adequate manner to all customers.[299] Finally, Ameritech argues that the Commission's interpretation of Congress' nondiscriminatory access

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294 *Local Competition Second Report and Order*, 11 FCC Rcd at 19444, ¶ 101. A "providing LEC" is a LEC that is required to permit nondiscriminatory access to its services pursuant to section 251(b)(3). *See id.* at 19444, ¶ 101, n.244. The term "competing provider" refers to a provider of telephone exchange service or a provider of telephone toll service that seeks nondiscriminatory access from a providing LEC. *Id.*

295 *Id.* at 19444, ¶ 102.

296 Ameritech Petition at 9.

297 *Id.* at 8-9 (citing section 251(c)(2) of the 1996 Act, 47 U.S.C. § 251(c)(2)(C), which explicitly requires an incumbent LEC to provide interconnection that is not only "nondiscriminatory," but also "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection"). Ameritech also cites section 272, which requires BOCs to provide telephone exchange service, access exchange service, and telecommunications facilities to unaffiliated telecommunications providers at rates and quality levels equal to those at which the BOCs and their affiliates provide such services to themselves and to each other. *See* 47 U.S.C. §§ 272(c)(1), (e)(1), & (e)(4).

298 *Ameritech Petition* at 10.

299 *Id.* at 10-11.

standard creates disincentives for LECs to invest in these services, because LECs will have to make such enhancements immediately available to competitors.[300]

AT&T, MFS, and TRA oppose Ameritech's petition, initially observing that Ameritech's arguments were raised and rejected in the *Local Competition Second Report and Order*.[301] These parties argue that requiring the providing LEC to offer access equal to that which it provides itself is an interpretation of section 251(b)(3) that is more consistent with the intent of the 1996 amendments to the Act because competing LECs cannot compete on equal terms with providing LECs without equal access to telephone numbers, operator services, and directory assistance and directory listing.[302] Noting that ". . . the underlying purpose of statutory construction . . . is to effectuate the intent of Congress,"[303] MFS also supports the Commission's interpretation of the nondiscriminatory access requirement. The Ohio Commission states that allowing access less than what the LEC provides itself is unreasonable, discriminatory and potentially anti-competitive."[304] AT&T dismisses Ameritech's assertions concerning the effect of State regulation, market conditions, and economic incentives on the interpretation of nondiscriminatory access.[305] According to AT&T, these arguments ask that section 251(b)(3)'s requirement concerning nondiscriminatory access be "ignored entirely."[306]

We deny Ameritech's request and affirm that under section 251(b)(3), "nondiscriminatory access" means that providing LECs must offer access equal to that which they provide to themselves.[307] We note initially that Ameritech made the identical argument in response to the *Local Competition Notice* that it now makes on reconsideration.[308] Nothing has

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300 *Id.* at 11.

301 AT&T Opposition at 12-13; MFS Opposition at 4-5; TRA Opposition at 14. MFS notes that Ameritech made the same argument concerning statutory construction previously in the proceeding, and this argument was expressly considered and rejected by the Commission in the *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-46, ¶¶ 100-05.

302 *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-46, ¶¶ 100-05.

303 MFS Opposition at 5.

304 Ohio Commission Opposition at 3.

305 AT&T Opposition at 13.

306 *Id.*

307 *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-46, ¶¶ 100-06.

308 Ameritech Comments at 12-13. (because Congress did not expressly impose a strict equality standard in section 251(b)(3), as it did in section 251(c)(2)(C) for incumbent LECs, "the only logical

changed since the adoption of the *Local Competition Second Report and Order* to alter our conclusion that section 251(b)(3)'s "nondiscriminatory access" requirement mandates a standard that such access be equal to that provided by the LEC to itself. We decided then, and affirm now, that any standard that would allow a LEC to provide access to any competitor that is inferior to that enjoyed by the LEC itself is inconsistent with Congress' objective of establishing competition in all telecommunications markets.[309]

Our conclusion here is entirely consistent with the *Local Competition First Report and Order*, where the Commission concluded that the 1996 Act imposed a more stringent nondiscrimination standard than that which applied under the 1934 Act.[310] Because an incumbent LEC would have the incentive to discriminate against competitors by providing them with less favorable terms and conditions than it provides to itself, we concluded that "the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself."[311]

We also reject Ameritech's contention that LECs do not provide themselves with "access" to telephone numbers, operator services, directory assistance, and directory listing, but rather provide these items as part of an overall service package. In fact, this argument is beside the point. LECs also provide loops as an integral part of their local exchange service offerings, but nevertheless were required to provide loops to competitors in a manner equal to the provision of loops to themselves.[312] In order to provide telephone numbers, operator services, directory assistance, and directory listing to end users, LECs must first provide those services to themselves. To the extent that any of the items in section 251(b)(3) may also be offered as services, nothing in this *Second Order on Reconsideration* prevents the States (or seeks to

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interpretation is that LECs are required to provide access . . . that is nondiscriminatory among carriers").

[309] *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-45, ¶¶ 100-05.

[310] *Local Competition First Report and Order*, 11 FCC Rcd at 15612, ¶ 217.

[311] *Id.*, 11 FCC Rcd at 15612, ¶ 218.

[312] *Local Competition First Report and Order*, 11 FCC Rcd at 15771-74, ¶¶ 534-40. On January 25, 1999, the Supreme Court vacated the Commission's unbundled network element rules. *AT&T v. Iowa Util. Bd.*, 119 S.Ct at 734-36. On April 16, 1999, the Commission sought further comment to refresh the record in the *Local Competition Proceeding* in order to identify those network elements to which incumbent LECs must provide nondiscriminatory access. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-70, 1999 WL 221834 (released Apr. 16, 1999). In this *Second Further Notice*, the Commission stated its "strong expectation that under any reasonable interpretation of the 'necessary' and 'impair' standards of section 251(d)(2), loops will be generally subject to the section 251(c)(3) unbundling obligations. *Id.* at ¶ 32.

supersede the States) from adopting rules and regulations concerning the quality of such services. Finally, we disagree with Ameritech's characterization of telephone numbers as a "service" subject to State regulation.[313] Telephone numbers are not a service, but rather are a public resource that provides access to the public switched telephone network.[314] Congress vested exclusive authority over the administration of numbers in this Commission, thus subjecting State regulation of numbering to Commission review.[315]

B. Burden of Proof for Showing "Nondiscriminatory Access"

1. Background

In the event that a dispute arises between a competing LEC and a providing LEC regarding the delivery of access pursuant to section 251(b)(3), the *Local Competition Second Report and Order* requires the providing LEC to bear the burden of demonstrating that it is permitting nondiscriminatory access, and that any disparity in access is not caused by factors within the providing LEC's control.[316] The providing LEC's burden extends to showing that it is not responsible for degraded access due to, *inter alia*, "the providing LEC's inadequate staffing, poor maintenance or cumbersome ordering procedures."[317]

313 Ameritech Petition at 10.

314 47 U.S.C. § 251(e)(1) requires that numbers must be available on an equitable basis.

315 *Id.*

316 47 C.F.R. § 51.217(e)(1).

317 *Local Competition Second Report and Order*, 11 FCC Rcd at 19450-51, ¶ 115.

2. Discussion

SBC requests that we place the burden of proof for demonstrating non-discriminatory access on the competing provider.[318] SBC contends that placing the burden upon the providing LEC is inconsistent with section 1.254 of our rules, which places the burden of proof at any application hearing upon the applicant,[319] and section 1.255, which requires the complainant, in a hearing on a formal complaint, to open and close the proceeding.[320] SBC also states that unless the Commission reverses its decision, parties will "file formal complaints at the drop of a hat."[321] AT&T and TRA oppose SBC's comments. TRA states, for example, "[n]ot only do [providing] LECs alone have access to all information necessary to satisfy the burden, but [providing] LECs are the parties with the primary incentives to violate the prescribed regulatory requirements."[322]

Ameritech requests that we modify the burden of proof rule to state that if a LEC has equipment that automatically places operator services and directory assistance calls into queue on a "first-come, first-served" basis, then it need not develop further proof of nondiscrimination; and if such equipment automatically places calls in queue on a "first-come, first-served" basis without knowledge of the source, such placement is *per se* nondiscriminatory and fully meets the burden placed on a LEC by section 51.217(e)(2) of the rules.[323]

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[318] SBC Petition at 10. SBC filed a pleading styled "Petition for Reconsideration" on behalf of its subsidiaries, Southwestern Bell Telephone Company (SWBT) and Southwestern Bell Mobile Systems (SWBMS). SBC, however, did not file this pleading until October 8, 1996, one day after the 30-day filing period required by section 405(a) of the Act had expired. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d). SBC filed a motion requesting that we accept its late-filed pleading in which SBC argued, *inter alia*, that the pleading was untimely due to a "miscommunication" within the courier service that was to file the petition. MFS filed a motion to dismiss SBC's late-filed "Petition for Reconsideration" as well as an opposition to SBC's motion to accept that pleading. The filing date for petitions for reconsideration in a notice and comment rulemaking proceeding is prescribed in section 405 of the Act. 47 U.S.C. § 405(a). The Commission lacks discretion to waive this statutory requirement. *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C.Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C.Cir. 1986). We must therefore deny SBC's motion. *See id.* We will, however, treat SBC's petition as an informal comment. 47 U.S.C. § 154(i).

[319] 47 C.F.R. § 1.254.

[320] 47 C.F.R. § 1.255.

[321] SBC Petition at 10.

[322] TRA Opposition at 15; *see also* AT&T Opposition at 13-14.

[323] Ameritech Petition at 13.

We decline to reopen our decision to allocate the burden of proof to providing LECs in complaint actions filed by requesting carriers seeking nondiscriminatory access pursuant to section 251(b)(3). We find that SBC's suggestion that we assign the burden of proof to the complainant would effectively require parties with minimal or no knowledge of the providing LEC's network and quality of service statistics to demonstrate that they are receiving a degraded quality of service from the providing LEC relative to access obtained by other carriers or the providing LEC.[324] In the context of a complaint action pursuant to section 208 of the Act and sections 1.720-1.735 of our rules,[325] such a requirement would place an undue hardship on a requesting carrier to overcome a general denial by a providing LEC that the access provided to the complainant is degraded relative to other carriers.[326] SBC's concern that our decision will lead to frivolous complaints is unfounded. Under our rules of practice and procedure, complainants will still have the threshold burden of alleging facts which, if true, are sufficient to constitute a violation of the Act's nondiscriminatory equal access requirements.[327] Where such a *prima facie* case is alleged, we are persuaded that shifting the burden to the providing LEC to come forward with evidence in its possession to demonstrate compliance with the requirements of the Act and our implementing rules and orders will facilitate fair and expeditious resolution of the complaint.[328]

We also decline to provide the clarifications requested by Ameritech. It would serve no useful purpose to rule that any particular network architecture (or sub-element thereof) is *per se* nondiscriminatory where it is not used by all competing LECs and where discrimination may be introduced elsewhere in the provisioning of these services, such as by causing an

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[324] We note that section 1.254 and section 1.255 of our rules concern formal adjudications and certain rulemaking proceedings, *see* 47 C.F.R. § 1.201, and as such are not germane to the kind of disputes discussed in the *Local Competition Second Report and Order*.

[325] 47 C.F.R. §§ 1.720 - 1.735 (rules governing the procedures to be followed when complaints are filed against common carriers). Our rules generally place the burden on complaining parties to present evidence and arguments to support a claim that a defendant carrier has violated the Act or our rules and orders. 47 C.F.R. § 1.720. The rules, however, specifically provide that we may require any party to submit additional information that we deem appropriate for a "full, fair and expeditious resolution" of a complaint. 47 C.F.R. § 1.732(g).

[326] *See, e.g.,* 47 C.F.R. § 1.724(c) (permitting defendant carriers, in certain instances, to controvert averments in a complaint by general denial).

[327] 47 C.F.R. § 1.720(b). Under subsection (c), such facts must be supported by relevant documentation or affidavit. 47 C.F.R. § 1.720(c).

[328] *See* 47 C.F.R. § 1.732(g). We released an order to implement the expedited complaint procedures mandated for certain categories of complaints by the 1996 Act and to generally improve the speed and effectiveness of our formal complaint process. *See Formal Complaints Second Report and Order*, 13 FCC Rcd at 17018-19, ¶¶ 2-5.

extensive delay in initiating directory assistance service to a reseller. Our decision here, however, does not preclude a LEC from arguing in a particular case that its automatic queuing of operator services and directory assistance calls should be treated as an affirmative defense to a discrimination complaint.

C. Access to Features Adjunct to Operator Services and Directory Assistance

1. Background

The *Local Competition Second Report and Order* required that "[o]perator services and directory assistance services must be made available to competing providers in their entirety, including access to any adjunct features (*e.g.*, rating tables or customer information databases) necessary to allow competing providers full use of these services."[329] The Commission reasoned that, although some adjunct features such as ratings tables and customer information databases may not be "telecommunications services" as defined in section 3(44) of the Act,[330] such features must be supplied to competing providers in order to allow them to use operator services and directory assistance at a level equal to that of the providing LEC.[331] For example, it would be impossible for a competing carrier to get nondiscriminatory access to a providing LEC's directory assistance platform without access to ratings tables and customer information databases.

2. Discussion

Several parties request reconsideration of the requirement that LECs provide access to adjunct features as part of the nondiscriminatory access requirement.[332] These parties argue that this rule requires them to provide competitors with the LECs' proprietary software or equipment and intellectual property the LEC has licensed from third parties.[333] GTE requests that the Commission amend the rule to specify that providing LECs must offer

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[329] 47 C.F.R. § 51.217(c)(3)(iv); *see also Local Competition Second Report and Order*, 11 FCC Rcd at 19445-46, ¶ 105. "Rating tables" are databases that cross-reference area codes, numbers called, and time of day to determine the price to be charged for telephone calls. Directory assistance may use databases that contain customer names, numbers and addresses, and operator services may use databases that contain customer billing information (*e.g.*, whether a customer will accept collect calls or third party billing).

[330] 47 U.S.C. § 153(44).

[331] *Local Competition Second Report and Order*, 11 FCC Rcd at 19445-46, ¶ 105.

[332] *See*, *e.g.*, SBC Petition at 11-14; USTA Opposition at 12.

[333] SBC Petition at 11-14; USTA Opposition at 12.

nondiscriminatory access without associated adjunct features.[334] GTE, U S WEST, and USTA state that a LEC lacks the legal authority to provide access to software or other equipment exclusively licensed from a third party.[335] GTE also contends that Congress did not intend that nondiscriminatory access to operator services and directory assistance required access to proprietary or licensed property because, unlike section 251(d)(2), which directs the Commission to consider whether access to network elements that are proprietary in nature is necessary, no analogous provision is made in section 251(b)(3).[336] U S WEST adds that the Commission lacks authority to "seize or destroy the intellectual property of a company, at least, not without affording just compensation for the value of the property."[337] GTE and U S WEST also state that requiring access to a LECs' intellectual property discourages LECs from investing in the development of new products.[338] U S WEST cites the analysis in the *Local Competition First Report and Order*, where the Commission recognized that "prohibiting [LECs] from refusing access to proprietary elements could reduce their incentives to offer innovative services."[339] Conversely, MCI argues that there is nothing in the *Local Competition Second Report and Order* that permits a LEC to refrain from providing access to any features adjunct to operator services and directory assistance.[340]

The Commission reasoned in the *Local Competition Second Report and Order* that requesting carriers would not have nondiscriminatory access to operator services and directory assistance under section 251(b)(3) unless those carriers have access to adjunct features such as rating tables and customer information databases. The Commission found that, without such access, competing providers cannot make full use of operator services and directory assistance.[341] Thus, to ensure that competing providers can obtain nondiscriminatory access to operator services and directory assistance, the Commission required LECs to make these services in their entirety available to competing providers.[342]

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334 GTE Opposition at 11.

335 *Id.* at 9; U S WEST Opposition at 19-20; USTA Reply at 8-9.

336 USTA Reply at 10.

337 U S WEST Opposition at 17.

338 GTE Opposition at 10; U S WEST Opposition at 19-20.

339 U S WEST Opposition at 19-20 (*quoting Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, ¶ 282).

340 MCI Reply at 9.

341 *Local Competition Second Report and Order*, 11 FCC Rcd at 19445-46, ¶ 105.

342 *Id.*

We acknowledge that providing LECs have the ability to protect any intellectual property interest that they may have in any features adjunct to operator services and directory assistance. The providing LEC may enter into an appropriate license and non-disclosure agreement with the requesting LEC to ensure that the requesting LEC may use the features in the same manner as the providing LEC uses these features itself. We do not, however, expect that such agreements would in any way inhibit competing carriers from accessing the adjunct features necessary to provide operator services and directory assistance. Where adjunct features contain intellectual property licensed from third parties, we note that the Commission is addressing in another proceeding the issue of whether section 251 requires incumbent LECs to modify their intellectual property license agreements with third party vendors to the extent necessary to allow requesting carriers to use the incumbent LEC's unbundled network elements.[343] Although section 251(b)(3) is not directly at issue in that proceeding, the ruling in that order will resolve the general issue of whether incumbent LECs must provide the same rights to new entrants for the use of third party intellectual property as the incumbent LECs themselves use in order for the incumbent LECs to meet their statutory obligations under section 251.

We reject the argument that requiring access to proprietary features will stifle innovation. As we found in the *Local Competition First Report and Order* in the context of our adoption of national rules for unbundled elements, our experience in other telecommunications markets leads us to conclude that requiring such access will stimulate competition by incumbent LECs.[344]

D.Branding

1. Background

In the *Local Competition Second Report and Order*, the Commission ruled that "[t]he refusal of a providing [LEC] to comply with the reasonable request of a competing provider that the providing LEC rebrand its operator services and directory assistance, or remove its brand from such services, creates a presumption that the providing LEC is unlawfully restricting access . . . [unless] it lacks the capability to comply with the competing provider's request."[345]

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343 *See MCI Petition for Declaratory Ruling*, CCBPol 97-4, CC Docket No. 96-98.

344 *Local Competition First Report and Order*, 11 FCC Rcd at 15626, ¶ 245.

345 47 C.F.R. § 51.217(d).

As the Commission explained in the *Local Competition Second Report and Order*, the term "branding requirements" does not refer to the requirement that operator services providers (OSPs) identify themselves to consumers in accordance with the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA);[346] rather, we refer to the obligations of a LEC, pursuant to section 251(b)(3), to provide non-discriminatory access to a competing provider that is using the LEC's operator services facilities in order to provide its own operator services or that is reselling the operator services of the LEC.[347] In these situations, the issue is whose brand should be used.

2. Discussion

NYNEX interprets our rule to require rebranding or unbranding only upon request by a carrier seeking interconnection and that the timing of such rebranding or unbranding is to be left to negotiation or the State arbitration process.[348] NYNEX also interprets this rule to mean that a LEC cannot brand its own traffic, even where identifiable, if it cannot identify all competing incoming traffic.[349] NYNEX states that a LEC should not be required to unbrand its own traffic when it is technically infeasible to perform rebranding, and states that such a requirement could put a LEC that provides interstate operator services in violation of TOCSIA's requirement that OSPs brand all interstate calls.[350] NYNEX also states that rebranding would require a separate route to and from the operator services facility for each reseller, and that current resource limitations prevent this architecture.[351]

U S WEST, on the other hand, interprets the rule to mean that a LEC may brand any portion of its own traffic where identifiable, even if the LEC is incapable of branding all competitors' traffic.[352] Such an arrangement occurs, according to U S WEST, when a LEC's own

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346 47 U.S.C. § 226. TOCSIA requires an OSP to identify itself audibly and distinctly to the consumer at the beginning of each interstate telephone call, before the consumer incurs any charge for that call. 47 U.S.C. § 226(b)(1)(A); *see also* 47 C.F.R. § 64.703(a)(1). This procedure is commonly referred to as "call branding." To the extent that interstate directory assistance services are within the definition of "operator services" in section 226(a)(7) of the Act, 47 U.S.C. § 226(a)(7), the service provider is required to identify itself to consumers at the beginning of a call.

347 *Local Competition Second Report and Order*, 11 FCC Rcd at 19453-54, ¶¶ 123-24.

348 NYNEX Petition at 15.

349 *See id*; s*ee also* U S WEST Opposition at 22.

350 NYNEX Petition at 15.

351 NYNEX Reply at 6.

352 U S WEST Opposition at 22.

incoming traffic is on dedicated trunk groups and interconnecting LECs' traffic is commingled.[353] U S WEST also states that there is a "First Amendment problem associated with compelling an incumbent LEC to remain silent with respect to its traffic if it is incapable of branding traffic of its competitors . . . because the Commission cannot constitutionally mandate that lawful speech not occur simply because a LEC is incapable of speaking the 'preferred' message of the Commission."[354]

TRA and AT&T oppose NYNEX's request that the Commission clarify that rebranding is only required for interconnecting carriers, and that when and whether the branding will be performed should be left to negotiation or arbitration.[355] AT&T states that limiting the requirement to perform rebranding to requests from interconnecting LECs would exclude resellers from the benefits and protection of section 251(b)(3).[356]

We affirm the rule the Commission adopted in the *Local Competition Second Report and Order* that a providing LEC's failure to comply with a reasonable, technically feasible request to rebrand operator or directory assistance services in the competing provider's name, or to remove the providing LEC's brand name from the service provided to the competing provider, creates a presumption that the providing LEC is unlawfully restricting access to these services.[357] Although our rule does not require the providing LEC to strip its own brand from the services it is providing in those cases where it is technically infeasible to rebrand the services of requesting LECs, we are concerned about situations where a providing LEC may not be able to brand requesting LEC traffic because the providing LEC's network architecture allows the providing LEC to identify its own incoming traffic but does not allow the providing LEC to distinguish each individual requesting LEC's incoming traffic. Rather than seeking to accommodate such network architectures, we are concerned that facilitating such architectures could give providing LECs an incentive to arrange their network architectures to achieve an anticompetitive result. Accordingly, we clarify our branding rule to require that, where the providing LEC claims that it cannot brand requesting LEC traffic because of the manner in which its network architecture is structured, such failure to rebrand requesting LEC traffic is presumptively discriminatory, and the burden will be on the providing LEC to show that it is not technically feasible to arrange its network architecture to allow it to brand requesting LEC

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353 *Id.* at n.47.

354 *Id.* at 21-22.

355 TRA Opposition at 15-16; AT&T Opposition at 14.

356 AT&T Opposition at 14.

357 47 C.F.R. § 51.217(d); *Local Competition Second Report and Order*, 11 FCC Rcd at 19455, ¶ 128 (operator services), 19463, ¶ 148 (directory assistance).

traffic. Further, because any alteration by a providing LEC of the manner in which it routes directory assistance or operator services would alter "the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks . . . ,"[358] we require that all LECs disclose such network alterations pursuant to our section 251(c) network disclosure rules.[359]

We reject NYNEX's request that we clarify that our branding rule only applies to interconnecting carriers. Our branding rules are mandated by section 251(b)(3), which requires that non-discriminatory access be provided to competing providers of telephone exchange service or telephone toll service,[360] a category that includes resellers. We have also been asked to clarify that the timing of rebranding or unbranding be left to negotiation or arbitration. We decline this request because we agree with AT&T that relying on interconnection agreement negotiations or arbitration to resolve the time by which the providing LEC would brand directory assistance and operator services calls would similarly exclude resellers from key benefits and protections of section 251(b)(3).[361] We note, however, that because section 51.217(d) of our rules requires the rebranding or unbranding of directory assistance and operator services to occur promptly upon a competing carrier's request, it is implicit in our branding requirement that specific timing may be negotiated between the providing and requesting LECs. We also conclude that by not requiring a providing carrier to strip its own operator and directory assistance services of the providing carrier's brand, we obviate NYNEX's concern that our rule would force it to violate TOCSIA.

With respect to First Amendment concerns, we note that our rules do not compel the providing LEC to remain silent because, as we discuss above, the providing LEC is not prevented from branding its own traffic. Our rules merely require that an incumbent providing LEC identify and brand, to the extent technically feasible, the traffic that it provides to its competitors. Because our branding rules do not prohibit speech of any kind, we need not address U S WEST'S arguments that the Commission cannot constitutionally bar lawful speech.

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358 47 U.S.C. § 251(c)(5).

359 *See* 47 C.F.R. §§ 51.325, *et seq.*

360 47 U.S.C. § 251(b)(3).

361 AT&T Opposition at 14.

E. Nondiscriminatory Access to Directory Assistance Databases

1. Background

In the *Local Competition Second Report and Order,* we defined nondiscriminatory access to directory assistance to mean that "[a] LEC shall permit competing providers to have access to its directory assistance services so that any customer of a competing provider can obtain directory listings[, except for unlisted numbers,] on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider, or the identity of the provider for the customer whose listing is requested."[362] By this ruling, we intended to ensure that customers of every provider would have access to the listed telephone numbers of all providers. The *Local Competition Second Report and Order* also concluded that a highly effective way to accomplish nondiscriminatory access to directory assistance is to allow competing providers to obtain read-only access to the directory assistance databases.[363] We also required LECs to share directory listings in readily accessible magnetic tape or electronic formats in a timely fashion upon request.[364]

2. Discussion

USTA asks the Commission to clarify that its local competition rules do not require that LECs transfer their directory assistance databases to a requesting carrier.[365] Bell Atlantic, U S WEST, Ameritech, and USTA also ask us to clarify that section 251(b)(3) does not require providing LECs to transfer databases.[366] U S WEST states that section 251(b)(3) does not mention "databases," nor suggests that LECs must provide database access.[367] U S WEST interprets section 251(b)(3) to require LECs to provide directory listings in any manner that permits competing providers to produce their own directory assistance and operator services, and that LECs must accept the numbers and listing of those customers being served by new entrants and include that information in the LEC's directories and directory assistance and operator

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362 47 C.F.R. § 51.217(c)(3)(i); *see also Local Competition Second Report and Order*, 11 FCC Rcd at 19457-58, ¶ 135.

363 *Local Competition Second Report and Order*, 11 FCC Rcd at 19461, ¶ 143.

364 *Id.* at 19460, ¶ 141.

365 USTA Petition at 3-4.

366 *See* Bell Atlantic Opposition at 7-8; U S WEST Opposition at 16-17; Ameritech Opposition at 13-14; USTA Petition at 4.

367 U S WEST Opposition at 16.

services databases.[368] USTA and U S WEST state that the Commission should not require more than "per-query access" to directory assistance or operator services databases.[369]

MCI opposes the USTA petition and requests that the Commission clarify that the *Local Competition Second Report and Order* requires providing LECs to share directory assistance databases in magnetic tape *or* electronic format at the election of the requesting carrier.[370] MCI cites the *Local Competition Second Report and Order*'s requirement that providing LEC's must share directory assistance data with competing carriers in readily accessible tape or electronic formats in a timely fashion upon request.[371] MCI states that "it is common practice for existing companies to exchange data by magnetic tape or electronic format to accomplish dialing parity goals."[372] MCI concludes that

> [b]ecause the ILECs have demonstrated the technical feasibility of providing access to DA [directory assistance] and OS [operator services] databases, these databases should be available to all new entrants. . . Thus, the DA database should be forwarded to new entrants electronically, since incumbent LECs already exchange DA data in that fashion. Updates should be provided on a daily basis . . . All customers benefit from DA services based on a complete and accurate database since each carrier has the same responsibility for maintaining up-to-date information on subscribers. However, because this obligation should be mutual, carriers should not be allowed to charge for providing those updates.[373]

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[368] *Id.*

[369] *See* USTA Petition at 4; U S WEST Opposition at 20. "Per query access" means that the competing LEC would be required to dip into the incumbent LEC's database each time it wanted a listing.

[370] MCI Reply at 6-7.

[371] *Id.* The *Local Competition Second Report and Order* also concluded that the requirements for directory assistance and listings are intertwined and that any customer of a competing provider should be able to access any listed number through directory assistance. *Local Competition Second Report and Order*, 11 FCC Rcd at 19457-58, ¶ 135.

[372] MCI Reply at 8 (citing *GTE California, Inc.*, Decision 89-03-051, 31 CPUC2d 370, 378 (Cal. PUC 1989) (attached as Exhibit 3 to MCI Reply)) ("[t]he key circumstance that has permitted this competition to break out is the sharing of local DA databases by [GTE] and [Pacific Bell] for the primary purpose of offering a seamless 411 service on a local basis. Of course, [Pacific Bell] has been using the joint database to provide interexchange DA service for some years now").

[373] *Id.* Excell also observes that gaining access to the providing LECs' databases is not sufficient for competing providers to be able to offer directory assistance on a competitive basis because of the "many millions of dollars" needed to match the various database systems, technologies, and protocols used by different providing LECs. Excell Petition at 8.

We conclude that section 251(b)(3) prohibits providing LECs from providing directory assistance database information in a manner that is inferior to that which they supply to themselves. Without access to directory assistance in a readily accessible format, new entrants will be ill-equipped to compete against providing LECs because new entrants' customers would have only limited access to that information. Although some competing providers may only want per-query access to the providing LEC's directory assistance database, per-query access does not constitute equal access for a competing provider that wants to provide directory assistance from its own platform. With only per-query access to the providing LEC's database, new entrants would incur the additional time and expense that would arise from having to take the data from the providing LEC's database on a query-by-query basis and then entering the data into its own database in a single transaction. Moreover, if the requesting LEC cannot enter the data into its own database, but is limited to supplying directory assistance to its customers by dipping into the providing LEC's database on a query-by-query basis, the requesting LEC would not have control over service quality and could be subject to degraded service and dialing delays with no control over the management of the database. Further, competitors limited to providing directory assistance through per-query dips into the providing LEC's database would be unable to offer certain enhanced services such as call completion.[374] Such extra costs and inability to offer comparable services would render the access discriminatory.

In connection with the requirement that LECs provide nondiscriminatory access, "read-only" access means that providing LECs may only prohibit "write" access to their own databases.[375] By supplying databases in an electronic format, the providing LECs will be able to protect the integrity of their databases. We thus conclude that LECs must transfer directory assistance databases in readily accessible electronic, magnetic tape, or other format specified by the requesting LECs, promptly upon request, as indicated below. We also conclude that non-discriminatory access requires that updates be provided to requesting LECs in the same manner as the original database transfer, and that such updates be made at the same time as updates are made to the providing carrier's database. Consistent with our conclusion today in the *Third Report and Order*,[376] the providing LEC shall provide access to its directory assistance database in any format specified by the requesting LEC, if the providing LEC's internal systems can accommodate that format. If the providing LECs systems cannot accommodate the requested format, within thirty days of when it receives the initial request the providing LEC must inform the requesting LEC of that fact and tell the requesting LEC which formats it can accommodate.

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[374] Call completion allows a directory assistance service provider, once it has provided a number to a caller, to complete the call.

[375] Requesting LECs may, of course, write to their own directory assistance databases.

[376] *See* part II.I, *supra*.

We have revised our rules to reflect these requirements. The new regulations are contained in Appendix D.

As stated in paragraph 0, *supra*, section 251(b)(3) requires that every LEC's customers be able to access each LEC's directory assistance service and obtain a directory listing. We agree with U S WEST and MCI that non-discriminatory access thus imposes a reciprocal obligation on all LECs to accept the listings of competing providers' customers for inclusion in their directory assistance and operator services databases.[377] This requirement also ensures that a competing LEC that does not wish to provide its own directory assistance service, but rather wishes to use the incumbent LEC's service, will have its customers listed. We decline, however, to grant MCI's request that carriers not be allowed to charge for these transfers of customer information.[378] The obligation to provide access may be mutual, but the costs for each carrier to supply such access will not necessarily be identical. Thus, it would not be just or reasonable for those carriers that face greater costs to require that carriers not be allowed to charge for these transfers of customer information. Our decision in this regard merely constitutes our determination of what comprises non-discriminatory access. We make no determination of what the price should be for directory assistance data transfer.

On June 10, 1997, Listing Service Solutions, Inc. (LSSI), a provider of directory assistance services, filed an *ex parte* letter requesting that the Commission clarify that, under section 251(b)(3), LECs should provide nondiscriminatory access to their directory assistance databases to all third party directory assistance providers, even those that do not themselves provide telephone exchange service or telephone toll service.[379] In support of its argument, LSSI points to a decision in which the California Commission concluded that section 251(b)(3) and the *Local Competition Second Report and Order* require that "third party independent vendors as well as CLCs [competitive LECs] and other competitors should have non-discriminatory access to the LECs' DA [directory assistance] database."[380] U S WEST argues in response that the LSSI letter should be rejected as an untimely petition for reconsideration, and that LSSI has no rights

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[377] *See* U S WEST Opposition at 16-17; MCI Reply at 8.

[378] MCI Reply at 8.

[379] *See* Letter from Jeffrey Blumenfeld, LSSI, to Regina Keeney, Chief, Common Carrier Bureau, FCC, at 1 (filed June 10, 1997) (*LSSI June 10, 1997 Letter*); *see also* Letter from Richard Thayer, Excell, to William F. Caton, Secretary, FCC (filed Sept. 18, 1997) (*Excell September 18, 1997 Letter*).

[380] *LSSI June 10, 1997 Letter*, *supra* note 379, at 2 (*citing California Commission 1997 Decision*, *supra* note 36, at 29-30).

under section 251(b)(3) because the section only applies to providers of exchange and toll services.[381]

We decline to resolve LSSI's request in this *Second Order on Reconsideration*. LSSI's June 10, 1997 Letter cannot be treated as a petition for reconsideration because it was not filed within the 30-day filing period required by section 405(a) of the Act.[382] The Commission lacks discretion to waive this statutory requirement.[383] Further, we note that the Common Carrier Bureau (Bureau) has ruled that a directory assistance provider that is not a provider of telephone exchange or telephone toll services is not entitled to non-discriminatory access to LEC directory assistance databases under section 251(b)(3).[384] We do acknowledge the conclusion of the California Commission that directory assistance providers like LSSI, INFONXX, and Excell Agent Services, Inc. (Excell) provide a service consistent with the competitive environment contemplated by the Act. Thus, in a *Notice of Proposed Rulemaking* we release today as part of this document, we solicit comment on whether the Commission can and should grant directory assistance providers that are not themselves telephone exchange service providers or telephone toll service providers nondiscriminatory access to LEC directory assistance databases.[385]

F.Definition of Directory Listing

1. Background

In the *Local Competition Second Report and Order*, the Commission adopted section 51.217(c)(3)(ii) of our rules, which requires LECs to share subscriber listing information with their competitors in readily accessible tape or electronic formats and that such data be provided in a timely fashion upon request.[386] We also concluded that the requirements for nondiscriminatory access to directory assistance and directory listings are intertwined and that the term "directory listings" means the listings that comprise a directory assistance database.[387]

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[381] *See* Letter from Richard A. Karre, U S WEST, to William F. Caton, Secretary, FCC (filed Aug. 1, 1997 (*U S WEST Aug. 1, 1997 Letter*).

[382] *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d).

[383] *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993).

[384] *INFONXX, Inc. v. NYNEX*, Memorandum Opinion and Order, 13 FCC Rcd 10288 (Com. Car. Bur. 1998) (*INFONXX v. NYNEX*).

[385] *See* part IV, *infra.*

[386] 47 C.F.R. § 51.217(c)(3)(ii); *see also Local Competition Second Report and Order*, 11 FCC Rcd at 19460-62, ¶¶ 141-45.

[387] *Local Competition Second Report and Order*, 11 FCC Rcd at 19457-58, ¶ 135.

2. Discussion

All of the petitioners addressing this issue agree that the Commission unnecessarily mixed the requirements for nondiscriminatory access to directory assistance with those for directory listing.[388] MFS argues that the rule in section 51.217(c)(3)(ii) "would more sensibly be construed as part of the duty to provide nondiscriminatory access to directory assistance," and that treating directory listing as redundant of directory assistance violates the principles of statutory construction.[389] MFS states that "directory listing" refers to the act of placing a customer's listing information in a published directory compilation, such as in white pages or an Internet directory.[390] MFS asserts, therefore, that nondiscriminatory access to directory listing should mean that "a LEC publishing a telephone directory has a duty to incorporate a listing supplied by its competitor with the same level of accuracy, in the same manner, and in the same time frame that it would list its own customer's information."[391] It states that access to listings suggests a duty to provide a carrier with access to a compilation of information in a directory, while access to directory listing involves listing a particular subscriber in a directory.[392]

Bell Atlantic states that it agrees with MFS's interpretation of nondiscriminatory access to directory listing.[393] USTA contends that section 251(b)(3)'s nondiscriminatory access requirement was intended merely to ensure that all carriers could arrange to have their customers' names listed in other carriers' directories, including the white pages books and directory assistance databases.[394] Bell Atlantic and GTE argue that the Commission erred in defining directory listings to be identical to "subscriber list information," as defined in section 222(f)(3) of the Act.[395] According to these parties, had Congress wanted to require that incumbent LECs

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388 *See, e.g.*, U S WEST Opposition at n. 38; Bell Atlantic Opposition at 7; MFS Petition at 10-11.

389 MFS Petition at 11-12.

390 MFS Reply at 3.

391 MFS Petition at 10-11.

392 *Id.* at 11.

393 Bell Atlantic Opposition at 7-8.

394 USTA Petition at 4.

395 *See* part II.A.1, *supra*, for that statutory definition.

supply competitors with subscriber list information, the Act would specifically have required incumbent LECs to do so.[396]

We agree with those petitioners who contend that our rules should be modified to recognize the difference between directory "listing" and directory "listings," and that our rules should recognize that these terms are distinct from directory assistance under the 1996 Act. We conclude that the section 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by the suggestion of MFS and Bell Atlantic that directory listing be defined as a verb that refers to the act of placing a customer's listing information in a directory assistance database or in a directory compilation for external use (such as a white pages).[397] We believe that interpreting the Act's requirements of non-discriminatory access to directory listing and directory assistance in this manner will clear up any ambiguities concerning LEC obligations to provide access to directory assistance databases to competitors and to list competitors' information. We also agree with Bell Atlantic and GTE that it is not necessary for the Commission to describe directory listings to be identical to "subscriber list information," as defined in section 222(f)(3) of the Act. The definition in section 222(f)(3) includes "primary advertising classifications" under which businesses are listed in yellow pages directories.[398] These classifications are not necessarily used in the provision of directory assistance. We therefore adopt these interpretations, and adopt revised new regulations incorporating these distinctions.

G. Access to Customer Guides and Informational Pages

1. Background

The *Local Competition Second Report and Order* concluded that there is no need for the Commission to state whether the term 'directory assistance and directory listings' includes the White Pages, Yellow Pages, 'customer guides,' and informational pages. The Commission was merely adopting a "minimum standard" for the provision of directory assistance and directory listing.[399]

2. Discussion

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396 Bell Atlantic Opposition at 8; GTE Opposition at 8.

397 *See* MFS Reply at 3; Bell Atlantic Opposition at 7.

398 *See* part II.E.2, *supra*.

399 *Local Competition Second Report and Order*, 11 FCC Rcd at 19458-59, ¶ 137.

NYNEX states that the *Local Competition Second Report and Order* is unclear as to whether LECs must provide competitors with access to the customer guides and information pages that appear in the LECs' printed telephone directories because the use of the term "minimum standard" does not specify what information, in addition to subscriber list information, the Commission intended the LEC to put into its directories.[400] According to NYNEX, because section 271(c)(2)(B)(viii) of the Act[401] merely requires incumbent LECs to provide non-discriminatory access to white pages directory listings, the Commission should clarify that incumbent LECs are not required to provide competitors with access to customer guides and informational pages.[402] NYNEX argues that requiring incumbent LECs to provide competitors with customer guides and informational pages for placement into the competitors' telephone directories could also lead to disputes between competitors and incumbent LECs regarding incumbent LECs' right to exercise editorial control over such information after it is given to the competitor.[403] GTE also contends that there is no support for the proposition that access to listings might include customer guides and informational pages, "or other wholly unregulated elements of directories," and requests that, in order to eliminate any confusion, the Commission should clarify here that LECs are not required to provide their competitors with access to these pages.[404] MFS, however, states that the term "minimum standard" "correctly recognizes the authority of State commissions, when acting as arbitrators under Section 252, to determine the full scope of nondiscriminatory access to directory listing services."[405] MFS also states that 271(c)(2)(B)(viii) applies only to BOCs, not all incumbent LECs. Consequently, this section only establishes conditions that must be met before a BOC may be authorized to provide interLATA service.[406]

Our rules do not require incumbent LECs to provide competitors with access to the customer guides and information pages that appear in the LECs' printed telephone directories, but neither do these rules preclude States from establishing such a requirement, to the extent they have such authority. What our rules, as clarified in this *Second Order on Reconsideration*, do require is that providing LECs grant requesting LECs access to directory assistance and directory listing equal to that which the providing LEC grants itself. NYNEX has

400 NYNEX Petition at 7-8.

401 47 U.S.C. § 271(c)(2)(B)(viii).

402 NYNEX Petition at 8.

403 *Id.* at n.21.

404 GTE Opposition at 8.

405 MFS Opposition at 6.

406 *Id.* at n.5.

not demonstrated that this language is either unclear or confusing. We adopted "subscriber list information" in the *Local Competition Second Report and Order* to be merely a minimum definition of "directory listing" to accommodate States that may require more stringent requirements as part of nondiscriminatory access to directory listings. Although we dispense with "subscriber list information" as a definition for "directory listings,"[407] a State may require, for example, listing of State-specific NXX codes and services that are subject to State tariff. To the extent that a providing LEC is required to list such information in its directory assistance database, the providing LEC must grant a requesting LEC non-discriminatory access to such information.

H. Access to Nonpublished Numbers

1. Background

The *Local Competition Second Report and Order* requires that a

> LEC shall not provide access to unlisted telephone numbers, or other information that its customer has asked the LEC not to make available. The LEC shall ensure that access is permitted only to the same directory information that is available to its own directory assistance customers.[408]

The Commission found this to be consistent with the definition of subscriber list information, which is limited to the listed names of subscribers of a carrier.[409]

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[407] *See* part III.F, *supra*.

[408] *Local Competition Second Report and Order*, 11 FCC Rcd at 19457-58, ¶ 135; 47 C.F.R. § 51.217(c)(3)(iii).

[409] *See* 47 U.S.C. § 222(f)(3).

2. Discussion

Excell states that LECs should be required to make the names, addresses and telephone numbers of customers with non-published numbers available to competing directory assistance providers, with appropriate requirements for privacy and confidentiality.[410] According to Excell, this availability is necessary for competitors to provide "a full range of information and services in competition with the LECs,"[411] including, Excell argues, the ability of a LEC to contact in an emergency a subscriber whose number is unpublished.[412] Excell interprets the current rule to mean that the names of subscribers with unpublished numbers have to be shared, even if the numbers are withheld.[413] It states that this information is essential to enable a competing directory assistance provider to inform callers that the number requested is unlisted, whereas, with no information on the subscriber with an unpublished number, the operator cannot be helpful to the caller in any way.[414] Excell states that it is compelled to use commercially available lists that do not distinguish between published and non-published numbers and thus can afford no opportunity for operators to protect the privacy of individuals with non-published numbers.[415] MCI agrees that database access must include information that will allow competing directory assistance providers to tell a caller that a subscriber's number is unlisted.[416] U S WEST also agrees that this information is "necessary to provide directory *assistance*, where individuals can get telephone number information pertaining to those customers who have *no directory listing*."[417]

Roseville and USTA oppose the sharing of listing information for those subscribers that have unlisted numbers.[418] Roseville states that such an arrangement would be

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410 Excell Petition at 9. Excell did not file a Petition for Reconsideration, but rather, on September 9, 1996, filed a Petition for Relief and Compliance in Docket No. 96-98. Numerous parties filed comments in response to the Excell petition as part of their opposition and reply pleadings in this reconsideration proceeding. We treat Excell's petition as an informal comment and address it within this *Second Order on Reconsideration*. *See* 47 U.S.C. § 154(j).

411 *Id.*

412 *Id.*

413 *Id.*

414 *Id.*

415 *Id.*

416 MCI Reply at 7.

417 U S WEST Opposition at n.38 (emphasis in the original).

418 *See* Roseville Opposition at 2-4; USTA Opposition at 14.

inconsistent with the California Commission's requirements that allow subscribers to choose not to have their telephone numbers, addresses, and names listed in telephone and street address directories, or published in the directory assistance records available to the general public.[419] Roseville also states that under the California privacy requirements:

> [C]ompetitive directory assistance providers, such as EAS [Excell], are not subject to any competitive disadvantage. Neither Roseville nor EAS may disclose the name of a subscriber who has requested that his/her name or number be unlisted, and both must return to the inquirer with a result of "not found."[420]

Roseville interprets the 1996 Act as protecting the privacy of subscribers and allowing disclosure of listing information only for subscribers with listed numbers.[421] Roseville also cites the Commission's billing name and address (BNA) rules, which prohibit LECs from sharing BNA information unless the subscriber affirmatively chooses to allow its distribution.[422]

Excell is correct that our rules require that a LEC share the names and addresses of subscribers with unpublished numbers if the LEC provides those names to its own directory assistance operators. Our rules, however, also prohibit a LEC from providing access to those customers' unlisted telephone numbers, or any other information that the LEC's customers have asked the LEC not to make available. We believe that this approach does not disadvantage competitive LECs, but rather is consistent with the Act's non-discriminatory access requirement that the providing LEC supply access to directory assistance services equal to that which it provides itself.[423] If a LEC, in its provision of directory assistance service to itself, allows its own directory assistance operators to see the names and addresses of subscribers with unlisted information, this information must also be made available to the requesting competitive LEC. If, as in the case of California, no customer information is available to the operator, no access need be given to the competitor. We agree with MCI and Excell that a requesting LEC is at a disadvantage if it does not have the names of non-published subscribers for its own directory assistance service. As Excell correctly observes, the names and addresses are essential to enable a competing directory assistance provider to inform callers that the number requested is unlisted,

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419 Roseville Opposition at 4 (*citing* CPUC Decisions Nos. 92860 and 93361, Case No. 10206).

420 *Id.*

421 *Id.* at 2-3.

422 *Id.* at 3-4 (*citing* 47 C.F.R. § 64.1201(e)(3)).

423 For the reasons indicated in part III.E, *supra*, this *Second Order on Reconsideration* does not address that portion of Excell's Petition that requests relief under section 251(b)(3) for directory assistance providers that do not themselves provide either telephone exchange access or telephone toll access service. In part IV, *infra*, however, we invite comment on this area.

whereas, where no information on the subscriber with an unpublished number is provided, the operator cannot provide any information on the requested number. The competitive disparity between incumbent and competitor in such a case clearly violates our rules and the non-discriminatory access provisions of section 251(b)(3) of the Act.

We decline, however, to require the sharing of non-published numbers. The Act and our rules require LECs to provide access equal to that which they supply to themselves. Incumbent LEC directory assistance operators are supplied with the names and addresses, but not the numbers of those customers whose numbers are not published. Thus, requesting LECs would suffer no competitive disadvantage by not being supplied the numbers. To require providing LECs to include the numbers of customers whose numbers are unlisted is not necessary to create a level playing field for the provision of directory assistance. We do agree with Excell, however, that it is important that a requesting LEC should be able to ensure that its subscribers will have the same ability as the providing LEC's subscribers to contact subscribers with unlisted numbers in an emergency.[424] We note that requesting LECs can arrange through interconnection agreements to have the providing LEC, upon request of the requesting LEC, contact the unlisted subscriber in such a situation.[425]

We note that, because of differences in statutory language, requiring LECs to provide other LECs with access to the names and addresses of subscribers with unpublished numbers as part of the LECs' provision of nondiscriminatory access to directory assistance under section 251(b)(3) is consistent with our determination in part II.E.3, above, that section 222(e) does not require LECs to provide directory publishers with those names and addresses. Specifically, in requiring "nondiscriminatory access to . . . directory assistance," section 251(b)(3) encompasses all the customer information, including the names and addresses of

[424] Excell Petition at 9. The definition of "emergency" would vary among LECs, but would typically include medical emergencies. For instance, a LEC might have a policy of contacting its unlisted subscribers on behalf of persons stating that a medical condition required such contact. If the LEC extended this service to its own subscribers, it also would have to extend it to other LECs' subscribers. In this circumstance, the calling party's LEC would contact the called party's LEC, whose operator would, in turn, contact the unlisted subscriber.

[425] We do not agree with Roseville that requiring providing LECs to supply unlisted or unpublished numbers would violate our BNA rules. In the *BNA Order*, the Commission required LECs to obtain explicit authorization from customers with an unlisted or unpublished numbers before releasing the customers' BNA. *Policy and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, *Second Report and Order*, 8 FCC Rcd 4478, 4486-87, ¶ 40 (1993), *recon. denied*, 8 FCC Rcd 8798 (1993) (*BNA Order*). Our nondiscriminatory access requirements require only the release of information that the providing LEC uses in its directory assistance operation. Each directory assistance provider that receives this information is also bound by the BNA rules and thus would have to obtain explicit customer authorization before using the customer's name and address for purposes not permitted by our BNA rules.

persons with unpublished numbers, that a LEC uses to provide directory assistance. In contrast, section 222(f)(3) explicitly excludes unpublished and unlisted information from the definition of subscriber list information. A carrier, therefore, need not provide that information to a directory publisher pursuant to section 222(e).

IV. NOTICE OF PROPOSED RULEMAKING

A.Relationship between Directory Publishing and Directory Assistance

1. Overview

Traditionally, consumers, service providers, and regulators have considered directory publishing and directory assistance to be distinct products or services. In directory publishing, the traditional products consist of two types of paper directories: white pages directories and yellow pages directories. White pages directories provide the names, addresses, and telephone numbers of telephone exchange service subscribers within particular geographic areas that do not elect to have unlisted numbers. Yellow pages directories provide the names, addresses, and telephone numbers of businesses receiving telephone exchange service within particular geographic areas. These directories include headings that direct users to groups of listings for businesses providing similar products or services (e.g., restaurants, automotive repair services, and the like) and to the advertising that accompanies those listings. Directory assistance, in contrast, traditionally has been a service in which live operators provide users with the telephone numbers and, in some instances, addresses of individual telephone exchange service subscribers. These operators obtain the information from databases that contain the names, addresses, and telephone numbers of the telephone exchange service subscribers within particular geographic areas that do not elect to have unpublished numbers.

In their traditional guises, directory publishing and directory assistance were easy to distinguish: directory publishing provided users with paper directories, while directory assistance provided users with access to a live operator. Technological advances have blurred this distinction. For instance, Internet users can now obtain access to databases that share many of the characteristics of both paper directories and directory assistance. As with paper directories, users of these databases can "look up" the telephone numbers of individual telephone exchange service subscribers. As with directory assistance, those users may obtain subscriber list information without consulting a paper directory. In this *Notice*, we invite comment on issues arising out of the development of Internet directories and the convergence of directory publishing and directory assistance.

2. Internet Directories

The recent explosion in Internet usage has spawned a number of innovative applications that rely on subscriber list information. These include databases that allow the user to obtain the names, addresses, and telephone numbers of telephone subscribers as well as a wealth of information concerning listed businesses. In some of these databases, a user may search electronically from among millions of listings by criteria such as business name, business category, location, zip code, brands carried, operating hours, and methods of payment accepted. A typical application would permit the user to obtain a list of hotels in a particular city, select a likely candidate, and obtain the hotel's address and telephone number as well as a street map of the area surrounding the hotel. More advanced applications provide hyperlinks to advertisers' web sites, where the user could obtain hotel rate information and make a reservation. As Internet usage increases, additional applications should make Internet databases containing subscriber list information a major source of advertising revenues.[426]

Section 222(e) entitles directory publishers to obtain subscriber list information "for the purpose of publishing directories in any format."[427] We seek comment on whether the phrase "in any format" indicates Congress' intent not to restrict the kinds of directories that could be published using subscriber list information obtained pursuant to section 222(e). We ask commenters to address whether and under what conditions the making available of subscriber list information on the Internet to users should be considered publication of a directory. We seek comment on whether section 222(e) entitles directory publishers to obtain subscriber list information for use in Internet databases.[428] We ask the commenters to address, in particular, whether the language of section 222(e) compels us to conclude that a person is obtaining subscriber list information "for purposes of publishing directories in any format" when the person obtains that information for use in an Internet database. We also ask the commenters to address whether interpreting that statutory language as encompassing the use of subscriber list information in Internet databases would be consistent with the legislative history, the broader statutory scheme, and the policy objectives of the 1996 Act.

We recognize that, in a May 1997 *Order*, the Florida Commission determined "the posting of directory listings on the Internet amounts to the provision of directory assistance, and that, thus the right to do so must be purchased" under BellSouth's directory assistance, rather

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426 *See Sandberg Article*, *supra* note 9.

427 47 U.S.C. § 222(e).

428 *ADP Dec. 30, 1997 Letter*, *supra* note 85, at 6. YPPA states that it takes no position on whether the language of section 222(e) encompasses Internet directories. *YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 5.

than its directory publishing, tariff.[429] In reaching this conclusion, the Florida Commission observed that a BellSouth affiliate, BellSouth Intelligent Media Ventures (BellSouth Media), was offering a trial business on the Internet.[430] BellSouth Media's Internet offerings, however, seem to have evolved considerably since the Florida Commission issued its *Order* in May 1997. The present offerings include a database containing subscriber list information, which BellSouth markets as "The Real Yellow Pages."[431] Users of this database can access listings and associated advertisements for businesses located within all areas of BellSouth's in-region states. We note that those listings are divided into categories such as automobile dealers, appliances, insurance, and restaurants and dining, similar to what is found in paper yellow pages.

Other Internet companies maintain similar databases. Bell Atlantic BigYellow, for instance, bills itself as "Your Yellow Pages on the Web and More." YAHOO! offers access to Internet directory listing databases maintained by five Regional Bell Operating Company affiliates.[432] Other Internet service providers rely on directory listing databases provided by non-carriers.[433] These Internet databases, including BellSouth Media's offerings, illustrate why the phrase "for the purpose of publishing directories in any format" in section 222(e) may encompass requests for subscriber list information for use in Internet databases. We invite comment on this matter.

We also recognize that some carriers, such as CBT and BellSouth, charge different prices for subscriber list information that will be used in printed directories than for subscriber list information that will used in Internet directories.[434] We invite comment on whether, in the event we conclude that Internet directories fall within the scope of section 222(e), we should preclude carriers from imposing on requesting directory publishers rates, terms, and

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[429] *Florida Commission 1997 Decision*, *supra* note 30, at 13. The Florida Commission did not explain the basis for this conclusion. *See id.*

[430] *Id.*

[431] Internet users can access this offering at http://yp.bellsouth.com

[432] *See, e.g., Yahoo! Selects Regional Bell Directory Companies to Provide Yellow Pages Service for Netscape Guide by Yahoo!*, www.yahoo.com/docs/pr/release105.html (Jul. 21, 1997) (discussing agreement between Yahoo! and Ameritech, BellSouth, NYNEX Big Yellow (now Bell Atlantic Big Yellow), Pacific Bell, and U S WEST to distribute the companies' "Internet yellow pages").

[433] *E.g.*, Business Wire, *MindSpring Goes Online with World's Largest Yellow Pages Directory* (June 15, 1999) (discussing Internet directory licensing agreements between SBN.COM and Internet service providers representing five million subscribers).

[434] *ADP Apr. 2, 1998 Letter*, *supra* note 144, at 3; *Florida Commission 1997 Decision*, *supra* note 30, at 13.

conditions for subscriber list information obtained to publish Internet directories that differ from the rates, terms, and conditions the carrier imposes for subscriber list information obtained to publish other directories. We also invite comment on whether we should preclude State regulation that requires or permits different rates, terms, and conditions for subscriber list information depending on the type of directory in which the information will be used.

We invite comment, in addition, on whether carriers that provide subscriber list information pursuant to section 222(e) may restrict how third parties may access and use Internet directories containing that information. For example, ADP asserts that CBT requires directory publishers to format their Internet directories so that they are not "'capable of permitting an end user to download or view more than 15 listings with a single command.'"[435] We ask commenters to address whether this and similar restrictions are consistent with section 222(e).

We further invite comment on whether the provision of access to an Internet directory through a web site constitutes the provision of directory assistance within the meaning of section 251(b)(3). That section requires each LEC to provide competing providers of telephone exchange service and telephone toll service with "nondiscriminatory access to . . . directory assistance . . . ."[436] In the *Local Competition Order*, the Commission defined "directory assistance service" as including "making available to customers, upon request, information contained in directory listings."[437] We invite comment on whether allowing Internet users to access a database containing directory listing information falls within this definition.

We ask the commenters to address, in particular, whether directory publishing under section 222(e) and directory assistance under section 251(b)(3) are mutually exclusive categories, so that a conclusion that placing subscriber list information in an Internet database constitutes directory publishing would necessarily preclude a conclusion that the provision of online access to the database also constitutes directory assistance. We also invite commenters to provide specific proposals on whether and, if so, how we should change our rules implementing sections 222(e) and 251(b)(3) in the event we conclude that Internet directory providers are engaged in both directory publishing under section 222(e) and directory assistance under section 251(b)(3).

3. Oral Provision of Listing Information

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[435] *ADP Apr. 2, 1998 Letter*, *supra* note 144, at 5 (*quoting* Unexecuted License Agreement between Cincinnati Bell Telephone Co. and Reuben H. Donnelley Corp. at § 7.1).

[436] 47 U.S.C. § 251(b)(3).

[437] *Local Competition Order*, 11 FCC Rcd at 16198 (text of section 51.5 of the Commission's rules).

a. Section 222(e)

As indicated previously,[438] technological advances have blurred the distinction between directory publishing, which traditionally provided users with paper directories, and directory assistance, which traditionally provided users with access to live operators. We invite comment on how, if at all, the convergence between directory publishing and directory assistance should influence our implementation of section 222(e). In particular, we invite comment on whether the phrase "for purposes of publishing directories in any format" in section 222(e) encompasses the oral publication of listing information by a directory assistance provider.[439] We ask the commenters to address whether the statutory language compels us to conclude that a person is obtaining subscriber list information "for purposes of publishing directories in any format" when the person obtains that information to provide oral directory assistance. We also ask the commenters to address whether interpreting section 222(e) as encompassing the oral dissemination of listing information by a directory assistance provider would be consistent with the legislative history, the broader statutory scheme, and the policy objectives of the 1996 Act.

Assuming that a directory assistance provider may obtain subscriber list information pursuant to section 222(e), we invite comment on whether a telecommunications carrier is therefore precluded from imposing rates, terms, and conditions with regard to the provision of subscriber list information for use by a directory assistance provider different from those imposed with regard to the provision of subscriber list information for more traditional forms of directory publication. We also seek comment on whether a carrier's rates, terms, and conditions for subscriber list information provided to a directory assistance provider pursuant to section 222(e) must be identical to rates, terms, and conditions under which the carrier provides nondiscriminatory access to listing information to competing providers of telephone exchange service and telephone toll service pursuant to section 251(b)(3).[440] As stated above, the Florida Commission requires directory publishers subject to its jurisdiction to obtain subscriber list information for the purpose of publishing an Internet directory under BellSouth's directory assistance tariff, which imposes rates, terms, and conditions different from those in BellSouth's

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[438] *See* part IV.A.1, *supra*.

[439] *E.g.*, Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 1-3 (filed Apr. 30, 1999) (*INFONXX Apr. 30, 1999 Letter*); Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 1-2 (filed Apr. 22, 1999) (*INFONXX Apr. 22, 1999 Letter*);

[440] *E.g.*, Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 1 (filed June 24, 1999) (*INFONXX June 24, 1999 Letter*); Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 4 (filed June 29, 1999) (*INFONXX June 29, 1999 Letter*).

directory publishing tariff.[441] We ask that commenters address whether we should preclude State regulation that requires or permits rates, terms, and conditions for subscriber list information that will be published orally that differ from the rates, terms, and conditions for subscriber list information that will be published in other formats.

b. Section 251(b)(3)

Section 251(b)(3) of the Communications Act requires each LEC to provide competing providers of telephone exchange service and telephone toll service with "nondiscriminatory access to . . . directory assistance . . . ."[442] In the *Local Competition Second Report and Order*, the Commission concluded that the term "nondiscriminatory access," as used in section 251(b)(3), encompasses both "(1) nondiscrimination between and among carriers in rates, terms and conditions of access; and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC."[443]

The provision of directory assistance has become increasingly competitive. Interexchange carriers and competitive LECs often provide directory assistance platforms independent of those provided by the incumbent LECs. Interexchange carriers and competitive LECs, however, whether or not facilities-based, may not have the economies of scale to construct and maintain a directory assistance platform of their own. A competitive LEC, independent LEC, or interexchange carrier also may determine that contracting with a non-carrier directory assistance provider would allow them to offer features and service enhancements such as call completion or reverse directory assistance.[444] Finally, individual business and residential customers may wish to contract with an independent provider of directory assistance service to avail themselves of services that might not be available through their LECs. To meet this market-driven demand, the number of non-carrier providers of directory assistance has grown. These directory assistance providers play an increasingly important role in ensuring that consumers receive the benefits of competition in all telecommunications-related services. We tentatively conclude that the presence of these directory assistance providers benefits competition, and that we should encourage such competition in the provision of directory assistance, whether or not the particular directory assistance provider also provides telephone exchange service or telephone toll service.

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441 *See* part IV.A.2, *supra*.

442 47 U.S.C. § 251(b)(3).

443 *Local Competition Second Report and Order*, 11 FCC Rcd at 19444, ¶ 101 (footnote omitted).

444 With reverse directory assistance, the caller can get the customer's name and address by giving the operator the customer's telephone number.

We invite comment on whether section 251(b)(3) authorizes us to require the provision of nondiscriminatory access to directory assistance to directory assistance providers that do not themselves provide either telephone exchange service or telephone toll service.[445] As stated above, section 251(b)(3) requires LECs to provide nondiscriminatory access to directory assistance to "competing providers of telephone exchange service and telephone toll service." We therefore tentatively conclude that a directory assistance provider that provides neither telephone exchange service nor telephone toll service does not fall within the class of entities that are entitled to the benefits of this section. We seek comment on this tentative conclusion.[446] In some cases, however, a non-carrier directory assistance service provider may be under an agency relationship with a carrier principal. We note that section 217 of the Act directs that "[i]n construing and enforcing the provisions of this Act, the act . . . of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act . . . of such carrier or user as well as that of the person."[447] We seek comment on whether a non-carrier directory assistance provider is entitled to nondiscriminatory access to directory assistance under section 251(b)(3) when that provider is an agent of a LEC or other carrier that qualifies for the benefits of section 251(b)(3).[448] We also seek comment on whether, if a carrier's agent is entitled to nondiscriminatory access under section 251(b)(3), that agent may use that access to provide directory assistance to persons other than the carrier's customers.

In addition, we note that directory assistance providers frequently complete calls to the requested numbers.[449] We seek comment on whether a directory assistance provider becomes a provider of telephone exchange or telephone toll service entitled to nondiscriminatory access to directory assistance under section 251(b)(3) when it offers call completion services.

Section 251(b)(3) does not, by its terms, limit the use of directory assistance data solely to the provision of directory assistance. We therefore seek comment on whether an entity that obtains directory assistance data pursuant to section 251(b)(3) may use them for directory publishing or other purposes. We also seek comment on the extent to which a providing LEC's rates, terms, and conditions for listing information that a requesting LEC intends to use for

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[445] Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 3 (filed July 1, 1999) (*INFONXX July 1, 1999 Letter*).

[446] We note that the Bureau reached such a conclusion in *INFONXX, Inc. v. NYNEX*, 13 FCC Rcd at 10293-95, ¶¶ 11-12.

[447] 47 U.S.C. § 217.

[448] *INFONXX July 1, 1999 Letter*, *supra* note 445, at 3.

[449] *Id.*

purposes in addition to the provision of directory assistance may differ from the rates, terms, and conditions the providing LEC applies to other requesting LECs.

Moreover, we seek comment on what impact the growing convergence between directory publishing and directory assistance should have on the manner in which directory assistance is priced. For example, in part II.G, above, we conclude that:

> [T]he nondiscrimination requirement, as set forth in section 222(e), obligates each carrier that gathers subscriber list information in its capacity as a provider of telephone exchange service to provide that information to requesting directory publishers at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation, its directory publishing affiliate, or another directory publishers.[450]

We seek comment on whether the requirement in section 251(b)(3) that a providing LEC must provide "nondiscriminatory access" to directory assistance similarly obligates such LECs to provide directory assistance to requesting carriers at the same rates, terms, and conditions that the LECs provide to themselves. We also invite comment on whether there are other alternatives for ensuring that the prices at which LECs provide access to directory assistance will be nondiscriminatory.

In part IV.A.2 above, we invite comment on whether the phrase "directories in any format" in section 222(e) encompasses Internet databases that contain subscriber list information.[451] We invite comment on whether and, if so, how our resolution of this issue should affect the prices under which carriers provide listing information under section 251(b)(3). We also seek comment on the effect, if any, on those prices in the event we conclude that the phrase "for purposes of publishing directories in any format" in section 222(e) encompasses the oral publication of listing information by a directory assistance provider.[452] We ask the commenters to address whether the prices a LEC charges for listing information under section 251(b)(3) must be identical to the rates the LEC charges for subscriber list information under section 222(e). We invite further comment on whether a conclusion that section 222(e) entitles directory assistance providers to obtain subscriber list information from carriers would affect directory assistance pricing.

c. Sections 201(b) and 202(a)

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[450] *See* para. 0, *supra*.

[451] *See* para. 0, *supra*.

[452] *E.g.*, *INFONXX Apr. 30, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 1-3; *INFONXX Apr. 22, 1999 Letter*, *supra* note **Error! Bookmark not defined.**, at 1-2.

In the *Local Competition Second Report and Order*, the Commission required incumbent LECs to provide access to telephone numbers to entities, such as paging carriers, that are not providers of telephone exchange service or telephone toll service, and thus not covered by section 251(b)(3).[453] The Commission reasoned that paging carriers are increasingly competing with other CMRS providers, and would be at an unfair competitive disadvantage if they alone could be charged discriminatory fees. The Commission concluded that charging discriminatory fees would violate the prohibition against unreasonable discrimination in section 202(a) and also would constitute an "unjust practice" and "unjust charge" under section 201(b).[454]

Non-carrier directory assistance providers may make innovative and increased services available to their customers, and also may compete with incumbent LECs to provide directory assistance to other LECs, interexchange carriers, and end-users. Just as paging carriers could not compete without access to numbers, we tentatively conclude that non-carrier directory assistance providers cannot compete without access to directory assistance equal to that provided to providers of telephone exchange service and telephone toll service pursuant to section 251(b)(3). We seek comment on whether, for reasons similar to those applied to paging carriers in the numbering context, we should require LECs to provide access to directory assistance to non-carrier directory assistance providers pursuant to sections 201 and 202 of the Act. We ask the commenters to address, in particular, whether the rates, terms, and conditions under which a LEC provides access to directory assistance are "charges, practices, classifications, and regulations for and in connection with [interstate communication by wire or radio]" within the meaning of section 201(b) or "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service" within the meaning of section 202(a).

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[453] *Local Competition Second Report and Order*, 11 FCC Rcd at 19538, ¶ 333; *see also INFONXX July 1, 1999 Letter*, *supra* note 445, at 3. Paging is not "telephone exchange service" within the meaning of the Act because it is neither "intercommunicating service of the character ordinarily furnished by a single exchange" nor "comparable" to such service. *See* 47 U.S.C. § 153(47).

[454] *Local Competition Second Report and Order*, 11 FCC Rcd at 19538, ¶ 333. Section 201(b) provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service [i.e., interstate or foreign communication by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b). Section 202(a) provides that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

We also seek comment on whether a LEC's refusal to provide access to directory assistance to a non-carrier directory assistance provider constitutes a "charge, practice, classification, or regulation that is unjust or unreasonable" within the meaning of section 201(b) or "unjust or unreasonable discrimination" within the meaning of section 202(a). We seek comment, in addition, on whether section 201(b) or section 202(a) authorizes us to require LECs to provide non-carrier directory assistance providers with access to directory assistance at the same rates, terms, and conditions under which competing providers of telephone exchange service and telephone toll service obtain such access pursuant to section 251(b)(3), and, if so, whether we should exercise that authority.[455]

B. Access to Nonlocal Listings

Recently, we adopted the *National Directory Assistance Order*, which grants, in part, U S WEST's petition that we allow it to provide "national directory assistance," a service that permits a directory assistance customer to obtain the telephone numbers of subscribers located anywhere in the United States.[456] We concluded that, although U S WEST's provision of nonlocal numbers to in-region directory assistance customers constitutes the provision of in-region, interLATA service, the regionwide component of its nonlocal directory assistance service offering falls within the scope of the exception provided in section 271(g)(4).[457] Thus, US WEST may continue to provide this service without obtaining authorization from the Commission under section 271(d). We also concluded, however, that the nationwide component of U S WEST's nonlocal directory assistance service did not qualify for this same exception because U S WEST does not own the database used to provide directory assistance information to out-of-region customers.[458] Accordingly, we ordered U S WEST to cease providing nationwide directory assistance service until the service is reconfigured to comply with the

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[455] *INFONXX July 1, 1999 Letter*, *supra* note 445, at 3.

[456] News Release, "FCC Grants U S WEST Significant Regulatory Relief to Provide Nonlocal Directory Assistance Service" (rel. June 9, 1999). Directory assistance service is considered "local" whenever a customer requests the telephone number of a subscriber located within the local access and transport area (LATA) or area code from which the directory assistance call is placed.

[457] In the regionwide component of its nonlocal directory assistance service offering, U S WEST makes information regarding telephone exchange service subscribers from inside its region available to its directory assistance customers. U S WEST owns the database from which it retrieves this information.

[458] In the nationwide component of its nonlocal directory assistance service offering, U S WEST makes information regarding telephone exchange service subscribers from outside its region available to its directory assistance customers. U S WEST retrieved this information from a database owned by a third party.

Communications Act. Finally, the Commission partially granted U S WEST's petition for forbearance by relieving U S WEST of its obligation to provide regionwide directory assistance service only on a structurally separate basis. The Commission did not forbear, however, from the requirement that U S WEST must make available to unaffiliated entities all of the in-region directory listing information it uses to provide directory assistance service to in-region customers at the same rates, terms, and conditions it imputes to itself. [459]

We now seek comment on whether all LECs providing national directory assistance must provide nondiscriminatory access to nonlocal directory assistance data pursuant to section 251(b)(3).[460] We observe that, although section 251(b)(3) does not distinguish between the offering of local and nonlocal numbers through directory assistance, the offering of nonlocal numbers is a relatively recent service that was not being provided when that section was enacted in February 1996, nor when the Commission released the *Local Competition Second Report and Order* in August 1996. We thus seek comment on whether section 251(b)(3) requires LECs to provide nondiscriminatory access to any nonlocal directory assistance data that they use to provide directory assistance to customers within their service areas. We also seek comment on whether requiring LECs to provide nondiscriminatory access to nonlocal listing information would further the policy underlying the *Local Competition Second Report and Order* that incumbent LECs provide competitors with access to the incumbent LECs' networks sufficient to create a competitively neutral playing field for new entrants.

We ask the commenters to suggest specific factors that we should take into account in determining whether nondiscriminatory access to nonlocal directory assistance data is

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[459] We note that there are also two formal complaints regarding the issue of BOC provision of national directory assistance currently pending before the Commission. *MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, File No. E-97-40 (filed July 22, 1997); *MCI Telecommunications Corp. v. Illinois Bell Telephone Co., et al.*, File No. E-97-19 (filed Apr. 11, 1997).

[460] Although we required U S WEST to provide these data in a nondiscriminatory manner in the *U S WEST NDA Order*, this requirement may sunset "3 years after the date [U S WEST] or any [U S WEST] affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order." 47 U.S.C. § 272(f)(1). Under section 251(b)(3), the nondiscriminatory requirement could be permanent.

needed to promote the development of a competitively neutral directory assistance market. For example, local directory assistance data is culled and updated from LEC customer service orders. Nonlocal data, in contrast, is obtained by the LEC from third parties, from whom competitors may arguably also obtain the data. Thus, where a LEC may currently exercise bottleneck control over its local customer data, it might not exercise such control over nonlocal data. We invite comment on whether section 251(b)(3) authorizes us to require a LEC to provide nondiscriminatory access to directory assistance data that it has obtained from third parties and, if so, whether we should exercise that authority.

We also invite comment on whether section 251(b)(3) requires a LEC, that combines listings for areas traditionally covered by its directory assistance operation (i.e, traditional listings) and other listings obtained from a third-party (i.e, non-traditional listings) into a single database, to provide the entire database, including the non-traditional listings, to requesting carriers.[461] We ask commenters to address whether, if a LEC is not required to provide access to the non-traditional listings under section 251(b)(3), the LEC's directory assistance competitors would encounter increased burdens or extra costs from being able to obtain only traditional listings from the LEC.

V. PROCEDURAL MATTERS

A. Third Report and Order

1. Final Regulatory Flexibility Analysis

As required by section 603 of the Regulatory Flexibility Act (RFA),[462] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* in CC Docket No. 96-115.[463] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA.[464] Appendix C sets forth the Final Regulatory Flexibility Analysis on the *Third Report and Order* in CC Docket No. 96-115.

2. Final Paperwork Reduction Act Analysis

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[461] For a BOC, the traditional listings likely would include listings from throughout the BOC's region.

[462] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[463] *Notice,* 11 FCC Rcd at 12533-34, ¶¶ 50-58.

464 *Id.* at 12534, ¶ 58.

The *Notice of Proposed Rulemaking* from which this *Third Report and Order* issues proposed changes to the Commission's information collection requirements. As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, the Commission sought comment from the public and from the Office of Management and Budget (OMB) on the proposed changes.[465] This *Third Report and Order* contains several new information collections, which have been submitted to OMB for approval. Implementation of these information collections is subject to OMB approval, as prescribed by the Paperwork Reduction Act.

B. Second Order on Reconsideration

1. Supplemental Final Regulatory Flexibility Analysis

As required by section 603 of the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in *Notice of Proposed Rulemaking* in CC Docket No. 96-98.[466] The Commission sought written public comment on the proposals in this *NPRM*, including comment on the IRFA.[467] In addition, pursuant to section 603, a Final Regulatory Flexibility Analysis was incorporated in the *Local Competition Second Report and Order*.[468] Appendix C sets forth the Supplemental Regulatory Flexibility Analysis on the *Second Order on Reconsideration* in CC Docket No. 96-98.

2. Final Paperwork Reduction Act Analysis

The *Notice of Proposed Rulemaking* from which this *Second Order on Reconsideration* issues proposed changes to the Commission's information collection requirements. As required by the Paperwork Reduction Act of 1995, the Commission sought comment from the public and from OMB on the proposed changes.[469] This *Second Order on Reconsideration* contains several modified information collections, which have been submitted to OMB for approval. Implementation of these information collections is subject to OMB approval, as prescribed by the Paperwork Reduction Act.

C. Notice of Proposed Rulemaking

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465 *Id.* at 12534, ¶ 59.

466 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14265-66, ¶¶ 274-87 (1996) (*Local Competition NPRM*).

467 *Id.* at 14266, ¶ 286.

468 *Local Competition Second Report and Order*, 11 FCC Rcd at 19542-60, ¶¶ 346-98.

469 *Local Competition NPRM*, 11 FCC Rcd at 14266, ¶ 288.

1. Ex Parte Presentations

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. 47 C.F.R. §§ 1.1200 *et seq*. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well.

2. Initial Regulatory Flexibility Act Analysis

Appendix C sets forth the Commission's Initial Regulatory Flexibility Analysis (IFRA) regarding the policies and rules proposed in the *Notice of Proposed Rulemaking* in CC Docket No. 99-273. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[470] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[471]

3. Initial Paperwork Reduction Act Analysis

The rule changes proposed in the *Notice of Proposed Rulemaking* may cause modifications to the collections of information approved by OMB in connection with the *Local Competition Second Report and Order*.[472] As part of our continuing effort to reduce paperwork burdens, we invite the general public and OMB to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from the date of publication of notice of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed information collections are necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

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470 *See* 5 U.S.C. § 603(a).

471 *See id.*

472 *See* OMB control number 3060-0710.

4. Comment Filing Procedures

Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 13, 1999, and reply comments on or before October 28, 1999. All filings should refer *only* to CC Docket No. 99-273. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[473] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, which in this instance is CC Docket No. 99-273. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th St. N.W., Washington, D.C. 20554.

Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Al McCloud, Common Carrier Bureau, Network Services Division, 445 12th Street, S.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 99-273), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036.

Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular

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473 *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.[474] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in this *Notice* in order to facilitate our internal review process.

Written comments by the public on the proposed and/or modified information collections are due on or before October 13, 1999, and reply comments on or before October 28, 1999. Written comments must be submitted by the OMB on the proposed and/or modified information collections on or before 60 days after date of publication of notice of this *Notice of Proposed Rulemaking* in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 1-C804, 445 12th Street, S.W., Washington, D.C. 20554 or via the Internet to jboley@fcc.gov and to Virginia Huth, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503, or via the Internet to vhuth@omb.eop.gov.

VI. ORDERING CLAUSES

Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f)(3), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f)(3), 303(r), & 403, the THIRD REPORT AND ORDER, SECOND ORDER ON RECONSIDERATION, AND NOTICE OF PROPOSED RULEMAKING ARE ADOPTED. Comments regarding the NOTICE OF PROPOSED RULEMAKING ARE REQUESTED as described above.

IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f)(3), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f)(3), 303(r), & 403, Parts 51 and 64 of the Commission's rules, 47 C.F.R. Parts 51 & 64, ARE AMENDED, as set forth in Appendix D.

IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f)(3), 251, 303(r), and 403 of the Communications Act of

474 *See* 47 C.F.R. § 1.49.

1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f)(3), 303(r), & 403, and section 1.427 of the Commission's Rules, 47 C.F.R. § 1.427, that the requirements and rules adopted in the THIRD REPORT AND ORDER and SECOND ORDER ON RECONSIDERATION SHALL BE EFFECTIVE thirty (30) days after publication of the text or summary thereof in the Federal Register, unless a notice is published in the Federal Register stating otherwise. The information collections are contingent upon OMB approval.

IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f)(3), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f)(3), 303(r), & 403, the petitions for reconsideration and clarification ARE GRANTED to the extent indicated herein and ARE DENIED to the extent indicated herein.

IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f)(3), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f)(3), 303(r), & 403, the Motion for Late-Filed Pleading of Southwestern Bell Corporation IS DENIED.

IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 201-205, 208, 222(e), 222(f)(3), 251, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 222(e), 222(f)(3), 303(r), & 403, the Motion to Dismiss Southwestern Bell's Petition for Reconsideration of Second Report and Order, and Opposition to Motion to Accept Late-Filed Pleading filed by MFS Communications Company, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this THIRD REPORT AND ORDER, SECOND ORDER ON RECONSIDERATION, AND NOTICE OF PROPOSED RULEMAKING, including the associated Final Regulatory Flexibility Analyses and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A -- LIST OF PARTIES (CC Docket No. 96-115)

Ad Hoc Telecommunications Users Committee (Ad Hoc)
AGI Publishing (AGI)
AirTouch Communications, Inc. (AirTouch)
Alarm Industry Communications Committee (AICC)
ALLTEL Corporate Services, Inc. (ALLTEL)
American Public Communications Council (APCC)
America's Carrier Telecommunications Association (ACTA)
Ameritech Corp. (Ameritech)
Arch Communications Group, Inc. (Arch)
Association for Local Telecommunications Services (ALTS)
Association of Directory Publishers (ADP)
Association of Telemessaging Services International (ATSI)
AT&T Corp. (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cable & Wireless, Inc. (CWI)
California Cable Television Association (CCTA)
California Public Utilities Commission (California Commission)
Cincinnati Bell Telephone (CBT)
Comcast Cellular Communications, Inc. (Comcast)
Competition Policy Instititute (CPI)
Competitive Telecommunications Association (CompTel)
Compuserve, Inc. (Compuserve)
Computer Professionals for Social Responsibility (CPSR)
Consolidated Communications, Inc. (Consolidated)
Consumer Federation of America (CFA)
Cox Enterprises, Inc. (Cox)
Direct Marketing Associates (DMA)
Directory Dividends
Equifax, Inc. (Equifax)
Excell Agent Services (Excell Agent)
Excel Telecommunications, Inc. (Excel)
Federal Bureau of Investigation (FBI)
Frontier Corporation (Frontier)
Anthony Genovesi, New York State Assemblyman
GTE Service Corporation (GTE)
INFONXX
Information Industry Association (IIA)
Information Technology Association of America (ITAA)
IntelCom Group (ICG)
Intermedia Communications, Inc. (Intermedia)

LDDS WorldCom Inc. (LDDS Worldcom)
MCI Telecommunications Corporation (MCI)
MFS Communications Company, Inc. (MFS)
MobileMedia Communications, Inc. (MobileMedia)
National Association of Regulatory Utility Commissioners (NARUC)
National Telecommunications and Information Association (NTIA)
National Telephone Cooperative Association and Organization for the Promotion and Advancement of Small Telephone Companies (NTCA/OPASTCO)
New York Clearinghouse Association, Securities Industry Association, Bankers Clearinghouse, and Ad Hoc Telecommunications Users Committee (NYCA)
New York State Department of Public Service (New York Commission)
NYNEX Telephone Companies (NYNEX)
Pacific Telesis Group (PacTel)
Paging Network (PageNet)
Pennsylvania Office of Consumer Advocate (PaOCA)
SBC Communications, Inc. (SBC)
Small Business in Telecommunications, Inc. (SBT)
Southern New England Telephone Company (SNET)
Sprint Corporation (Sprint)
Sunshine Pages (Sunshine)
Telecommunications Industry Association (TIA)
Telecommunications Resellers Association (TRA)
Teleport Communications Group, Inc. (TCG)
Public Utility Commission of Texas (Texas Commission)
United States Telephone Association (USTA)
U.S. Small Business Administration, Office of Advocacy (SBA)
U S WEST, Inc. (U S WEST)
Virgin Islands Telephone Corporation (VITELCO)
Washington Utilities and Transportation Commission (Washington Commission)
Wireless Technology Research, L.L.C. (WTR)
Yellow Pages Publishers Association (YPPA)

APPENDIX B -- LIST OF PARTIES (CC Docket No. 96-98)

Petitions for Reconsideration/Clarification, filed by October 7, 1996:

Airtouch Paging and PowerPage (joint comments) (Airtouch)
Ameritech Corp. (Ameritech)
AT&T Corp. (AT&T)
Beehive Telephone Company, Inc. (Beehive)
BellSouth Corporation and BellSouth Telecommunications (BellSouth)
Cox Communications, Inc. (Cox)
Excell Agent Services, Inc. (Excell)
GTE Service Corporation (GTE)
Jan David Jubon/Jubon Engineering, P.C. (Jubon)
MCI Telecommunications Corp. (MCI)
MFS Communications Co., Inc. (MFS)
New York State Dept. of Public Service (NYDPS)
NYNEX Telephone Companies (NYNEX)
Omnipoint Communications, Inc. (Omnipoint)
Paging Network, Inc. (PageNet)
Pennsylvania Public Utility Commission (Pennsylvania Commission)
Rural Telephone Coalition (RTC)
SBC Communications Inc. filed on behalf of its subsidiaries, Southwestern Bell Telephone Company and Southwestern Bell Mobile Systems (SBC)
Teleport Communications Group, Inc. (TCG)
U.S. Telephone Association (USTA)
The Washington Post Company (Washington Post)

Oppositions, filed by November 20, 1996:

Airtouch Communications Inc. (AirTouch)
Ameritech
Arch Communications Group, Inc. (Arch)
AT&T
Bell Atlantic (Bell Atlantic)
Bell Atlantic NYNEX Mobile, Inc. (BANM)
BellSouth
Communications Venture Services, Inc. (CVS)
Cox
GTE
MCI
MFS
National Cable Television Association, Inc. (NCTA)
Public Utilities Commission of Ohio (Ohio Commission)

Pacific Telesis Group (PTG)
Pennsylvania Commission
Personal Communications Industry Association (PCIA)
Roseville Telephone Company (Roseville)
SBC
Southern New England Telephone Company (SNET)
Sprint Corporation (Sprint)
Telco Planning, Inc. (Telco Planning)
Telecommunications Resellers Association (TRA)
TCG
USTA
U S WEST, Inc. (U S WEST).

Replies, filed by December 5, 1996:

Airtouch
Ameritech
AT&T
BellSouth
Cox
GTE
MCI
MFS
NYNEX
Omnipoint
Paging Network
PCIA
SBC
TCG
USTA

APPENDIX C -- REGULATORY FLEXIBILITY ACT

A.Third Report and Order - Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[475] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice* in CC Docket No. 96-115.[476] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA.[477] This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[478]

1.Need for and Objectives of this Third Report and Order and the Rules Adopted Herein

The Commission, in compliance with section 222(e) of the 1996 Act, promulgates rules in this *Third Report and Order* to further Congress' goals of preventing unfair LEC practices in relation to subscriber list information and of encouraging the development of competition in directory publishing. This *Third Report and Order* reflects the statutory mandate that each "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."[479] We conclude that our clarification and particularization of the obligations imposed on carriers by section 222(e) is necessary to achieve Congress' goals in relation to subscriber list information. This approach should reduce confusion and potential controversy with minimal burdens on carriers and directory publishers, many of whom are small businesses.

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475 *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

476 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513, 12533-34, ¶¶ 50-58 (1996) (*Notice*).

477 *Id.* at 12534, ¶ 58.

478 *See* 5 U.S.C. § 604.

479 47 U.S.C. § 222(e).

2.Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

In the IRFA, the Commission generally stated that any rule changes that might occur as a result of this proceeding could impact small business entities. Specifically, in the IRFA, the Commission indicated there were no reporting, recordkeeping, or other compliance requirements. The IRFA solicited comment on alternatives to the proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. In response, we received no comments specifically directed to the IRFA. In making the determinations reflected in this *Third Report and Order*, however, we have considered the impact of our proposed rules on small entities.

3.Description and Estimate of the Number of Small Entities Affected by this Third Report and Order

a.Overview

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by rules.[480] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[481] For the purposes of this *Third Report and Order*, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act,[482] unless the Commission has developed one or more definitions that are appropriate to its activities.[483] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[484] The SBA has defined a small business for standard industrial classification (SIC) categories 4812 (radiotelephone communications) and 4813 (telephone communications, except radiotelephone) to be small entities when they have no more than 1,500 employees.[485] The SBA has also defined a small business for SIC categories 2754 (commercial printing, gravure) and 2759 (commercial printing, not elsewhere classified) to be small entities when they have no more than 500 employees, and 7389 (business services, not elsewhere classified), to be small entities when they have gross annual revenues of $5 million or less. We discuss generally the total number of small telephone companies and small directory publishers falling within these SIC categories. We also discuss the number of small businesses within the subcategories, and attempt to refine our small business estimates to correspond with the categories of telephone companies that are commonly used under our rules, as well as the categories of directory publishers.

We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer

480 5 U.S.C. §§ 603(b)(3), 604(a)(3).

481 5 U.S.C. § 601(6).

482 15 U.S.C. § 632.

483 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

484 15 U.S.C. § 632.

485 13 C.F.R. § 121.201.

employees), and "is not dominant in its field of operation."[486] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[487] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

b.Affected Carriers

The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[488] These firms include a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, wireless providers, operator service providers, pay telephone operators, wireless providers, and resellers. At least some of these 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."[489] For example, a wireless provider that is affiliated with a LEC having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 of these telephone service firms are small entities that may be affected by this *Third Report and Order*. Since 1992, however, many new carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this *Third Report and Order*.

i.Wireline Carriers

The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies that had been operating for at least one

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486 5 U.S.C. § 601(3).

487 Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999) (*SBA May 27, 1999 Letter*). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

488 United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

489 15 U.S.C. § 632(a)(1).

year at the end of 1992.[490] According to the SBA's definition, a wireline telephone company is a small business if it employs no more than 1,500 persons.[491] All but 26 of the 2,321 wireline companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 wireline companies that might qualify as small entities. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 of these wireline companies are small entities that this *Third Report and Order* may affect. Since 1992, however, many wireline carriers have entered the telephone services marketplace. Many of these new entrants may be small entities that are affected by this *Third Report and Order*.

The rules adopted in this *Third Report and Order* apply to only those carriers that gather subscriber list information in their capacity as providers of telephone exchange service. Many carriers engaged in providing wireline telephone services do not provide telephone exchange service. Neither the Commission nor the SBA has developed a definition of small providers of telephone exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of wireline carriers nationwide of which we are aware appears to be the data collected annually in connection with Telecommunications Relay Services (TRS).[492] According to the most recent data, 1,410 companies reported that they were engaged in the provision of local exchange services, 129 carriers reported that they were competitive access providers, and 3 companies reported that they were "other local carriers."[493] In addition, 351 companies reported that they were engaged in the resale of telephone services.[494] Although it seems certain that at least some of these carriers are not independently owned and operated, have more than 1,500 employees, or are dominant, we are unable at this time to estimate with greater precision the number of LECs and competitive access providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,410 providers of local exchange service, fewer than 129 competitive access providers, fewer than 3 other local carriers, and fewer than 351 resellers are small entities or that may be affected by this *Third Report and Order*.

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490 *1992 Census*, *supra* note **Error! Bookmark not defined.**, at Firm Size 1-123.

491 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

492 Federal Communications Commission, *Carrier Locator: Interstate Service Providers*, Figure 1 (Jan. 1999) (*Carrier Locator Report*).

493 *Id.*

494 *Id*.

ii.Wireless Carriers

The SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[495] According to the SBA's definition, a wireless company is a small business if it employs no more than 1,500 persons.[496] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 wireless companies had more than 1,500 employees, there would still be 1,164 wireless companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireless carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,164 of these wireless carriers are small entities that may be affected by this *Third Report and Order*. Since 1992, however, many wireless carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this *Third Report and Order*. This *Third Report and Order* will affect these new entrants as well as other carriers, however, only to the extent that they publish, cause to be published, or accept for publication subscriber list information.

Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to cellular or other mobile service providers. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of wireless carriers nationwide of which we are aware appears to be the TRS data collected annually. According to the most recent data, 804 companies reported that they were engaged in the provision of cellular services and 172 companies reported that they were engaged in the provision of mobile services.[497] Although it seems certain that some of these carriers are not independently owned and operated or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular and other mobile service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 976 small entity cellular and mobile service carriers that may be affected by this *Third Report and Order*.

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495 *1992 Census*, *supra* note **Error! Bookmark not defined.**.

496 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

497 *Carrier Locator Report*, *supra* note 492, at Figure 1. This category includes PCS carriers.

The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined small entity in the auctions for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[498] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenue of not more than $15 million for the preceding three calendar years.[499] The SBA has approved these regulations defining small entity in the context of broadband PCS auctions. No small business within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. Licenses for Blocks C through F, however, have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups or women. Small businesses were defined as those with average gross revenues for the prior three fiscal years of $40 million or less.[500] For purposes of this FRFA, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[501] Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the facts that nearly all radiotelephone companies have fewer than 1,000 or

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498 *Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, ¶¶ 57-60 (1996), 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R § 24.720(b).

499 *Id.*

500 *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS*, GEN Docket No. 90-314, Competitive Bidding Third Memorandum Opinion and Order and Further Notice, 10 FCC Rcd 175, 208 (1994).

501 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

fewer employees[502] and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, we assume, for purposes of the evaluations and conclusions in this FRFA, that all the remaining narrowband PCS licenses will be awarded to small entities.

Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. The SBA has approved this definition of a "small entity" in the context of 800 MHz and 900 MHz SMR.[503] The rules adopted in this *Third Report and Order* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities.

The Commission has held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this *Third Report and Order* includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Thus, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. Moreover, there is no basis on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities.

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502 The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. *1992 Census*, *supra* note **Error! Bookmark not defined.**, at Table 5, Employment Size of Firms: 1992, SIC Code 4812.

503 *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Poo*l, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

The rules adopted in this *Third Report and Order* apply to only those carriers that gather subscriber list information in their capacity as providers of telephone exchange service.[504] Many carriers engaged in providing wireless service do not provide telephone exchange service or, if so, do not gather subscriber list information in their capacity as providers of that service. These carriers, even if classified as small entities, will not be affected by this *Third Report and Order*. As a result, it appears certain that at least some of the wireless carriers described above will not be affected by this *Third Report and Order*.

iii. Directory Publishers

Many directory publisher are members of either of two trade associations, Association of Directory Publishers (ADP) and Yellow Pages Publishers Association (YPPA). ADP states that it had 169 publisher members in fiscal year 1997. ADP also states that 146 of these publishers have gross revenues of less than $5 million and thus are small businesses. ADP further states that virtually all of its remaining 23 members began as small, entrepreneurial businesses that have grown through expansion or consolidation with other small publishers in the directory publishing industry.[505] Consequently, we estimate that 146 ADP members are small entities that may be affected by this *Third Report and Order*.

YPPA states that is presently comprised of 123 publisher members and 76 non-member publishers. YPPA also states that these publishers produce over 95 percent of the directories published in North America.[506] We have no data on which, if any, of these publishers have gross annual revenues of $5 million or less. We assume, for purposes of this FRFA, that all of these 199 publishers are small entities that may be affected by this *Third Report and Order*.

Collectively, ADP and YPPA publishers produce the vast majority of the directories published in the United States. There likely are additional directory publishers, including entities that publish only Internet directories, that are small entities. In addition, the rules adopted in this *Third Report and Order* may enable other entities to enter directory publishing, consistent with Congress' goal encouraging the development of competition in directory publishing. These new entrants may be small entities.

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504 *See Third Report and Order*, *supra*, at part II.D.

505 *ADP June 2, 1998 Letter*, *supra* note 31.

506 This information may be accessed at http://135.145.21.244/YPPA/About_YPPA.htm.

4.Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

In this *Third Report and Order*, we require all telecommunications carriers to provide subscriber list information gathered in their capacity as providers of telephone exchange service to any person upon request for the purpose of publishing directories in any format, including Internet directories. We also define subscriber list information as "the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service) or any combination of such listed names, numbers, addresses, or classifications . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format."[507]

Not only LECs, but all telecommunications carriers, including interexchange carriers, cable operators, and other competitive LECs, must provide subscriber list information gathered in their capacity as providers of telephone exchange service to any person upon request for the purpose of publishing directories.[508] Only the carrier that provides a subscriber with telephone exchange service is obligated to provide a particular telephone subscriber's subscriber list information. A carrier need not provide subscriber list information to requesting directory publishers pursuant to section 222(e) unless the carrier gathered that information in its capacity as a provider of telephone exchange service.[509]

The definition of subscriber list information we adopt includes primary advertising classifications only if they are "assigned at the time of the establishment" of telephone exchange service.[510] A primary advertising classification is assigned at the time of the establishment of telephone exchange service if the carrier that provides telephone exchange service assigns the classification or if a tariff or State requirement obligates the carrier to provide yellow pages listings as part of telephone exchange service to businesses.[511]

Carriers are obligated to provide updated subscriber list information to requesting directory publishers. For subscribers that have multiple telephone numbers, a carrier must

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507 *See* Appendix D, *infra*.

508 *See Third Report and Order*, *supra*, at part II.D.

509 *See id.* at parts II.D & II.F.

510 *See* Appendix D, *infra*.

511 *See Third Report and Order*, *supra*, at part II.E.2.

provide requesting directory publishers with each telephone number that it has published, caused to be published, or accepted for publication in a directory.[512]

Each carrier that gathers subscriber list information in its capacity as a provider of telephone exchange service is obligated to provide that information to requesting directory publishers at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation, its directory publishing affiliate, or other directory publishers.[513]

We also require each carrier that is subject to section 222(e) to make available to requesting directory publishers any written contracts that it has executed for the provision of subscriber list information for directory publishing purposes to itself, an affiliate, or an entity that publishes directories on the carrier's behalf. In addition, to the extent any of a carrier's rates, terms, and conditions for providing subscriber list information for those operations are not set forth in a written contract, the carrier must keep a written record of, and make available to requesting directory publishers, those rates, terms, and conditions. Upon request, the carrier shall also provide these contracts and this information to this Commission. A carrier must not restrict a directory publisher's choice of directory format.[514]

A carrier must provide subscriber list information at the time requested by the directory publisher, provided that the directory publisher has given at least thirty days advance notice and the carrier's internal systems permit the request to be filled within that time frame. We require carriers to unbundle subscriber list information, including updates, on any basis requested by a directory publisher that the carrier's internal systems can accommodate. A carrier, in addition, must not require directory publishers to purchase any product or service other than subscriber list information as a condition of obtaining subscriber list information. In unbundling subscriber list information for directory publishers, however, the carrier shall not disclose customer proprietary network information except as permitted by sections 222(c) and (d) of the Communications Act and our implementing rules. Upon request, a carrier that has received at least thirty days advance notice also must provide subscriber list information on any periodic basis that the carrier's internal systems can accommodate.[515]

If the carrier's systems cannot accommodate the delivery schedule, the level of unbundling, or the format requested by a directory publisher, the carrier must inform the directory publisher of that fact, tell the publisher which delivery schedules, unbundling levels, or

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512 *See id.* at part II.E.5.

513 *See id.* at part II.G.

514 *Id.*

515 *Id.*

formats can be accommodated, and adhere to the schedule, unbundling level, or format the publisher chooses from among those available. The carrier must provide this information within thirty days of when it receives the publisher's request. If this process results in the provision of listings in addition to those the directory publisher requested, the carrier may impose charges for, and the directory publisher may publish, only the requested listings. A carrier, in addition, must not require directory publishers to purchase any product or service other than subscriber list information as a condition of obtaining subscriber list information.[516]

If a carrier finds that it cannot accommodate all of a group of multiple or conflicting requests for subscriber list information within the specified time frames, the carrier shall respond to those requests on a nondiscriminatory basis. The carrier shall inform each affected directory publisher of the conflicting requests within thirty days of when it receives the publisher's request.[517] Within that thirty-day period, the carrier also shall inform each affected directory publisher how it intends to resolve the conflict and the schedule on which it intends to provide subscriber list information to each publisher.

In future disputes regarding the sufficiency of a carrier's internal subscriber list information systems, the burden will be on the carrier to show that those systems cannot accommodate the delivery schedule, unbundling level, and format the directory publisher requests.[518]

We require carriers to provide requesting directory publishers with notice of changes in subscriber list information to the extent those changes reflect customers' decisions to cease having particular telephone numbers listed.[519]

Based on the record before us, we conclude that $0.04 per listing is a presumptively reasonable rate for base file subscriber list information, as defined below, and that $0.06 per listing is a presumptively reasonable rate for other subscriber list information, including updates, that carriers provide directory publishers. We do not preclude a carrier from charging subscriber list information rates different from these presumptively reasonable rates. However, any carrier whose rates exceed either of these rates should be prepared to provide cost data and all other relevant information justifying the higher rate in the event a directory publisher files a complaint regarding that rate pursuant to section 208 of the Communications Act. Absent credible and verifiable data showing that the carrier's costs, including a reasonable profit, exceed

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516 *Id.*

517 *Id.*

518 *Id.*

519 *Id.*

the applicable presumptively reasonable rate, the Bureau or the Commission, depending on the circumstances, shall conclude that the rate is unreasonable and award damages accordingly.[520]

In the event a directory publisher files a complaint regarding a carrier's subscriber list information rates, the carrier must present a cost study providing credible and verifiable cost data to justify each challenged rate. This cost study must clearly and specifically identify and justify:

a. Incremental Costs. Each specific function the carrier performs solely to provide subscriber list information to the complainant; and the incremental costs the carrier incurs in performing each of these specific functions.

b. Common Costs. The cost the carrier incurs in creating and maintaining its subscriber list information database and the methods the carrier uses to allocate that cost among supported services.

c. Overheads. Any other costs the carrier incurs to support its provision of subscriber list information to the complainant; the other activities those costs support; and the methods the carrier uses to allocate those costs.

d. Other Information. The projected average number of listings the carrier provides to directory publishers and, if applicable, to other entities in a year; the rate of return on investment and depreciation costs the carrier uses in calculating its subscriber list information rates; and any other information necessary to make clear the carrier's costing process.

The carrier should provide this information separately for both base file and updated subscriber list information if the complainant challenges both types of rates. We also expect the carrier to describe how its methods for allocating common costs compare to those the carrier uses in other contexts. In the absence of cost data showing that the carrier's costs exceed the presumptively reasonable rates, the Bureau or the Commission, depending on the circumstances, shall find in favor of the plaintiff, and award damages accordingly.[521]

We require that directory publishers be allowed to purchase updated subscriber list information rather than having to repurchase a carrier's entire subscriber list information database each time the publisher wishes to update its own database.[522]

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520 *See id.* at part II.H.

521 *See id.* at part II.H.6.

522 *See id.* at parts II.E.4 & II.J.2.

Carriers may require directory publishers to certify that they will use subscriber list information obtained pursuant to section 222(e) only for directory publishing purposes. The certification may be either oral or written, at the carrier's option.[523]

5.Significant Alternatives and Steps Taken by Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives

After consideration of possible alternatives, we conclude in the *Third Report and Order* that our clarification and particularization of the obligations imposed on carriers by section 222(e) is necessary to achieve Congress' goals in relation to subscriber list information. Our decision to act in this *Third Report and Order*, rather than exclusively through case-by-case adjudication, will reduce confusion and potential controversy with minimal burdens on carriers and directory publishers, many of whom are small entities.

As indicated above, our actions in this *Third Report and Order* will affect both carriers and directory publishers that, for purposes of the FRFA, we assume are classified as small entities. The record in this proceeding reflects the carriers' and directory publishers' conflicting views as to the meaning of the statutory language and, in particular, as to the application of statutory terms, such as "timely" and "reasonable," to specific situations.[524] The record also makes clear that these disputes may have prevented full realization of Congress' goals of preventing unfair carrier practices in relation to subscriber list information and encouraging the development of competition in directory publishing.[525]

In resolving these disputes, we have considered significant alternatives, such as allowing value-based rates for subscriber list information carriers provide directory publishers. In choosing among the various alternatives, we have sought to minimize the adverse economic impact on carriers, including those that are small entities. We recognize, however, that Congress intended section 222(e) to prevent carriers from deriving economic benefits from refusing to provide subscriber list information on a timely and unbundled basis, charging discriminatory or unreasonable rates for that information, or imposing discriminatory or unreasonable terms or conditions in connection with the provision of that information. In implementing that section, we have sought to eliminate those benefits.[526]

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523 *See id.* at part II.J.4.

524 *See*, *e.g.*, *id.* at part II.H.

525 *See id.* at part II.C.

526 *See id.* at part II.H.

As discussed in this *Third Report and Order*, we recognize that the ability of independent directory publishers to improve customer service and to develop new products is dependent on telecommunications carriers' understanding and complying with their obligations under section 222(e).[527] Many independent directory publishers are small, entrepreneurial businesses. Our actions in this *Third Report and Order* will benefit these directory publishers by facilitating their directory publishing operations. Those actions also will eliminate barriers to entering the directory publishing market, and thus benefit small entities as they take that step. In general in this *Third Report and Order*, we have attempted to implement section 222(e) in a manner that keeps burdens on carriers to a minimum while ensuring that directory publishers, including new entrants, are able to compete based on the quality of their directories. We believe that this *Third Report and Order* furthers our commitment to minimizing regulatory burdens on small entities in accordance with statutory requirements.

6. Report to Congress

The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Third Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Third Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

B.Second Order on Reconsideration - Supplemental Final Regulatory Flexibility Analysis

As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in CC Docket No. 96-98.[528] The Commission sought written public comment on the proposals in this *NPRM*, including the IRFA.[529] In addition, pursuant to section 603, a Final Regulatory

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527*See id.* at part II.C.

528 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14265-66, ¶¶ 274-87 (1996) (*Local Competition NPRM*).

529 *Id.* at 14266, ¶ 286.

Flexibility Analysis (FRFA) was incorporated in the *Local Competition Second Report and Order*. That FRFA conformed to the RFA, as amended.[530] A Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) is contained herein. This Supplemental FRFA also conforms to the RFA, as amended.

1. Need for and Objectives of the Second Order on Reconsideration and the Rules Adopted Herein

530 *See* 5 U.S.C. § 604.

The need for and objectives of the rules adopted in this *Second Order on Reconsideration* are the same as those discussed in the FRFA in the *Local Competition Second Report and Order*. In general, these rules implement the Congressional goal of opening local exchange and exchange access markets to competition by eliminating certain operational barriers to competition. The Commission promulgated rules pursuant to section 251(b)(3), (c)(5), and (e)(1) of the Act in the *Local Competition Second Report and Order*. In this *Second Order on Reconsideration*, we grant in part and deny in part several of the petitions filed for reconsideration and/or clarification of the *Local Competition Second Report and Order*.[531] We conclude that a LEC shall permit competing providers of telephone exchange service and telephone toll service access to its directory assistance services, including directory assistance databases.[532] In addition, we clarify that, upon request, a LEC shall provide access to its directory assistance services, including directory assistance databases, and to its directory listings in readily accessible electronic, magnetic tape, or other format specified by the competing provider, if the LEC's internal systems can accommodate that format. In addition, LECs must supply updates to the requesting LEC in the same manner as the original transfer and at the same time that it provides updates to itself.[533]

2.Summary of Significant Issues Raised in Response to the FRFA

In the FRFA, the Commission concluded that rules set forth in the *Local Competition Second Report and Order* would have a significant impact on a number of entities, many that could be small business concerns. The rules we adopted regarding nondiscriminatory access apply to all LECs. These rules also affect interexchange carriers, providers of cellular, broadband PCS, and geographic area 800 MHz and 900 MHz specialized mobile radio services, including licensees who have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR services, either by waiver or under section 90.629 of the Commission's rules.[534] Our rules apply to SMR licensees only if they offer real-time, two-way voice service that is interconnected with the public switched network. Additional business entities affected by the rules include providers of telephone toll service, providers of telephone exchange service, independent operator services providers, independent directory assistance providers, independent directory listing providers, independent directory database managers, and resellers of these services.

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531 *See Second Order on Reconsideration*, *supra* at part III.

532 *See id*.

533 *See id.* at part III.E.

534 47 C.F.R. § 90.629.

We recognized that our rules might have significant economic impacts on a substantial number of small businesses. We discussed the reporting requirements imposed in the *Local Competition Second Report and Order*. Finally, we discussed the steps taken to minimize the impact on small entities, consistent with our stated objectives. We concluded that our actions in the *Local Competition Second Report and Order* would benefit small entities by facilitating their entry into the local exchange and exchange access markets.

In the pleadings considered in this *Second Order on Reconsideration*, we received no argument or comment specifically directed to the FRFA. In making the determinations reflected in this *Second Order on Reconsideration*, however, we have considered the impact of actions on small entities.

3. Description and Estimate of the Number of Small Entities Affected by this Second Order on Reconsideration

We have included small incumbent LECs in this Supplemental RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[535] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[536] We have therefore included small incumbent LECs in this Supplemental RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

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535 5 U.S.C. § 601(3).

536 *SBA May 27, 1999 Letter*, *supra* note 487. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

Total Number of Telephone Companies Affected. The decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The Census Bureau reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[537] These firms include a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator services providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."[538] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by this *Second Order on Reconsideration*. Since 1992, however, many new carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this *Second Order on Reconsideration*.

Wireline Carriers and Service Providers. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[539] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[540] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that fewer than 2,295 of these small entity telephone communications companies other than radiotelephone companies are small entities that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*. Since 1992, however, many new carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this *Second Order on Reconsideration*.

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537 *1992 Census*, *supra* note **Error! Bookmark not defined.**, at Firm Size 1-123.

538 15 U.S.C. § 632(a)(1).

539 *1992 Census*, *supra* note **Error! Bookmark not defined.**, at Firm Size 1-123.

540 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

Local Exchange Carriers. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS Worksheet. According to our most recent data, 1,410 companies reported that they were engaged in the provision of local exchange services.[541] In addition, 351 companies reported that they were engaged in the resale of telephone services and three companies reported that they were "other local carriers."[542] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,410 small incumbent LECs, and there are fewer than 351 resellers as that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 130 companies reported that they were engaged in the provision of interexchange services.[543] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 130 small entity IXCs that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

541 *Carrier Locator Report*, *supra* note 492, at Figure 1.

542 *Id.*

543 *Id*.

Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 129 companies reported that they were engaged in the provision of competitive access services.[544] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 77 small entity CAPs that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Operator Services Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator services providers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 25 companies reported that they were engaged in the provision of operator services.[545] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator services providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 25 small entity operator services providers that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration.*

Pay Telephone Operators. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 271 companies reported that they were engaged in the provision of pay telephone services.[546] Although it seems certain that some of these carriers are not independently owned and operated,

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544 *Id*.

545 *Id*.

546 *Id.*

or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 271 small entity pay telephone operators that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Wireless (Radiotelephone) Carriers. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[547] According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[548] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Cellular Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 792 companies reported that they were engaged in the provision of cellular services.[549] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 792 small entity cellular service carriers that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Mobile Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for radiotelephone (wireless)

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547 *1992 Census*, *supra* note **Error! Bookmark not defined.**, at Firm Size 1-123.

548 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

549 *Carrier Locator Report*, *supra* note 492, at Figure 1.

companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 138 companies reported that they were engaged in the provision of mobile services.[550] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 138 small entity mobile service carriers that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[551] For Block F, an additional classification for "very small businesses" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[552] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.[553] However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz

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550 *Id*.

551 *See Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, ¶¶ 57-60 (1996), 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R § 24.720(b).

552 *Id.* at ¶ 60.

553 FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released January 14, 1997).

SMR has been approved by the SBA.[554] The rules adopted in this *Second Order on Reconsideration* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this Supplemental FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rules adopted in this *Second Order on Reconsideration* include these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this Supplemental FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this *Second Order on Reconsideration*.

Resellers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 260 companies reported that they were engaged in the resale of telephone services.[555] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition.

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554 *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

555 *Carrier Locator Report*, *supra* note 492, at Figure 1.

Consequently, we estimate that there are fewer than 260 small entity resellers that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

Independent Operator Services Providers, Independent Directory Assistance Providers, Independent Directory Listing Providers, and Independent Directory Database Mangers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to these entities. The closest applicable definition under SBA rules is for business services companies. According to SBA's definition, a small business services company is one employing with annual receipts of less than five million dollars.[556] The Census Bureau reports that, there were 46,289 business services companies with annual receipts of 5 million dollars or less in operation at the end of 1992.[557] Consequently, we estimate that there are fewer than 46,289 business services companies that may be affected by the decisions and rules adopted in this *Second Order on Reconsideration*.

4.Summary Analysis of the Projected Reporting, Recordkeeping and Other Compliance Requirements and Steps Taken to Minimize the Significant Economic Impact of this *Second Order on Reconsideration* on Small Entities, Including the Significant Alternatives Considered and Rejected

In this section of the Supplemental FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities as a result of this *Second Order on Reconsideration*. As part of this discussion, we mention some of the types of skills that will be needed to meet the new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities, including the significant alternatives considered and rejected.

Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. In the *Local Competition Second Report and Order*, the Commission required all LECs to allow competing providers of telephone exchange service and telephone toll service access to telephone numbers, operator services, directory assistance, and directory listings at least equal in quality to the access the LEC itself receives, without unreasonable dialing delays. In addition, LECs were to make available to competing providers operator services, directory assistance, and all adjunct features necessary for the use of these services. In the *Second Order on Reconsideration*, we affirm that a providing LEC must brand the operator or directory assistance services of a competing provider (i.e. audibly identify that provider of the operator or directory assistance service) or remove the LEC's brand name from the service provided.[558] We

556 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 7389.

557 *1992 Census*, *supra* note **Error! Bookmark not defined.**, at Table 2D.

558 *See Second Order on Reconsideration*, *supra* at part III.D.

also state that the burden of proof falls on the providing LEC to provide evidence that it lacks the technical capability to comply with the competing provider's request and is not unlawfully restricting access to those services.[559]

Steps Taken to Minimize Significant Economic Impact on Small Entities. In the *Second Order on Reconsideration*, after consideration of possible alternatives, we affirm that a providing LEC must brand the operator or directory assistance services of a competing provider or remove the LEC's brand name from the service to the extent it is technically feasible.[560] This rule aids operator or directory service providers, that may include small business entities, in their efforts to market their services and attract customers. If customers are not able to identify the entity from which they are receiving service, they would probably assume that the providing LEC is the entity from which they are receiving directory or operator assistance. We also clarify that a providing LEC cannot provide access to directory assistance listings to a requesting LEC in a manner inferior to the manner in which it supplies the information to itself.[561] In addition, we conclude that the providing LEC must provide updates to the requesting LEC at the same time and in the same manner that it supplies updates to itself. If incumbent LECs were not obligated to supply directory assistance listings in a readily accessible format, new entrants, some of which may be small business entities, would have limited access to the incumbent LECs' listings and would thus provide their customers with slower directory assistance service, and possibly, inferior data.[562]

5. Report to Congress

The Commission shall send a copy of this Supplemental FRFA, along with this *Second Order on Reconsideration*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Supplemental FRFA will also be published in the Federal Register.

C.Notice of Proposed Rulemaking - Initial Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act (RFA), as amended,[563] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the

559 *See id.* at part III.B.

560 *See id.* at part III.D.

561 *See id.* at part III.A.

562 *See id.* at part III.E.

563 5 U.S.C. § 603.

expected significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (*Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[564] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[565]

1. Need for and Objectives of the Proposed Rules

The Commission is issuing the *Notice of Proposed Rulemaking* to seek comment on issues arising out of developments in, and the convergence of, directory publishing and directory assistance.[566] The resolution of these issues may affect small entities that publish directories, provide directory assistance, or provide listing information to directory publishers or directory assistance providers.

We invite comment on issues relating to the development of Internet directories, including whether section 222(e) entitles directory publishers to obtain subscriber list information for use in those directories. The issues include whether carriers that provide subscriber list information pursuant to section 222(e) may restrict how third parties may access and use Internet directories containing that information. We also invite comment on whether the provision of access to an Internet directory through a web site constitutes the provision of directory assistance within the meaning of section 251(b)(3). We invite the commenters to provide specific proposals on whether and, if so, how we should change our rules implementing sections 222(e) and 251(b)(3) in the event we conclude that Internet directory providers are engaged in both directory publishing under section 222(e) and directory assistance under section 251(b)(3).[567]

The Commission is also issuing the *Notice* to seek comment on whether and how the Commission may require the provision of nondiscriminatory access to such directory assistance providers that do not themselves provide either telephone exchange service or telephone toll service. We further seek comment on whether a non-carrier directory assistance provider is entitled to nondiscriminatory access to directory assistance under section 251(b)(3) when that provider is the agent of a LEC or other carrier that qualifies for the benefits of section 251(b)(3). We further invite comment on whether the phrase "for purposes of publishing

564 *See* 5 U.S.C. § 603(a).

565 *See id.*

566 *See Notice of Proposed Rulemaking, supra* at part IV.

567 *See id.* at part IV.A.

directories in any format" in section 222(e) encompasses the oral publication of listing information by a directory assistance provider. Assuming that we conclude that a directory assistance provider may not obtain subscriber list information pursuant to section 222(e), we invite comment on whether an entity that obtains listing information pursuant to section 251(b)(3) is free to use that information to publish directories in addition to using that information to provide directory assistance. Lastly, we seek comment on whether the Commission should require nondiscriminatory access to directory assistance to non-carrier directory assistance providers pursuant to sections 201 and 202 of the Act.[568]

We invite comment on issues relating to the development of national directory assistance, a service that permits a directory assistance customer to obtain the telephone numbers of subscribers located anywhere in the United States. These issues include whether all LECs providing national directory assistance must provide nondiscriminatory access to nonlocal directory assistance data pursuant to section 251(b)(3). We also seek comment on whether section 251(b)(3) requires LECs to provide nondiscriminatory access to any nonlocal directory assistance data that they use to provide directory assistance to customers within their service areas. We ask whether section 251(b)(3) authorizes us to require a LEC to provide nondiscriminatory access to directory assistance data that it has obtained from third parties and, if so, whether we should exercise that authority. We invite comment on whether section 251(b)(3) requires a LEC, that combines listings for areas traditionally covered by its directory assistance operation and other listings obtained from a third-party into a single database, to provide the entire database, including the non-traditional listings, to requesting carriers. We ask commenters to address whether, if a LEC is not required to provide access to the non-traditional listings under section 251(b)(3), the LEC's directory assistance competitors would encounter increased burdens or extra costs from being able to obtain only traditional listings from the LEC.[569]

2. Legal Basis

The *Notice of Proposed Rulemaking* is adopted pursuant to sections 1, 4(i), 201, 202, 222(e), 222(f)(3), 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201, 202, 222(e), 222(f)(3), 251, & 303(r).

568 *See id.* at part IV.B.

569 *See id.* at part IV.C.

3.Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply

Consistent with our conclusions in the *Third Report and Order*, our subscriber list information rules affect directory publishers as well as carriers that gather subscriber list information in their capacity as providers of telephone exchange services. Therefore, any new or changed rules adopted as a result of the *Notice* might affect small entities, as described in the Final Regulatory Flexibility Analysis (FRFA). For a list of the small entities to which the proposed rules would apply, see part A.3 of this Appendix (Description and Estimate of the Number of Small Entities to Which the Rules Will Apply). We hereby incorporate that description and estimate into this IRFA. These entities include wireline carriers, wireless carriers, and directory publishers. In the FRFA, we discuss the number of small businesses falling within applicable standard industrial classification categories, and attempt to refine further those estimates using available information regarding carriers and directory publishers.

Consistent with our conclusions in the *Third Order on Reconsideration*, our non-discriminatory access rules affect LECs, interexchange carriers, providers of cellular, broadband PCS, and geographic area 800 MHz and 900 MHz specialized mobile radio services, including licensees who have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR services, either by waiver or under section 90.629 of the Commission's rules. Our rules apply to SMR licensees only if they offer real-time, two-way voice service that is interconnected with the public switched network. Additional business entities affected by the rules include providers of telephone toll service, providers of telephone exchange service, independent operator service providers, independent directory assistance providers, independent directory listing providers, independent directory database managers, and resellers of these services.

Therefore, any new or changed rules adopted as a result of the *Notice* might affect small entities, as described in the Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA), set forth in part B of this Appendix. For a list of the small entities to which the proposed rules would apply, see part B.3 of this Appendix (Description and Estimate of the Number of Small Entities to Which the Rules Will Apply). We hereby incorporate that description and estimate into this IRFA. These entities include wireline carriers, wireless carriers, and directory assistance providers. In the Supplemental FRFA, we discuss the number of small businesses falling within applicable standard industrial classification categories, and attempt to refine further those estimates using available information regarding carriers and directory assistance providers.

4.Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

See part V.C.3 of the attached item for an Initial Paperwork Reduction Act analysis. This *Notice* seeks comment on several possible information collections. The *Notice* seeks comment on issues relating to the development of Internet directories, including whether section 222(e) entitles directory publishers to obtain subscriber list information for use in those directories. We also invite comment on whether the provision of access to an Internet directory through a web site constitutes the provision of directory assistance within the meaning of section 251(b)(3). We invite the commenters to provide specific proposals on whether and, if so, how we should change our rules implementing sections 222(e) and 251(b)(3) in the event we conclude that Internet directory providers are engaged in both directory publishing under section 222(e) and directory assistance under section 251(b)(3).[570] The resolution of these issues will potentially affect the rates, terms, and conditions under which carriers provide directory publishers and directory assistance providers with telephone subscriber listing information. As indicated above, these carriers, directory publishers, and directory assistance providers may all be small entities.

The *Notice* also seeks comment on whether the phrase "for purposes of publishing directories in any format" as used in section 222(e) encompasses the oral publication of listing information by a directory assistance provider. The statutory language does not state whether a person is obtaining subscriber list information "for purposes of publishing directories in any format" when it obtains that information to provide directory assistance. Assuming that the Commission concludes that a directory assistance provider may not obtain subscriber list information pursuant to section 222(e), the *Notice* invites comment on whether an entity that obtains listing information pursuant to section 251(b)(3) is free to use that information to publish directories in addition to using that information to provide directory assistance. The *Notice* also invites comment on whether and how the Commission may require the provision of nondiscriminatory access to such directory assistance providers that do not themselves provide either telephone exchange service or telephone toll service. The *Notice* further seeks comment on whether a non-carrier directory assistance provider is entitled to nondiscriminatory access to directory assistance under section 251(b)(3) when that provider is the agent of a LEC or other carrier that qualifies for the benefits of section 251(b)(3). Lastly, the *Notice* seeks comment on whether the Commission should require nondiscriminatory access to directory assistance to non-carrier directory assistance providers pursuant to sections 201 and 202 of the Act.[571] The resolution of these issues will potentially affect the rates, terms, and conditions under which directory assistance providers obtain listing information from carriers. These carriers, directory publishers, and directory assistance providers may all be small entities.

We also invite comment on issues relating to the development of national directory assistance. These issues include whether all LECs providing national directory

570 *See id.* at part IV.A.

571 *See id.* at part IV.B.

assistance must provide nondiscriminatory access to nonlocal directory assistance data pursuant to section 251(b)(3). We also seek comment on whether section 251(b)(3) requires LECs to provide nondiscriminatory access to any nonlocal directory assistance data that they use to provide directory assistance to customers within their service areas. We ask whether section 251(b)(3) authorizes us to require a LEC to provide nondiscriminatory access to directory assistance data that it has obtained from third parties and, if so, whether we should exercise that authority. We invite comment on whether section 251(b)(3) requires a LEC, that combines listings for areas traditionally covered by its directory assistance operation and other listings obtained from a third-party into a single database, to provide the entire database, including the non-traditional listings, to requesting carriers. We ask commenters to address whether, if a LEC is not required to provide access to the non-traditional listings under section 251(b)(3), the LEC's directory assistance competitors would encounter increased burdens or extra costs from being able to obtain only traditional listings from the LEC.[572] The resolution of these issues also will potentially affect small entities that either provide national directory assistance or that seek to provide that or similar services.

5.Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

This *Notice* is designed to develop a complete record on Internet directory publishers' rights to obtain listing information from carriers. The *Notice* also is designed to seek comment on ways to address fully third party rights to obtain telephone exchange service subscribers' names, addresses, and telephone numbers from LECs. In addition, the *Notice* seeks to develop a complete record on issues relating to national directory assistance, a service that permits a directory assistance customer to obtain the telephone numbers of subscribers located anywhere in the United States.

As discussed in the *Third Report and Order*, we recognize that the ability of independent directory publishers to improve customer service and to develop new products is dependent on telecommunications carriers' understanding and complying with their obligations under section 222(e). Many independent directory publishers are small, entrepreneurial businesses. Our actions in the *Third Report and Order* will benefit these directory publishers by facilitating their directory publishing operations. Those actions also will eliminate barriers to entering the directory publishing market, and thus benefit small entities as they take that step. In general in the *Third Report and Order*, we have attempted to implement section 222(e) in a manner that keeps burdens on carriers to a minimum while ensuring that directory publishers, including new entrants, are able to compete based on the quality of their directories.

As discussed in the *Second Order on Reconsideration*, the Commission promulgated rules and policies to require incumbent LECs to provide competitors with access to

572 *See id.* at part IV.C.

the incumbent LECs' networks sufficient to create a competitively neutral playing field for new entrants consistent with section 251(b)(3). Among these rules, the Commission required incumbent LECs to provide nondiscriminatory access to directory assistance and directory listings to ensure that customers of all LECs would have access to accurate directory assistance information.

The issues raised in the *Notice* are outgrowths of the issues addressed in the *Third Report and Order* and *Second Order on Reconsideration*. We believe that this *Notice* seeks ways to further our commitment to minimizing regulatory burdens on small entities in accordance with statutory requirements.

APPENDIX D -- FINAL RULES

Parts 51 and 64 of the Code of Federal Regulations are amended as follows:

PART 51 -- INTERCONNECTION

1. The authority citation for Part 51 continues to read as follows:

Authority: Sections 1, 2, 4, 5, 48 Stat. 1066, as amended; 47 U.S.C. §§ 151, 152, 154, 155 unless otherwise noted. Interpret or apply secs. 3, 4, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. §§ 153, 154, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332 unless otherwise noted.

2. Revise § 51.217(c)(3) to read as follows:

*****

(c) ***

(3) *Directory assistance services and directory listings.*

(i) *Access to directory assistance.* A LEC shall permit competing providers to have access to its directory assistance services, including directory assistance databases, so that any customer of a competing provider can obtain directory listings, except as provided in paragraph (c)(3)(iv) of this section, on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider, or the identity of the provider for the customer whose listing is requested. A LEC must supply access to directory assistance in the manner specified by the competing provider, including transfer of the LECs' directory assistance databases in readily accessible magnetic tape, electronic or other convenient format, as provided in paragraph (c)(3)(iii) of this section. Updates to the directory assistance database shall be made in the same format as the initial transfer (unless the requesting LEC requests otherwise), and shall be performed in a timely manner, taking no longer than those made to the providing LEC's own database. A LEC shall accept the listings of those customers served by competing providers for inclusion in its directory assistance/operator services databases.

(ii) *Access to directory listings.* A LEC that compiles directory listings shall share directory listings with competing providers in the manner specified by the competing provider, including readily accessible tape or electronic formats, as provided in paragraph (c)(3)(iii) of this section. Such data shall be provided in a timely fashion.

(iii) *Format.* A LEC shall provide access to its directory assistance services, including directory assistance databases, and to its directory listings in any format the competing provider specifies, if the LEC's internal systems can accommodate that format.

(a) If a LEC's internal systems do not permit it provide directory assistance or directory listings in the format the specified by the competing provider, the LEC shall:

(1) Within thirty days of receiving the request, inform the competing provider that the requested format cannot be accommodated and tell the requesting provider which formats can be accommodated; and

(2) Provide the requested directory assistance or directory listings in the format the competing provider chooses from among the available formats.

(iv) *Unlisted numbers.* A LEC shall not provide access to unlisted telephone numbers, or other information that its customer has asked the LEC not to make available, with the exception of customer name and address. The LEC shall ensure that access is permitted to the same directory information, including customer name and address, that is available to its own directory assistance customers.

(v) *Adjuncts to services.* Operator services and directory assistance services must be made available to competing providers in their entirety, including access to any adjunct features (*e.g.*, rating tables or customer information databases) necessary to allow competing providers full use of these services.

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: 47 U.S.C. 1-5, 7, 201-05, 222.

2. The table of contents for Part 64 is revised to read as follows:

* * * * *

Subpart X -- Subscriber List Information

64.2329Format.
64.2333Burden of Proof
64.2337Directory publishing purposes.
64.2341Record keeping.
64.2345 Primary advertising classification.

3.Subpart X is added to read as follows:

Subpart X -- Subscriber List Information

§ 64.2301Basis and purpose.

(a) *Basis.* These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose*. The purpose of these rules is to implement section 222(e) of the Communications Act of 1934, as amended, 47 U.S.C. 222. Section 222(e) requires that "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."

64.2305Definitions.

Terms used in this subpart have the following meanings:

(a) *Base file subscriber list information.* A directory publisher requests base file subscriber list information when the publisher requests, as of a given date, all of a carrier's subscriber list information that the publisher wishes to include in one or more directories.

(b) *Business subscriber.* Business subscriber refers to a subscriber to telephone exchange service for businesses.

(c) *Primary advertising classification.* A primary advertising classification is the principal business heading under which a subscriber to telephone exchange service for businesses chooses to be listed in the yellow pages, if the carrier either assigns that heading or is obligated to provide yellow pages listings as part of telephone exchange service to businesses. In other circumstances, a primary advertising classification is the classification of a subscriber to telephone exchange service as a business subscriber.

(d) *Residential subscriber.* Residential subscriber refers to a subscriber to telephone exchange service that is not a business subscriber.

(e) *Subscriber list information.* Subscriber list information is any information (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

(f) *Telecommunications carrier*. A telecommunications carrier is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226(a)(2)).

(g) *Telephone exchange service.* Telephone exchange service means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(h) *Updated subscriber list information.* A directory publisher requests updated subscriber list information when the publisher requests changes to all or any part of a carrier's subscriber list information occurring between specified dates.

§ 64.2309Provision of subscriber list information.

(a) 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.

(b) The obligation under paragraph (a) to provide a particular telephone subscriber's subscriber list information extends only to the carrier that provides that subscriber with telephone exchange service.

§ 64.2313Timely basis.

(a) For purposes of § 64.2309, a telecommunications carrier provides subscriber list information on a timely basis only if the carrier provides the requested information to the requesting directory publisher either:

(1) At the time at which, or according to the schedule under which, the directory publisher requests that the subscriber list information be provided;

(2) When the carrier does not receive at least thirty days advance notice of the time the directory publisher requests that subscriber list information be provided, on the first business day that is at least thirty days from date the carrier receives that request; or

(3) At a time determined in accordance with paragraph (b).

(b) If a carrier's internal systems do not permit the carrier to provide subscriber list information within either of the time frames specified in subparagraph (a)(1), the carrier shall:

(1) Within thirty days of receiving the publisher's request, inform the directory publisher that the requested schedule cannot be accommodated and tell the directory publisher which schedules can be accommodated; and

(2) Adhere to the schedule the directory publisher chooses from among the available schedules.

§ 64.2317Unbundled basis.

(a) A directory publisher may request that a carrier unbundle subscriber list information on any basis for the purpose of publishing one or more directories.

(b) For purposes of § 64.2309, a telecommunications carrier provides subscriber list information on an unbundled basis only if the carrier provides:

(1) The listings the directory publisher requests and no other listings, products, or services; or

(2) Subscriber list information on a basis determined in accordance with paragraph (c).

(c) If the carrier's internal systems do not permit it unbundle subscriber list information on the basis a directory publisher requests, the carrier must:

(1) Within thirty days of receiving the publisher's request, inform the directory publisher that it cannot unbundle subscriber list information on the requested basis and tell the directory publisher the bases on which the carrier can unbundle subscriber list information; and

(2) In accordance with paragraph (d), provide subscriber list information to the directory publisher unbundled on the basis the directory publisher chooses from among the available bases.

(d) If a carrier provides a directory publisher listings in addition to those the directory publisher requests, the carrier may impose charges for, and the directory publisher may publish, only the requested listings.

(e) A carrier must not require directory publishers to purchase any product or service other than subscriber list information as a condition of obtaining subscriber list information.

§ 64.2321Nondiscriminatory rates, terms, and conditions.

For purposes of § 64.2309, a telecommunications carrier provides subscriber list information under nondiscriminatory rates, terms, and conditions only if the carrier provides subscriber list information gathered in its capacity as a provider of telephone exchange service to a requesting directory publisher at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation, its directory publishing affiliate, or other directory publishers.

§ 64.2325Reasonable rates, terms, and conditions.

(a) For purposes of § 64.2309, a telecommunications carrier will be presumed to provide subscriber list information under reasonable rates if its rates are no more than $0.04 a listing for base file subscriber list information and no more than $0.06 a listing for updated subscriber list information.

(b) For purposes of § 64.2309, a telecommunications carrier provides subscriber list information under reasonable terms and conditions only if the carrier does not restrict a directory publisher's choice of directory format.

§ 64.2329Format.

(a) A carrier shall provide subscriber list information obtained in its capacity as a provider of telephone exchange service to a requesting directory publisher in the format the publisher specifies, if the carrier's internal systems can accommodate that format.

(b) If a carrier's internal systems do not permit the carrier to provide subscriber list information in the format the directory publisher specifies, the carrier shall:

(1) Within thirty days of receiving the publisher's request, inform the directory publisher that the requested format cannot be accommodated and tell the directory publisher which formats can be accommodated; and

(2) Provide the requested subscriber list information in the format the directory publisher chooses from among the available formats.

§ 64.2333Burden of Proof.

(a) In any future proceeding arising under section 222(e) of the Communications Act or § 64.2309, the burden of proof will be on the carrier to the extent it claims its internal subscriber

list information systems cannot accommodate the delivery time, delivery schedule, unbundling level, or format requested by a directory publisher.

(b) In any future proceeding arising under section 222(e) of the Communications Act or § 64.2309, the burden of proof will be on the carrier to the extent it seeks a rate exceeding $0.04 per listing for base file subscriber list information or $0.06 per listing for updated subscriber list information.

§ 64.2337Directory publishing purposes.

(a) Except to the extent the carrier and directory publisher otherwise agree, a directory publisher shall use subscriber list information obtained pursuant to section 222(e) of the Communications Act or § 64.2309 only for the purpose of publishing directories.

(b) A directory publisher uses subscriber list information "for the purpose of publishing directories" if the publisher includes that information in a directory, or uses that information to determine what information should be included in a directory, solicit advertisers for a directory, or deliver directories.

(c) A telecommunications carrier may require any person requesting subscriber list information pursuant to section 222(e) of the Communications Act or § 64.2309 to certify that the publisher will use the information only for purposes of publishing a directory.

(d) A carrier must provide subscriber list information to a requesting directory publisher even if the carrier believes that the directory publisher will use that information for purposes other than or in addition to directory publishing.

§ 64.2341Record keeping.

(a) A telecommunications carrier must retain, for at least one year after its expiration, each written contract that it has executed for the provision of subscriber list information for directory publishing purposes to itself, an affiliate, or an entity that publishes directories on the carrier's behalf.

(b) A telecommunications carrier must maintain, for at least one year after the carrier provides subscriber list information for directory publishing purposes to itself, an affiliate, or an entity that publishes directories on the carrier's behalf, records of any of its rates, terms, and conditions for providing that subscriber list information which are not set forth in a written contract.

(c) A carrier shall make the contracts and records described in paragraphs (a) and (b) available, upon request, to the Commission and to any directory publisher that requests those contracts and records for the purpose of publishing a directory.

§ 64.2345 Primary advertising classification.

A primary advertising classification is assigned at the time of the establishment of telephone exchange service if the carrier that provides telephone exchange service assigns the classification or if a tariff or State requirement obligates the carrier to provide yellow pages listings as part of telephone exchange service to businesses.

Separate Statement
of
Commissioner Susan Ness

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Docket Nos. 96-115, 96-98).

Today the Commission has adopted rules implementing section 222(e) of the Telecommunications Act pertaining to subscriber list information. Regrettably, it has taken the Commission over three years to complete this rulemaking proceeding.

I write separately because, unlike the majority, I would have decided the issue regarding Internet databases that contain subscriber list information. Section 222(e) entitles directory publishers to obtain subscriber list information "for the purpose of publishing directories in any format." The majority seeks further comment on whether the phrase "directories in any format" encompasses Internet databases. To me, the statutory language is clear on this point – "in any format" necessarily includes directories published in an electronic format.[573] Indeed, at least one Bell company markets its Internet database containing subscriber list information as "The Real White Pages."[574] We are, after all, living in an electronic age. The Internet has increasingly become an important part of our everyday lives. By not deciding this issue -- particularly in light of the length of time that it has taken the Commission to complete this proceeding -- we postpone the day that competitive directory publishers (and, thus, Internet-savvy consumers) will reap the pro-competitive benefits envisioned by Congress.

573 *See, e.g.,* Reno v. ACLU, 521 U.S. 844, 117 S.Ct. 2329, 2335 (1997) (stating that "[a]ny person or organization with a computer connected to the Internet can 'publish' information").

574 *See* http://yp.bellsouth.com (stating that "[t]he Real White Pages was designed to provide greater efficiency through quick electronic directory searches and to eliminate the hassle associated with telephone directory distribution").

SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH
DISSENTING IN PART

Re:In the Matters of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended (CC Docket Nos. 96-115; 96-98; 99-**).

I support aspects of this Order, but write separately to express several reservations. I strenuously object to the majority's establishment of a presumptively reasonable rate for updated subscriber listing information in the absence of credible evidence supporting that decision. I also disagree with the majority's definition of "nondiscriminatory" and am troubled by the resulting imposition of requirements that will result in the micromanagement of the provision of operator services and directory assistance. Finally, I object to the initiation of a rulemaking proceeding that I find to be unnecessary.

I. Presumptive Rate for Updates

I dissent from the majority's conclusion that $0.06 per listing for "updated" subscriber listing information is a presumptively reasonable rate. *Supra.* at paras. 99-103. First, I cannot accept the notion that there is a single price that can be presumed reasonable when the cost of updated listings will vary according to the nature of the particular request. Regulators can attempt to regulate price, quantity, or quality. We cannot expect to regulate any two of these factors without affecting the third, and it is virtually impossible to regulate all three. In today's Order, the majority permits the requesting entity to choose the quantity and the quality of the listings, while the government sets the price. *See supra.* Part II.G. This leaves no variable of control to the supplier. There is simply no way to predict the cost of *different* types of requested subscriber listing information, in *different* quantities, and in *different* formats. This approach is analogous to requiring a grocer to charge $1 for every item in the store, without regard to the quantity or quality of any particular product.

The majority concedes that "the costs a carrier incurs in responding to requests for subscriber list information may vary, depending on the delivery schedules and levels of unbundling requested, among other factors." *See supra.* at par. 67. The majority nevertheless presumes that $0.06 will be a reasonable rate unless the carrier proves otherwise. Given their recognition that costs will vary depending on numerous factors, the establishment of a presumptive rate for updated listings seems rather arbitrary.

Moreover, assuming it was possible to demonstrate a particular cost for updated listings, there is no evidence on the record to support the majority's presumptive rate. The majority does not rest its conclusion on any factual basis; rather, as the Order concedes, it is "based on the *assumptions* that (1) a carrier's allocations of common costs and overheads should not vary

significantly according to whether a directory publisher requests updated, rather than base file, subscriber list information; and (2) a carrier's incremental costs of providing subscriber list information should not significantly vary with the type of subscriber list information requested." *Supra.* at par. 100. (emphasis added). The majority provides no basis in fact for these assumptions, and I cannot fully agree with them. To the contrary, I would assume that, given the variety of requests permitted by today's Order, incremental costs can vary widely, particularly for smaller carriers, based on the nature of the request. Even if it were true that a large carrier with dedicated personnel to handle requests pursuant to section 222 may face small incremental costs in providing updated listings, it is not at all apparent that smaller carriers will face similar cost structures.

Finally, the statute does not require us to establish a presumptively reasonable rate for updates. By setting a $0.04 presumptively reasonable rate for the base file, the Commission facilitates the purchase of these listings by those entities interested in obtaining them. There is simply no need to establish a "one-size-fits-all" approach to setting a rate for updates, particularly in the absence of any evidence to support this rate.

II. Petitions for Reconsideration

I am also troubled by the Order's treatment of the petitions for reconsideration of the Local Competition Order, Second Report and Order. First, I do not agree with the Commission's interpretation of "nondiscriminatory." Moreover, I am concerned that, in applying that standard to operator services and directory assistance, today's Order results in micromanagement of these services and places too high of a burden on carriers, big and small, new entrants and incumbents, that operate their own operator services and directory assistance platform. It is not clear that Congress intended, through section 251(b), to establish an elaborate set of requirements for carriers that develop, or have developed, these capabilities.

Today's order affirms the Commission's definition of "nondiscriminatory access" for purposes of section 251(b). *Supra.* at par. 128. Section 51.217 of the Commission's rules defines "nondiscriminatory access" as access "that is at least equal to the access that the providing local exchange carrier itself receives" and includes "[t]he ability of a competing provider to obtain access that is at least equal in quality to that of the providing LEC."

I would interpret "nondiscriminatory" differently. To me, this term is not meant to address discrimination as between the incumbent LEC and requesting telecommunications carriers; rather it is meant to prohibit discrimination by the incumbent LEC as among requesting carriers. That is, nondiscriminatory access does not mean that the incumbent LEC must treat all requesting telecommunications carriers as it treats itself, but that the incumbent LEC must treat a particular requesting telecommunications carrier just as it treats all other requesting telecommunications carriers.

This interpretation is more consistent with the principle of statutory construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."575 In the *next subsection* of section 251, Congress explicitly required incumbent LECs to provide interconnection that is not only "nondiscriminatory," but also "that is at least equal in quality to that provided by the LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier provided interconnection."576 If "nondiscriminatory" already included the concept of "equal in quality," this additional language would be mere surplusage, and statutes should be construed to avoid such a result. Congress could have imposed the "equal in quality" standard in section 251(b)(3), but did not do so.

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575 *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).
576 Section 251(c)(2).

Application of this nondiscriminatory standard produces troubling results in the majority's related interpretation of the requirements imposed by section 251(b)(3). I am concerned, for example, that the elaborate rebranding requirements perpetuated and expanded in today's Order go beyond what is necessary to implement this section. Insomuch as these rebranding requirements arise out of the nondiscriminatory standard, one wonders whether the majority would be prepared to impose a requirement that carriers rebrand their trucks and staff uniforms as complete implementation of this standard would seem to require. Moreover, I am concerned that the majority overlooks the fact that its elaborate requirements apply to *all* local exchange carriers, even those that are attempting to develop a platform for operator services and directory assistance. I fear that the obligations placed on such carriers in today's Order may discourage new investment in these platforms. I would prefer to let competitive forces dictate the how carriers provide operator services and directory assistance. Indeed, it appears that competition in this market is developing successfully.

III. "Publishing Directories in Any Format"

Finally, I find it unnecessary to initiate a Notice of Proposed Rulemaking regarding the availability of subscriber list information to requesting parties that intend to publish directories either electronically or orally. The statute requires that carriers make this information available "to any person upon request for the purpose of publishing directories in any format." Webster's Third New International dictionary is instructive. It defines "publish" to mean "to declare publicly: make generally known: disclose, circulate." Thus an operator orally "making known" subscriber list information to a requesting party over the telephone or an entity that "discloses" this information on an Internet site would clearly be engaging in activity that the dictionary would call "publishing."577 In an age where commentators discuss the potential for a "paperless society," I cannot believe that a reference to publishing "in any format" should be limited to the printing of subscriber list information on paper.

577 *See Gertz v. Welch*, 418 U.S.323, 332 (1974) (deciding principal issue of whether "a newspaper or broadcaster that 'publishes' defamatory falsehoods about an individual" may claim a constitutional privilege against liability); *see also Reno v. ACLU*, 521 U.S. 844, 853 (1997) ("[a]ny person or organization with a computer connected to the Internet can 'publish' information").