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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

JUN 11 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of the )  
Telecommunications Act of 1996: )  
 )  
Telecommunications Carriers' Use )  
of Customer Proprietary Network )  
Information and Other )  
Customer Information )

CC Docket No. 96-115

COMMENTS OF THE  
ASSOCIATION OF DIRECTORY PUBLISHERS

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11 June 1996

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## SUMMARY

### SUBSCRIBER LIST INFORMATION:

- IS THE FOUNDATION OF YELLOW PAGES DIRECTORY PUBLISHING

### CONGRESS ENACTED SECTION 222(e) TO:

- PREVENT LECs FROM UTILIZING EXCLUSIONARY TACTICS TO MAINTAIN CONTROL OVER THE YELLOW PAGES DIRECTORY MARKET
- ALLOW THE PUBLIC TO REAP THE REWARDS OF COMPETITION IN THE YELLOW PAGES DIRECTORY MARKET

### SECTION 222(E) :

- WAS EFFECTIVE UPON ENACTMENT
- PREEMPTS INCONSISTENT STATE REGULATIONS
- REQUIRES COMMISSION GUIDANCE TO EFFECTUATE CONGRESS' GOALS

### TO IMPLEMENT SECTION 222(e), THE COMMISSION MUST:

- BROADLY DEFINE "TELECOMMUNICATIONS CARRIER"
- MANDATE THAT PRIMARY BUSINESS CLASSIFICATIONS BE SUPPLIED AS PART OF SUBSCRIBER LIST INFORMATION
- ALLOW DIRECTORY PUBLISHERS FLEXIBILITY IN THEIR CHOICE OF FORMATS
- REQUIRE THAT SUBSCRIBER LIST INFORMATION BE PROVIDED AT INCREMENTAL COST
- UNBUNDLE SUBSCRIBER LIST INFORMATION ON A GEOGRAPHIC, CLASS OF SERVICE (BUSINESS/RESIDENTIAL), AND TEMPORAL BASIS
- DIRECT THAT SUBSCRIBER LIST INFORMATION BE PROVIDED ON A TIMELY AND UP-TO-DATE BASIS

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**COMMENTS OF THE ASSOCIATION OF DIRECTORY PUBLISHERS**

The Association of Directory Publishers ("ADP"), by its attorneys, hereby submits its Comments in the above-captioned proceeding.<sup>1</sup>

**I. BACKGROUND.**

ADP is a ninety-eight year-old international trade association representing the interests of "independent" telephone directory publishers, that is, publishers of white and yellow pages telephone directories that compete with the Regional Bell Operating Companies and other local exchange carriers ("LECs") in the sale of telephone directory advertising (primarily yellow pages classified advertising). ADP's more than 125 member

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<sup>1</sup> Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, *Notice of Proposed Rulemaking*, FCC 96-221 (released May 17, 1996) ("NPRM")

publishers produce telephone directories serving communities throughout the United States.

**A. Subscriber List Information Is The Foundation Of Classified Telephone Directory Publishing.**

Classified telephone directory advertising has grown to a more than \$10 billion per year industry generally because it is one of the primary means by which local businesses -- restaurants, painters, doctors, etc. -- reach their customers. The core of this business is subscriber list information ("list information"): the name, address, telephone number, and business heading for each subscriber.<sup>2</sup> This information is essential to selling advertising into, publishing, and distributing a directory. Without accurate (no errors), timely (new businesses included and closed businesses excluded) and complete (no omissions) listings, a directory is of little value to end users.<sup>3</sup>

As of 1995, LECs controlled 93.6 percent of the yellow pages directory market.<sup>4</sup> This market has "long been an enormously

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<sup>2</sup> See 47 U.S.C. § 222(f) (defining listings as including a subscriber's primary advertising classifications -- plumbing, moving, etc.).

<sup>3</sup> See Affidavit of A.C. Parsons, then-President and CEO of Southwestern Bell Yellow Pages (Dec. 18, 1987) ("Parsons Affidavit") (Exhibit 1); Affidavit of T.H. Avery, then-Vice President and General Manager of Southwestern Bell Media, Inc. (June 16, 1986) ("Avery Affidavit") (Exhibit 2).

<sup>4</sup> See "Yellow Pages Revenues Expected To Surpass \$10 Billion in 1996," Business Wire (April 2, 1996).

profitable business" for the LECs.<sup>5</sup> The large profits and overwhelming market share are attributable, in large measure, to the fact that LECs, as the sole providers of telephone service in their areas, have monopoly control over subscriber list information.<sup>6</sup> As noted by the Supreme Court, LECs obtain subscriber list information "quite easily" because a person or business must supply their name and address in order to obtain telephone service.<sup>7</sup> For each business customer, LECs simply place the subscriber list information under the appropriate yellow pages heading, such as "restaurants", "painters", "stereo supplies", etc.<sup>8</sup> To ensure freshness, LECs place subscriber list information into a computer database where it is "constantly revised" and "compiled"<sup>9</sup> as for example, when a new business or family moves into an area or when service is disconnected.

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<sup>5</sup> See Christopher C. Pflaum, Ph.D., Competitive Issues Relating To Subscriber Listing Information: A Brief Empirical Economic Overview at 3 (June 1996) ("Pflaum"), appended to these Comments.

<sup>6</sup> Id. at 3 (noting LECs' large profit margins).

<sup>7</sup> See Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 343 (1991) (striking down copyright protection for listings contained in telephone white pages).

<sup>8</sup> Most yellow pages adhere to a standardized heading format proposed by the Yellow Pages Publishers Association (formerly known as the National Yellow Pages Service Association). See Michael F. Finn, *"Just the Facts, Ma'am": The Effect of the Supreme Court's Decision in Feist v. Rural Telephone Service Co. on the Colorization of Black and White Films*, 33 Santa Clara L. Rev. 859, 878 (1993).

<sup>9</sup> See Hutchison Tel. Co. v. Fronteer Directory Co., 770 F.2d 128 (8th Cir. 1985). U S WEST has indicated that "up-to-

**B. Local Exchange Carriers Have Traditionally Utilized Various Exclusionary Tactics To Maintain Their Domination Of The Yellow Pages Directory Market.**

As noted by Dr. Pflaum, independent directory publishers (those not affiliated with a LEC) have encountered significant resistance when attempting to obtain subscriber list information from LECs.<sup>10</sup> Many LECs historically refused to sell or otherwise license subscriber list information to competing directory publishers.<sup>11</sup> Of those LECs offering subscriber list information, many imposed pricing and other terms that were so excessive as to constitute a virtual refusal to deal. In *Great Western*, a case upholding a jury verdict that Southwestern Bell violated the antitrust laws in its quest to eliminate a competing independent directory publisher, the Fifth Circuit noted that Southwestern Bell "tripled its subscriber list information prices twice within four years until they reached \$0.50 cents per

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date basic listing information is easily and relatively inexpensively gathered" and is "compile[ed] and continuously update[d]." See Mot. of U S WEST For Permission To File Brief Amicus Curiae in BellSouth Advertising & Pub.. v. Donnelley Information Pub., Case No. 85-3233-CIV-SCOTT (March 2, 1987) at 5 ("U S WEST Amicus Mot.") (Exhibit 3).

<sup>10</sup> See Pflaum at 3-5.

<sup>11</sup> Rochester Telephone and Wilson Telephone are two examples or independent LECs which refused to provide listings to directory publishers in competition with their directory affiliates. See, e.g., Letter from Paul Grauer, President of Wilson Telephone Co. to Ridenour and Knobbe (March 5, 1986) ("we still have no intention of selling our directory listings to anyone") (Exhibit 4).

listing while simultaneously lowering the price it charged advertisers by 40 percent."<sup>12</sup> The outrageousness of the \$0.50 per listing price was made plain when Southwestern Bell admitted that its costs for providing subscriber list information were less than one cent per listing<sup>13</sup> and that the price increases were "expense driven attacks" on its competitor.

Other exclusionary practices have included a refusal to provide updated subscriber list information (e.g., change of addresses, new businesses, etc.).<sup>14</sup> Southwestern Bell and other LECs have demanded that, as a condition of obtaining any subscriber list information, independent directory publishers buy subscriber list information for a far greater area than actually needed, rather than just for the regions to be covered in the competing directory. As noted by the Fifth Circuit, such actions "substantially increase the fixed costs" for small independents.<sup>15</sup>

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<sup>12</sup> See Great Western Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1388 (5th Cir. 1995), vacated and remanded in part on other grounds, 74 F.3d 613 (5th Cir. 1996).

<sup>13</sup> See Southwestern Bell White Pages Plans, Plaintiff's Exhibit T108 in Great Western Directories (Exhibit 5).

<sup>14</sup> GTE, which subsequent to the enactment of Section 222(e) offered to provide updates, has yet to specify when such updates will be available or on what terms. Southwestern Bell offers updates but only if independent directory publishers buy both residential and business updates, pay \$1.00 per update, and contract to take updates for two years at a time. See Great Western, 63 F.3d at 1384, 1387.

<sup>15</sup> See Great Western, 63 F.3d at 1387. A more complete discussion of the harms stemming from the unfair raising of

**C. Congress Passed Section 222(e) To Promote Competition In The Directory Publishing Market By Preventing LECs And Other Telecommunications Carriers From Behaving Anticompetitively.**

To prevent LECs from continuing their anticompetitive behavior towards their directory publishing competitors, Congress, in the Telecommunications Act of 1996, added Section 222(e) to the Communications Act. Section 222(e) provides:

Subscriber List Information. . . . 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.

According to Representative Paxon, Section 222(e) "is a simple requirement to protect an area of telecommunications where there has been competition for more than a decade, but where service providers have used pricing and other terms to try to limit that competition. Now we are prohibiting such anticompetitive behavior."<sup>16</sup> Thus, Section 222(e) "guarantees independent publishers access to subscriber list information at

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rivals' costs (increased prices to consumers, decreased competition, etc.) may be found in Steven C. Salop and David T. Scheffman, Raising Rivals' Costs, 73 Am. Econ. Rev. 267 (1983).

<sup>16</sup> See Floor statement of Representative Bill Paxon, 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996) (discussing reasons for passing Section 222(e)) (Exhibit 6).

reasonable and nondiscriminatory rates, terms and conditions from any provider of local telephone service."<sup>17</sup>

**II. THE COMMISSION HAS CORRECTLY DETERMINED THAT SECTION 222 TOOK EFFECT UPON ENACTMENT AND THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE FCC SPECIFYING PARTIES' RIGHTS AND RESPONSIBILITIES UNDER THE STATUTE.**

**A. Section 222(e) Took Effect Upon Enactment.**

ADP agrees with the NPRM's sound conclusion that Section 222(e) "became effective immediately upon enactment."<sup>18</sup> It is black letter law that a statute is effective upon the date of its enactment unless an express provision states otherwise.<sup>19</sup> Thus, as of enactment, directory publishers possessed a statutory entitlement to subscriber list information "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions."<sup>20</sup>

**B. Commission Guidance Is Required For Section 222(e) To Be Fully Effective.**

The Commission should adopt the NPRM's tentative conclusion that "regulations that interpret and specify in more detail a

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<sup>17</sup> See Conf. Rep. No. 230, 104th Cong., 2d Sess. 205.

<sup>18</sup> NPRM at ¶ 12; see also NPRM at ¶ 2 ("requirements of Section 222 were immediately effective").

<sup>19</sup> See, e.g., United States v. Bafia, 949 F.2d 1465, 1480 (7th Cir. 1991), cert. denied, 504 U.S. 928 (1992); United States v. King, 948 F.2d 1227, 1228 (11th Cir. 1991), cert. denied, 112 S. Ct. 1701 (1992).

<sup>20</sup> This new statutory right supplements directory publishers' long-standing rights under the antitrust laws. Supplementation of those rights was necessary because rights under the antitrust laws, while valuable, are notoriously difficult and expensive to vindicate.

telecommunications carrier's obligations under [Section 222(e) - (f)] would be in the public interest."<sup>21</sup> A major reason in support of that conclusion is the fact that subscriber list information is an essential facility controlled by entities (LECs) with monopoly power. Under the antitrust laws, a facility is "essential" if a potential competitor could not feasibly duplicate the facility and if refusal of access precludes entry into the market.<sup>22</sup> Independent directory publishers have no practical alternative means of access to subscriber listing information<sup>23</sup> and cannot economically gather such large amounts of information from the subscribers themselves.<sup>24</sup> Indeed, both Southwestern Bell<sup>25</sup> and U S WEST<sup>26</sup> have characterized subscriber

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<sup>21</sup> NPRM at ¶ 2.

<sup>22</sup> See, e.g., City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978) (holder of essential facility has the power to prohibit entry to the market).

<sup>23</sup> The Supreme Court has noted that an independent directory publisher "is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information." See Feist, 499 U.S. at 342.

<sup>24</sup> See Pflaum at 8 (subscriber list information is a "quintessential 'essential facility'").

<sup>25</sup> In 1987, the then-President and CEO of Southwestern Bell Yellow Pages, Inc. stated that "it is not possible for a directory publisher to truly compete with a telephone company affiliated directory publisher without access on basically equal terms to [listings which] is an essential facility." See Parsons Affidavit (Exhibit 1). That statement echoed an earlier affidavit by the then-Vice President and General Manager of Southwestern Bell Media, Inc. See Avery Affidavit (Exhibit 2).

list information as an essential facility and admitted that without being supplied subscriber list information from LECs, directory publishers cannot enter the market and compete. In such circumstances, those controlling the essential facility must make it available to competitors on just and reasonable terms.<sup>27</sup>

Listing information is a literal byproduct of the provision of regulated telephone service, and is necessary to the provision of such service. The same considerations that led to the need to regulate the rates and terms for telephone service require regulation of the rates and terms for provision of subscriber list information. And, whereas there is an apparent trend toward competitive provision of local telephone service, there is no corresponding prospect for the evolution of multiple, competitive sources for subscriber listing information.

With respect to the provision of subscriber list information, regulatory forbearance would ill-serve the public

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<sup>26</sup> U S WEST has stated that listings are an essential facility or bottleneck and that it "would be virtually impossible" for a competing directory publisher to issue a directory without up-to-date listings supplied by LECs. See U S WEST Amicus Mot. (Exhibit 3).

<sup>27</sup> See A.D. Neale, *The Antitrust Laws of the United States of America: A Study of Competition Enforced By Law* 67 (2d ed. 1970) (Where "facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms."). See also MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir.) ("the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms"), cert. denied, 464 U.S. 891 (1983).

interest as it would result in negotiations between parties of vastly different market power, yielding contracts reflecting (1) the LECs' monopoly power and (2) the LECs' incentive to discriminate in favor of their own directory publishing interests and against competitors.<sup>28</sup> That would seem especially true here in light of LECs' historical recalcitrance to provide subscriber list information to independent directory publishers.

Notably, such recalcitrance has not abated following the passage of Section 222(e). For example, nearly two months after the passage of the 1996 Telecommunications Act, at least one LEC was claiming that it would not commit to providing subscriber list information because it did not know what implementation actions the Commission was undertaking or whether Section 222(e)-(f) would be voided by the courts.<sup>29</sup> As of March 29, 1996, GTE had yet -- despite repeated requests -- to offer updated subscriber list information to independent directory publishers<sup>30</sup>

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<sup>28</sup> See Uniform Settlements Policy, 51 Fed. Reg. 4736, 4742 ¶ 24 (1986) (absent FCC regulation, operating agreements would more directly reflect foreign monopolists' market power); Domestic Public Messaging Service, 73 FCC.2d 151 ¶ 30 (1979) (eliminating contract clauses required by oligopolists as a result of their superior bargaining power as compared to a potential new entrant "dependent on them for any substantial share [of business]").

<sup>29</sup> See Letter from David C. Henny, President and General Manager, Whidbey Telephone Co., to Mac MacGregor, Publisher, MacGregor Publishing Co. (April 3, 1996) (Exhibit 7).

<sup>30</sup> See Letter from R.L. Roberts, Manager, GTE National Directory Center, to Dolores E. Wagner, White Directory Publishers, Inc. (March 29, 1996) ("We are unable to say at this time when all matters [relating to updates] will be resolved but we do expect resolution very shortly. Please

while Carolina Telephone, a Sprint company, alleged that it would not have the ability as a "technical matter" to offer updates for at least another year.<sup>31</sup> In light of the above, there is little reason to believe Commission forbearance would serve the public interest.<sup>32</sup> Rather, it would provide LECs with a tremendous incentive to engage in anticompetitive behavior, thereby depriving the public of the benefits of competition including "lower prices and greater choices for advertisers, and more and better quality telephone directory information."<sup>33</sup> As shown, the

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feel free to contact [GTE] periodically to check on the status of updates.") (Exhibit 8).

<sup>31</sup> See Letter from Elizabeth A. Denning, Esq., Sprint Mid Atlantic Telecom, to Rex D. Peters, President, Beach Book (March 22, 1996) (Exhibit 9). Given modern computer technology, such claims of technical difficulty from a major telephone company are facetious at best.

<sup>32</sup> Chairman Hundt has stated that the FCC must "write rules of fair competition" in order to assist in the realization of the goals of the 1996 Telecommunications Act, the removal of entry barriers and the opening of competition. See Reed Hundt, Chairman Federal Communications Commission, Interoperability: The Foundation Of Competition, Speech at the Network Reliability Comforum (April 18, 1996).

<sup>33</sup> See Pflaum at 6-7 (noting that directory competition engendered by independent publishers has led to price decreases and various product innovations such as talking yellow pages, area maps, and community interest sections). Representative Joe Barton of Texas, a member of the Conference Committee on the 1996 Telecommunications Act, stated that competition in the directory market resulting from Section 222(e) should lead to "cheaper more innovative, more helpful directory alternatives." See 142 Cong. Rec. H. 1160 (daily ed. Feb. 1, 1996) (Exhibit 10).

Commission has long realized that regulation, not forbearance, is required in such circumstances.<sup>34</sup>

Finally, bright line rules setting forth LECs' and directory publishers' rights and duties would conserve Commission resources by reducing the need for *ad hoc* Commission determinations over the suitability of terms and conditions. Regulatory resources are limited and whatever benefits might stem from a case-by-case analysis would be overwhelmed by strategic anticompetitive behavior on the part of the LECs.<sup>35</sup> Thus, Commission rules are required to allow the public interest to benefit from the types of new and innovative directories envisioned by Representative Barton as a result of independent directory publishers' receiving subscriber list information on a "timely and unbundled basis, under nondiscriminatory and reasonable rates, terms and conditions."

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<sup>34</sup> See Mackay Radio and Telegraph Co., 2 FCC 592, 594 (Tel. Comm. 1936) (reliance on competition between a monopolist and competitors is a tenuous basis to rest the public interest), aff'd, 4 FCC 150 (1937), aff'd, Mackay v. FCC, 97 F.2d 641 (D.C. Cir. 1938). See also Pflaum at 8 ("Where market power is acquired as the result of government action, the abuse of that power is proscribed and controlled through regulation.").

<sup>35</sup> For example, LECs could price listings or impose other onerous conditions up to the point at which a directory publisher would seek legal redress.

**III. THE COMMISSION HAS THE ULTIMATE RESPONSIBILITY FOR ENSURING THAT LISTING DATA ARE AVAILABLE PURSUANT TO THE STATUTE.**

The NPRM solicits comment on the scope of the Commission's authority with respect to subscriber list information and "the respective federal and state roles in ensuring that [listing information] is made available 'under nondiscriminatory and reasonable rates, terms, and conditions.'"<sup>36</sup>

**A. State PUCs May Not Impose Regulations Inconsistent With Section 222(e).**

The Commission has the ultimate oversight authority for Section 222(e). Section 222(e) is a federal statute setting forth a uniform national policy concerning the provision of subscriber list information. Telephone directories are not limited by state boundaries as evidenced by the metropolitan Washington, DC directory which contains listings from Maryland, Virginia, and the District of Columbia. Indeed, many businesses advertise on a national level in directories produced by a variety of different publishers. Were states to have primary oversight of subscriber list information, it would be possible for "reasonable rates, terms, and conditions" to mean one thing in Maryland and another in Virginia. Consequently, the Commission -- as opposed to state PUCs -- has chief authority over Section 222(e).

However, state PUCs should be permitted to enact rules and oversee tariffs designed to further Section 222(e)'s goals so

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<sup>36</sup> NPRM at ¶ 19.

long as such rules and tariffs are not inconsistent with the statute. Inconsistent state regulations are necessarily preempted.<sup>37</sup> In that regard, ADP believes that state PUCs have the authority to tariff listing information so long as the tariff is consistent with the statute. State PUCs would therefore have the authority to review tariffs to ensure that they are in compliance with state law. The question whether a particular tariff was "reasonable" and "nondiscriminatory" pursuant to Section 222(e) would, of course, be reserved for the Commission, perhaps after an initial determination by the PUC, as would the question of whether a state regulation was inconsistent with the statute.

**B. Complaints Should Be Filed With The Commission And Not The District Court In The First Instance.**

ADP believes that complaints concerning subscriber list information should be filed with the FCC in the first instance and then appealed to the appellate courts. It would be inefficient for vindication of Section 222(e) rights to occur in the courts. The Commission is intimately involved with the telecommunications industry on a day-to-day basis and its familiarity with the peculiarities of the local exchange market place it in the best position to review allegations that Section

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<sup>37</sup> "State action is preempted if its effect is to discourage conduct that federal legislation specifically seeks to encourage." See City of Morgan City v. South Louisiana Elec. Co-op. Ass'n, 31 F.3d 319, 322 (5th Cir.), cert. denied, 1166 S. Ct. 275 (1995); see also Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (federal regulations have preemptive effect).

222(e) has been violated.<sup>38</sup> Agency supervision is especially warranted where, as here, essential facilities are involved. Justice (then-judge) Breyer has observed that with respect to essential facilities, "regulators, not courts, have the expertise needed to administer the doctrine (They have a staff, for example, capable of finding facts related to rates.)"<sup>39</sup> Consequently, the Commission should make clear that it asserts exclusive jurisdiction over complaints alleging noncompliance with the statute, so that such complaints must to be filed with the Commission and not the courts in the first instance.<sup>40</sup>

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<sup>38</sup>. See Robert S. Handmaker, Note, *Deregulating the Transmission of Electricity: Wheeling Under P.U.R.P.A. Sections 203, 204, and 205*, 67 Wash. U.L.Q. 435, 454 (Spring 1989) (arguing that FERC was better suited than the courts to handle certain disputes because judges are not attuned to the "practical realities of the abstruse technological and economic issues" of particular industries).

<sup>39</sup> Hon. Stephen Breyer, "The Cutting Edge of Antitrust: Lessons From Deregulation," 57 Antitrust L.J. 771, 775 (1989).

<sup>40</sup> Such an interpretation would, among other things, prevent parties and the courts from wasting valuable time transferring listings cases to the FCC under the primary jurisdiction doctrine. See United States v. Western Pacific R.R. Co., 352 U.S. 59, 63-65 (1956) (under this doctrine, issues not within the conventional experience of judges or requiring exercise of administrative discretion by an expert federal agency are referred to that agency for resolution).

IV. THE COMMISSION'S RULES FOR IMPLEMENTATION OF SECTION 222(e) MUST: (1) BROADLY DEFINE TELECOMMUNICATIONS CARRIERS; (2) REQUIRE THE PROVISION OF PRIMARY BUSINESS CLASSIFICATIONS; (3) ALLOW FLEXIBILITY IN THE FORMATS UTILIZED TO PROVIDE SUBSCRIBER LIST INFORMATION; AND (4) SET A PRICE FOR SUBSCRIBER LIST INFORMATION BASED UPON INCREMENTAL COSTS.

A. The Term "Telecommunications Carrier" Must Be Defined Broadly.

The Commission has correctly determined that Section 222(e)'s requirements are applicable "not only [to] LECs, but also to any telecommunications carrier, including an IXC or cable operator . . . to the extent such carrier provides telephone exchange service."<sup>41</sup> That definition accords with Congress' definition of "telecommunications carrier" in both the 1996 Telecommunications Act and the Joint Explanatory Statement as "any provider of telecommunications services."<sup>42</sup> It also conforms to the Commission's long-standing practice of adopting definitions "which best reflect legislative intent."<sup>43</sup> That Congress intended Section 222(e) duties to be borne by more than LECs is demonstrated by the fact that it imposed such duties on "telecommunications carriers" (not just LECs) to the extent they provide telephone exchange services. Exempting such carriers would therefore be contrary to the purpose of Section 222(e)-(f)

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<sup>41</sup> NPRM at ¶ 43.

<sup>42</sup> See Section 3(44) of the Communications Act; Joint Explanatory Statement at 205.

<sup>43</sup> See Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8755 ¶ 6 (1992).

and ill serve the public interest as it would allow those carriers to withhold their subscriber list information from competing directory publishers. Hence, the Commission should adopt its proposed definition.<sup>44</sup>

**B. Primary Business Classifications Must Be Supplied As Part of Subscriber List Information.**

The NPRM asks whether clarification is necessary concerning the type and/or categories of information that must be made available pursuant to Section 222(e).<sup>45</sup> As expressed above, ADP believes that bright line regulations will decrease substantially the likelihood of disputes over the provision of list information. Pursuant to the language of Section 222(e)-(f), the Commission should declare that subscriber list information includes a subscriber's name, address, telephone number, and -- in the case of a business subscriber -- the primary advertising classification, which refers to the yellow pages business heading under which the subscriber has chosen to be listed. For example, the primary advertising classification for Mayflower Van Lines, would presumably be in the nature of "Moving Companies", "Van Lines", or "Moving and Storage" as chosen by the subscriber.

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<sup>44</sup> See Regulatory Treatment of Mobile Svcs., *Second Report and Order*, 9 FCC Rcd 1411, 1422-23 ¶ 30 (1994) (defining "commercial mobile services" in a manner meeting the statutory definition and their functional equivalents in order to best serve the public interest); New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4959-60 ¶¶ 4-6 (1994) (adopting broad definition of PCS to meet congressional goals).

<sup>45</sup> NPRM at ¶ 44.

Some telephone companies have adopted the evasive practice of delegating the responsibility for recording primary classification information to employees nominally employed by the telephone company's directory affiliate. Since the information is necessary to fulfill the telephone company's tariff obligation to furnish a "free" yellow pages listing as part of business telephone service, such delegation should not diminish the telephone company's obligation to provide primary business classification information to independent directory publishers. The Commission's rules<sup>46</sup> should so specify, because the omission of that requirement would frustrate Congress' desire for increased directory competition (and its associated public interest benefits, such as "cheaper, more innovative, more helpful directories" for the public).

**C. Independent Directory Publishers Must Be Given Flexibility In Their Choice Of Formats.**

The Commission should not restrict the format in which subscriber list information must be supplied but instead should grant flexibility to carriers and directory publishers provided that certain essential criteria are met.<sup>47</sup> Flexibility would allow both LECs and directory publishers to attempt innovations

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<sup>46</sup> As noted above, ADP intends to submit draft rules with its reply comments, reflecting its own views and those of other commenters.

<sup>47</sup> See NPRM at ¶ 45 (seeking comment on formatting options).

in terms of directory and subscriber list information formats<sup>48</sup> and would conserve FCC resources by eliminating the need for the agency to grant waivers each time a carrier wishes to change its formatting mode in response to changing market or technological conditions. Consequently, ADP believes that the Commission should require that subscriber list information be provided in a format that is convenient, usable, and reasonably feasible, both for carriers to provide and for directory publishers to utilize. At a minimum, subscriber list information should be available in both a "camera ready" format and in some electronic medium that is easily readable, such as a tape or diskette containing information in ASCII format. In the unlikely event that a telephone carrier does not utilize an electronic medium, the carrier should be required to provide subscriber list information to independent publishers in the same format (and content) as they are provided to the carrier's own directory publisher.

**D. Subscriber List Information Must Be Provided At A Price At Or Approximating The Incremental Cost Of Providing Them.**

As discussed by Dr. Pflaum, in the years preceding the 1984 Bell System divestiture, there were no great controversies over subscriber list information and they were readily available for a

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<sup>48</sup> The Commission has recognized -- in other areas -- that flexibility leads to innovation. See FCC News Release, "Chairman Hundt Says Telecom Bill Will Spur Genuine Competition" (Feb. 2, 1996) (flexible use of spectrum helps "foster innovation"); CMRS Flexibility NPRM, 11 FCC Rcd 2445, 2450 ¶ 24 (1996) (flexible spectrum use "should allow licensees to adapt quickly to technological innovation and changing consumer demands").

penny or two per listing. Today, as a direct result of telephone companies' efforts to raise barriers to entry in to the classified telephone directory business, prices of \$.75 and \$1.00 per listing have become commonplace. Section 222(e) is Congress's reaction to that sort of abuse.

Telephone companies have sometimes sought to justify gouging for subscriber list information by calling their prices "market based". Such claims are specious. As with any monopolized service, the "market" price is one that reflects the inelastic demand for the product and the consequent opportunity to charge well above cost. Public utility regulation exists precisely to prohibit that sort of market pricing. So, with respect to rates, the Commission should mandate that a "reasonable rate" is one based on the incremental cost of providing the materials.<sup>49</sup>

Recent data indicates that the incremental cost of subscriber list information is somewhere around \$0.004.<sup>50</sup> Other data confirm that the cost is certainly less than one cent.<sup>51</sup> Thus, any price much above one cent a listing would be

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<sup>49</sup> In other FCC proceedings, various LECs have expressed their agreement with the use of incremental costs. U S WEST, for example, has filed comments with the commission justifying certain rates on the grounds that "economic efficiency is maximized when prices are based on marginal (incremental) costs." See, e.g., Annual 1987 Tariff Filings, Memorandum Opinion and Order, 2 FCC Rcd 866, 878 ¶ 112 (Common Car. Bur. 1986) (characterizing U S WEST's filing).

<sup>50</sup> See Pflaum at 11.

<sup>51</sup> See id. at 12 n.2.

unreasonable. Current prices in the \$0.15 to \$1.00 range are plainly abusive and unlawful, and the Commission should expressly so state.

**E. Subscriber List Information Must Be Unbundled On A Geographic, Class Of Service (Business/Residential) And Temporal Basis.**

With respect to unbundling, carriers should no longer be allowed to force directory publishers to purchase listings for areas other than those requested by the publisher.<sup>52</sup> Nor should carriers be allowed to require directory publishers to purchase both business and residential listings as a condition of obtaining any listings whatsoever.<sup>53</sup> Such requirements are inefficient, anticompetitive, and evidence the unequal bargaining power held by independent directory publishers.<sup>54</sup> Independent publishers must have the opportunity to obtain only the subscriber list information that they desire.

Nor should carriers be allowed to force publishers to repurchase subscriber list information anew each year. This too stems from LECs' overwhelming bargaining power as it results in their receiving payments for substantially the same subscriber list information every year. Rather, directory publishers should

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<sup>52</sup> See, e.g., Great Western Directories, 63 F.3d at 1388.

<sup>53</sup> See id. (noting that Southwestern Bell imposed such a condition).

<sup>54</sup> See Pflaum at 10 ("anticompetitive" to force independent publishers to "take the same universe of data" as provided to an affiliated publisher).