HALPRIN, TEMPLE, GOODMAN & SUGRUE

1100 NEW YORK AVENUE, N.W., SUITE 650 EAST
WASHINGTON, D.C. 20005
(202) 371-9100 TELEFAX: (202) 371-1497
HTTP://WWW.HTGS.COM

ORIGINAL

ALBERT HALPRIN
RILEY K. TEMPLE
STEPHEN L. GOODMAN
MELANIE HARATUNIAN
WILLIAM F. MAHER, JR.

THOMAS J. SUGRUE
JOEL BERNSTEIN
J. RANDALL COOK

EX PARTE OR LATE FILED

February 27, 1998

RECEIVED
FEB 27 1998

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Subscriber Listing Information Issues in GN Docket No. 96-115

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

Dear Ms. Salas:

The Yellow Pages Publishers Association (YPPA) is filing this ex parte in response to the ex parte presentations of the Association of Directory Publishers of December 30, 1997, January 20, 1998, January 27, 1998 and February 10, 1998. YPPA believes it is important to clarify some of the points raised by ADP.

Incremental Pricing

ADP continues to complain about BellSouth's subscriber listing information pricing of four cents per listings, in spite of the fact that the Florida PSC, after a full evidentiary hearing on the matter, deemed this rate reasonable and in compliance with section 222(e).

Particularly egregious is ADP's total misrepresentation of costs. ADP claims that BellSouth's profit margin is more than 1300%[1]. ADP derived this number from testimony before the Florida PSC. In that testimony, BellSouth was asked about its incremental cost of running a single tape of its listings. The cost figure which BellSouth gave (and the one ADP

[1] ADP calculates this profit margin by using the incremental cost of providing an average run of the listing information (.003 cents per listing), and a price of four cents per listing.

No. of Copies rec'd 0+7
List ABCDE

relies so heavily on) excluded all costs of gathering, correcting, enhancing and maintaining the database, and any other costs associated with the listings, which ADP continually ignores. Incremental cost as a basis for providing listing information was rejected by the U.S Congress, and again by the Florida PSC.

Incremental costs of physically duplicating a computer tape have nothing to do with reasonable and nondiscriminatory pricing. Under ADP's scenario, the first book publisher, usually the local exchange carrier (LEC) affiliated publisher[2], will pay 100% of the costs of gathering, correcting, enhancing and maintaining the database, and each subsequent (non-affiliated) publisher then only pays the "incremental" cost of running one tape. This makes the affiliated publisher pay for most of the cost of gathering and maintaining the database, and everyone else gets a free ride. Unless directory publishers pay for the cost of creating the value of the information, the telephone subscriber, i.e. the ratepayer, will end up being saddled with the entire cost of gathering and maintaining the database, while directory publishers, who use the information contained in the database as the foundation of their product in a competitive, profit-making business, pay next to nothing. Following this logic, computer software should be sold for the incremental cost of pressing one disk.

In the Florida situation, the PSC determined that four cents per listing was reasonable for BellSouth, based on all the evidence in the case, including the number of publishers taking listings from BellSouth, the cost BellSouth Advertising and Publishing Corporation pays, the cost of updates, corrections and enhancements, and a host of other factors. The Florida PSC engaged in an extensive proceeding, based on those particular facts, and determined a price that the PSC deemed reasonable and in compliance with section 222(e). A copy of the decision of the Florida PSC has been previously submitted to the FCC by YPPA (See YPPA ex parte letter dated December 4, 1997). Other states have tariffed subscriber listings, as well. Where there is a state-approved tariff, the FCC should give deference to that state.

Essential Facilities

ADP also claims that LECs are the sole source of listing information, and subscriber list information is an essential facility. Even if this were correct, a question of considerable debate, this argument is irrelevant.[3] Congress already made the determination that all telecommunications carriers must provide their listing information to directory publishers under nondiscriminatory and reasonable rates, terms and conditions. There are hundreds of

---

[2] Some of YPPA's members are LEC-affiliated publishers.

[3] YPPA notes that independent publishers have published directories in the past without reliance on obtaining listings directly from the LEC. In fact, advertisements from independent directories have touted that the non-affiliated directory has listings that the telephone company does not. See Attachment A.

certified carriers today, all of whom must make this information available. LECs are not the only source of listings information. Further, even if LECs were the only source of listing information, and listing information were an essential facility for publishing directories,[4] Congress already has adopted the proper remedy. It is a long standing judicial precedent that, where something has been deemed an essential facility, access based on nondiscriminatory and reasonable terms and conditions, and not based on incremental pricing, is the obligation.[5] Indeed, even when a trial court has found that there was an antitrust violation by a LEC regarding its subscriber list information, the trial court's remedy was not to require the LEC to price its listings based on incremental pricing, but instead it found that 13.5 cents per listing was a fair price.[6]

Pricing for Multiple Use and Updates

ADP states that LECS are charging more for multiple uses of the information, and are charging more for updates, on a per listing basis, than for runs of the entire subscriber list database. Looking at these items logically in any business context, multiple use and updates should be more expensive. In fact, this is consistent with the practices of other companies that license or sell listings of information.

Using the same data multiple times means that there is more value in the data for the multiple user. The House Committee Report was clear that the subscriber list information provisions ensure "that the telephone companies that gather and maintain such data are compensated for the value of the listings."[7] Charging more for additional uses is standard licensing practice in many fields. If an individual purchases software for installation on one computer, the software license is one price. If it is purchased for an office for installation on a series of computers, the price is generally much higher, even though the cost to the manufacturer is exactly the same.

If two publishers use the same subscriber list information, and publisher A uses it once and publisher B uses it multiple times, it is reasonable for publisher B to pay for a greater portion of the cost of gathering and maintaining the database. The multiple user is getting much more value than the single user.

---

[4] LECs are not the sole source for listing information nor should that listing information be treated as an essential facility.

[5] *See* United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912).

[6] Great Western Directories v. S.W. Bell Telephone, 1993 WL 755366, Civil Action Cause Numbers 2:88-CV-0218-J and 2:89-CV-003-J (N.D. Tex. July 2, 1993), *affirmed in part and reversed in part*, 63 F.3d 1387 (5th Cir. 1995), *petition for rehearing granted in part and denied in part*, 74 F.3d 613 (5th Cir. 1996) (vacated on other grounds).

[7] H.R. Rpt. No. 104-204, Part I, 104th Cong., 1st Sess. at p. 89 (1995) (emphasis added).

Similarly, updates are a much more valuable product, as updates only contain the changes from the last time information was provided. For example, if a publisher orders the entire list from a LEC, it may contain 10,000 entries. The next year, that same publisher can order only the updates, and the LEC will pull out from the 10,000 entries any additions, deletions, or changes that have occurred since the last time the publisher ordered information. There may only be a few hundred entries at this time. Buying an update gives a publisher equivalent information to purchasing the entire list anew. On a per-listing basis, updates are generally more expensive to provide. An update product is much more valuable, but, in total, usually less expensive than an entire feed of the subscriber list information.[8/]

Refusal to Provide Listings

ADP claims that some telecommunications carriers are refusing to deal with non-affiliated publishers, and are placing unreasonable terms in contracts for listing information. The law requires that telecommunications carriers provide listings on a timely, unbundled basis, under nondiscriminatory and reasonable rats, terms, and conditions.

The law has been in effect for two years. If an independent directory publisher feels that a telecommunications carrier is not providing listings in accordance with section 222(e), the publisher is free to file a complaint with the FCC against the telecommunications carrier. YPPA supports the rights of directory publishers to file section 222(e) complaints to the FCC.[9/]

Provision of CLEC listings

ADP alleges that independent publishers are unable to obtain competitive LEC (CLEC) subscriber listing information. An independent publisher has the right to a CLEC's subscriber list information -- directly from the CLEC -- on reasonable and nondiscriminatory terms. YPPA supports the right of directory publishers to obtain this information from CLECs and believes that CLECs have the obligation to provide this information in compliance with Section 222(e). Yet, it is apparent that ADP does not wish to obtain the information directly from the CLECs.[10/]

[8/] Similarly, when purchasing most software databases, updates cost less than repurchasing the entire database. On a per-entry or per-line-of-code basis, however, the updates are more expensive.

[9/] In ADP's January 20, 1997 ex parte, the court order ADP attached to its filing instructs the aggrieved party to file a section 222(e) complaint at the FCC.

[10/] In its February 10, 1998 ex parte, ADP asserts that, because MCI's systems were not able to handle a subscriber list information request, the duty should instead be imposed on the ILEC. The statute, however, is clear. The duty to provide subscriber list information is upon all telecommunications carriers. The FCC should not absolve MCI or any other CLEC of its duties under section 222(e).

The definition of subscriber list information states that it is information "identifying the listed names of subscribers of a carrier..."[11] Indeed, the statute requires that telecommunications carriers need only provide the listing information of their own subscribers. While a CLEC may request that an incumbent LEC (ILEC) provide the CLEC's subscriber information to independent publishers on behalf of the CLEC, that is a matter of contract and negotiation -- not legislative requirement. Absent an agreement with the CLEC to the contrary, the ILEC may not have the legal right to sell the CLEC's subscriber list information. The method by which an ILEC obtains CLEC subscriber list information is irrelevant.

A CLEC's refusal to provide subscriber list information to directory publishers, for use as described in the Act, is a clear violation of section 222(e). If a CLEC is, indeed, refusing to provide the information to directory publishers, the publishers should file a complaint at the FCC. To force ILECs to provide CLEC subscriber list information simply for the convenience of independent directory publishers, however, is clearly outside the bounds of sections 251, 271 and 222(e).

Use of Subscriber List Information for Internet Directories

ADP notes that BellSouth in Florida requires independent publishers wanting to use subscriber list information in an internet directory to obtain the information through a directory assistance tariff, not a directory publishing tariff. The statute only requires access for publishing directories. While YPPA does not take a position as to whether or not directory information on the internet is directory assistance or directory publishing, YPPA notes that the Florida PSC determined that internet directories are directory assistance, not directory publishing, and the tariff in question is structured to meet that definition. In other words, BellSouth is complying with the tariff requirements in Florida.

Provision of Business Classification

ADP claims that some LECs are not providing business classification information. It is entirely possible that the LEC may not even collect that information. If the LEC collects the information and provides the information to its own publisher, then YPPA believes that section 222(e) requires the LEC to provide such information to independent publishers. The statute plainly does not require a LEC to collect business classification information.

The Information Given the Directory Publishers Often Contains Errors

It is YPPA's experience that LECs attempt to provide subscriber list information which is as complete and accurate as possible. Unfortunately, such information can and does

---

[11] 47 U.S.C. 222(f)(3)(A) (emphasis added).

contain errors. These errors are passed on to affiliated, as well as non-affiliated, directory publishers. Many affiliated publishers spend a great deal of time and money ensuring the accuracy of the listings, checking on and correcting the information given to the publisher by the LEC. YPPA assumes that non-affiliated directory publishers are capable of performing the same checks which are performed by the affiliated directory publishers. The FCC should not attempt to legislate accuracy, particularly when Congress did not. The statute, however, demands nondiscrimination. In this context, nondiscrimination means that if the LEC cleanses the database of errors for its affiliated publisher, it should offer to provide that service for non-affiliated directory publishers.

FCC Jurisdiction over LEC-affiliated Publishers

ADP suggests that the FCC can exercise jurisdiction over LEC-affiliated publishers. This proposed expansion of FCC jurisdiction flies in the face of the statute. The statute clearly imposes obligations on telecommunications carriers. Congress specifically gave the FCC jurisdiction over the BOC's electronic publishing, manufacturing, and alarm monitoring activities (see 47 U.S.C. §§ 273-275). If Congress had intended to grant jurisdiction to the FCC to regulate a competitive industry, such as the directory publishing industry, Congress would have explicitly done so.[12/] The FCC does not claim or exercise any jurisdiction over directory publishing operations (e.g. its costs and revenues are not subject to jurisdictional separations) and cannot and should not attempt to do so now.

Other Subscriber List Proceedings

ADP brings to the FCC's attention a case filed in Georgia, Direct Media Corporation v. Camden Telephone, No. CV-296-108 (S.D. Ga. Dec. 2, 1997), wherein a complaint was filed by Direct Media against a LEC for not providing subscriber list information. ADP states that the FCC should have primary jurisdiction over section 222(e). YPPA agrees that the FCC should settle complaints arising under section 222(e).

ADP also notes that the court determined that Camden's pricing policies may indicate a monopoly or attempted monopoly. YPPA does not have an opinion on the facts of the case. The FCC, however, is not the appropriate tribunal to determine whether there is a violation of U.S. antitrust laws.

[12/] To support its conclusion, ADP cites General Telephone Company of the Southwest v. United States, 449 F. 2d 846 (5th Cir. 1971). In that case, the FCC determined that telephone companies building cable television systems within their own service territory are required to obtain section 214 authorization from the FCC. The circumstances in General Telephone are clearly different from the circumstances surrounding directory publication. Transport of video signals is a common carrier activity, whereas directory publishing is not.

Finally, ADP states that the California PUC has determined to review the subscriber list information pricing policies of PacBell and GTE. The California PUC's decision on subscriber list information prices, whatever that final decision may be, is clearly within the jurisdiction of the California PUC. The states have the expertise to determine the proper compensation for subscriber list information, based on a multitude of factors. States will not decide these rates in a vacuum, but will determine the proper rates based on many elements, including the effect on the telephone ratepayers, the effect on non-affiliated directory publishers, and the effect on the affiliated directory publishers. States should have the flexibility to determine the rates for subscriber list information which makes the most sense for that state. The FCC should not take this responsibility from the states by mandating any specific pricing, other than what is required by the statute -- nondiscriminatory and reasonable rates, terms and conditions.

The statute provides the legal means for non-affiliated directory publishers to obtain subscriber list information from telecommunications carriers under nondiscriminatory and reasonable rates, terms and conditions. As YPPA has advocated throughout this proceeding, the FCC should reject ADP's entreaties to enact rules beyond the plain language of the statute and the accompanying committee and conference reports. If the FCC adopts any rules or guidelines for this statute, those rules and guidelines must be bounded by the legislative language.

Sincerely,

Albert Halprin
Joel Bernstein
Counsel for the Yellow Pages Publishers Association

cc: Dorothy Attwood
Lisa Choi
Raelynn Tibayan Remy
Tonya Rutherford
David Konuch

ATTACHMENT A

AN OPEN LETTER TO THE INDIAN RIVER COUNTY BUSINESS COMMUNITY

During the past several months we've received numerous reports from local business people that representatives of the BellSouth yellow pages have made inaccurate statements about our company and our Indian River County telephone book. Most of these statements attempt to understate our Directory's circulation numbers, question our secondary distribution procedure, misrepresent our billing options, and create doubt about our company's credibility. If these reports are true, it would appear that they may be part of a deliberate campaign to damage our reputation and limit competition in the local yellow page industry. We would like to make the following response:

As BellSouth very well knows, our company is one of the largest and most respected independent publishers in the yellow page industry. We are a 29-year-old family-owned business which currently publishes telephone directories in fourteen cities, four states and two countries. Our company has won more yellow page industry awards than any other publisher in North America, including the "Publisher of the Year" award in 1989 and 1994. We are known for our innovative spirit and customer service orientation.

We print 85,000 copies of our Indian River County Talking Phone Book and we distribute our directory free of charge to every home and business in Indian River County, Micco, Barefoot Bay and Grant.

We deliver our book to all new businesses and residents who move into the area throughout the year.

We offer billing plans which do not require payment prior to publication.

We purchase our listing information from BellSouth under a tariff and we list every single non-confidential residential and business listing in Indian River County in our directory.

If anyone from BellSouth has ever said anything contrary to this to you, they have not told you the truth. The use of disparagement tactics is a typical response of telephone companies when confronted with yellow page competition. Apparently BellSouth is trying to substitute a campaign of innuendoes against our company in place of what they should be doing - lowering their rates and improving their products. Obviously, our entry into the market has caused BellSouth to become very concerned and prompted this reaction.

The reason that BellSouth has resorted to such desperate tactics seems self-evident. The Talking Phone Book is a much better product than their telephone book.

We've updated our listing base more recently than BellSouth. We have over 3,000 updated listings that they don't have. We have many features that they don't have, including larger print, midi directories, process color, a Talking section, and more.

For these reasons our directory is used much more than theirs.

In fact, a recent survey done by Directory Distributing Associates (D.D.A.) confirms that Indian River residents prefer The Talking Phone Book over BellSouth 44% to 23%.

Ironically, Directory Distributing Associates (D.D.A.) is the same company that BellSouth contracts with to distribute their Vero Beach directory. So even a survey conducted by their distribution company says that The Talking Phone Book has greater usage.

We would like everyone in Indian River County to know that no matter how intense the competition between our company and BellSouth gets, we will never resort to disparagement tactics. In our opinion, these tactics are desperate and unethical and reflect poorly on the company which employs them. We prefer to tell you about the good points of our product rather than to cast innuendoes on our competition.

If you have any questions about our company's background or our directory, please contact our local Sebastian office at 388-1255. We would be very happy to provide additional documentation on the points we've raised here.

Sincerely,

Richard D. Lewis
President
The Talking Phone Book

THE TALKING PHONE BOOK.