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EX PARTE OR LATE FILED

April 23, 1998

EX PARTE

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

RECEIVED

APR 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: 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

DOCKET FILE COPY ORIGINAL

Dear Ms. Salas:

This letter responds to the April 13, 1998 ex parte presentation of the Association of Directory Publishers (ADP). In that presentation, ADP contends that Congress actually intended the words "reasonable and non-discriminatory" to mean that the FCC should impose cost-based pricing for subscriber listing information. ADP's interpretation ignores the both the plain language of the statute and the relevant legislative history.

ADP claims that Congress knew that the word "reasonable" has been interpreted to mean cost-based pricing. Congress, however, knows the meaning of cost-based pricing, and, indeed prescribed exactly that in Section 252(d). Section 252(d)(1) states, in part, that "the just and reasonable rate for network elements.. (A) shall be (1) based on the cost..." (emphasis added). Similarly, section 252(d)(2)(A) states, in part, that reciprocal compensation shall not be "deemed just and reasonable unless-- (i) such terms and conditions provide for the mutual recovery by each carrier of the costs associated with the transport and termination..." (emphasis added).

In fact, the word cost appears more than 40 times in the text of the Telecommunications Act of 1996, and more than three dozen times in the Conference Report thereto. The word cost, however, does not appear in section 222(e), nor does the term

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appear in either the Conference Report or the House Commerce Committee Report explaining that section.

Congress, in section 252(d), uses the phrase "just and reasonable" to describe the pricing allowed under that section. Indeed, that phrase mimics the phrase already found in Title II of the Communications Act.^{1/} Section 222(e), however, uses the phrase "nondiscriminatory and reasonable." Presumably, Congress determined that rates for subscriber listing information under section 222(e) would be governed by something other than the Commission's traditional cost-based rate structure. Contrary to ADP's suggestion, Congress did not mandate that the pricing for subscriber listing information be based only on costs.

ADP wants the Commission to go even further than imposing traditional cost-based prices. ADP wants the Commission to impose incremental pricing. As YPPA has stated in its past filings in this docket, there is no statutory, legal, or regulatory basis for incremental pricing. Indeed, Congress imposed incremental pricing in section 252(d)(2)(A)(ii),^{2/} but chose to not impose a similar incremental cost-based standard in section 222(e). ADP continually ignores the fully-distributed costs of providing subscriber listing information, choosing to instead focus on the incremental cost of physically duplicating a computer tape.^{3/}

The statute gives the Commission flexibility to determine whether subscriber listing rates are reasonable, and fully-distributed costs may well, indeed, be a factor in determining reasonableness. Value of the information, however, was specifically enumerated by Congress as a factor in determining reasonableness. The House Commerce Committee Report makes it clear that the listing information has some market value, and telephone companies are permitted to charge for listings based on that value. The report states 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."^{4/}

It is apparent from the statute and legislative history that Congress determined pricing for subscriber listing information should be based on value, as well as other factors. Those other factors may include fully-distributed costs, but Congress did not limit the

^{1/} See, *e.g.*, section 201; section 205.

^{2/} "[S]uch terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."

^{3/} Even ADP's *ex parte* recognizes that the FCC's AT&T Seven-Way Cost Study used fully distributed, and not incremental costs. ADP April 13, 1998 *ex parte* at pp. 2-4.

^{4/} H.R. Rpt. No. 104-204, Part I, 104th Cong., 1st Sess. at p. 89 (1995) (emphasis added).

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Commission's analysis to cost factors. Finally, Congress is fully capable of mandating incremental cost-based pricing, and chose not to do so.

Sincerely,



Joel Bernstein

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