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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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I. INTRODUCTION

1. 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

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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*.

issues arising under section 251(b)(3),[7] and issues arising out of the convergence of directory publishing and directory assistance.[8]

2. 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 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]

3. 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

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

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

[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).

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

4. 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]

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[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).

[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.

5. 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.

6. 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]

7. 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*

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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.*

and Order in CC Docket No. 96-98.[22] We also seek comment on additional issues arising out of developments in, and the convergence of, directory publishing and directory assistance, in the *Notice of Proposed Rulemaking* in CC Docket No. 99-273, below.

8. 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.

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[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).

- 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.

9. 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

[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*.

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.

10. 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).

[25] 47 U.S.C. § 251(b)(3).

II. THIRD REPORT AND ORDER

A. Background

1. Statutory Provisions

11. 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:

> (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]

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[26] 47 U.S.C. § 222(e).

[27] 47 U.S.C. § 222(f)(3).

[28] 47 U.S.C. § 153(47).

2. Directory Publishing

12. 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.

13. 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]

14. 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

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[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 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.

areas or that appeal to particular ethnic groups.[33] Some independents publish foreign language directories for areas within the United States.[34]

15. 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]

16. 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

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[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 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

information to directory publishers electronically, on magnetic tape, or on paper, among other means.[40]

3. Commission Proceedings

17. 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]

"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*).

[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).

18. 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 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

19. 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]

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

[47] *Id.*

[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

2. Discussion

20. 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.

21. 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,

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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).

[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).

without regard to whether those listings are derived from the intrastate service offered by those carriers or from their interstate service (if any).[57]

C. Need for Commission Regulation

22. 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]

23. 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'

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[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 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).

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 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

24. 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

25. 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

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[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 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.

extent they provide telephone exchange service.[66] Accordingly, all telecommunications carriers 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.[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.

26. 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

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[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 11-12 (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),

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

27. 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

28. 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

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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).

[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.

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."[75] In this section, we address issues arising under this definition.

2. Primary Advertising Classifications

a. Definition

29. 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]

30. 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."

31. 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)

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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.

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

32. 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]

33. 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

[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).

business customer constitutes the subscriber's primary advertising classification.[83] Such carriers therefore must provide this classification to requesting directory publishers.

34. 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]

35. 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).

36. 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

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

[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*).

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

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

38. 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

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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.

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]

3. Unpublished and Unlisted Information

a. Background

39. 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

40. 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

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[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).

[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*).

the delivery of directories, independent directory publishers also should be able to obtain those addresses for the same purpose.[99]

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

42. 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

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[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.

[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.