that the language and legislative history of section 222(e) make clear that Congress intended to require carriers to make updated listing information available to directory publishers.[105] USTA and Vitelco argue that the Communications Act does not require carriers to provide subscriber list information more than once for each directory or edition thereof that is published.[106]

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

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

45. We recognize, of course, that the statutory definition of subscriber list information refers to "the *listed* names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications . . . ."[108] We conclude that this reference to "*listed*" information does not exclude information from the definition of

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

[106] USTA Comments at 6; Vitelco Comments at 3.

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

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

subscriber list information that has not yet been, but will be, published in a directory. Any other conclusion would make the statutory phrase "*accepted for publication*" in section 222(f)(3)(B) mere surplusage. Indeed, section 222(f)(3)(B) distinguishes listings that a carrier "*has published [or] caused to be published*" in a directory from those it "*has . . . accepted for publication.*"[109] Because, as a practical matter, a carrier or an affiliate has either "published" or "caused to be published" any subscriber's name that has been published, we conclude that the statutory phrase "accepted for publication" must refer to listings that have not yet been published. We therefore also conclude that the statutory definition of subscriber list information includes updates that a carrier "has . . . accepted for publication," but not yet published.

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

47. Finally, given Congress' goal of encouraging the development of competition in directory publishing,[113] the inclusion of updates within the statutory definition of subscriber list information is not surprising. Updated subscriber list information is critical to the success of a directory publishing operation.[114] A directory publisher typically will obtain an "initial load" of subscriber list information from a carrier that provides the carrier's

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[109] 47 U.S.C. § 222(f)(3)(B).

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

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

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

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

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

subscriber list information as of a given date.[115] This information requires reformatting and other processing before it can be published in a directory. As that happens, the carrier is continuously updating its subscriber list information database to reflect the addition of new telephone exchange service subscribers as well as any changes in the information regarding existing subscribers. This updated information is essential to ensure that the directory is as complete and accurate as possible as of its publication date.

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

5. Subscribers with Multiple Telephone Numbers

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

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

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

[117] ADP Comments at 22.

[118] *See* ADP Reply at 6.

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

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

50. Some carriers provide customers, such as large corporations, that have multiple listings for their places of business or employees, with directories containing those listings. We conclude that these directories fall outside the statutory definition of subscriber list information to the extent they are not made available or sold to the public. In these circumstances, the carrier has not published the directories, caused them to be published, or accepted them for publication within the meaning of section 222(f)(3).

6. Other Information

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

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

F. Subscriber List Information Obtained from Competitive LECs

53. Section 222(e) requires each telecommunications carrier that provides telephone exchange service to provide subscriber list information "gathered in its capacity as a provider of such service" to requesting directory publishers.[124] The parties to this proceeding dispute whether this requirement extends to incumbent LECs with regard to subscriber list information that they obtain from competitive LECs pursuant to section

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

[122] YPPA Reply at 5.

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

[124] 47 U.S.C. § 222(e).

251(b)(3) of the Act.[125] That section requires, in pertinent part, each LEC to provide competing providers of telephone exchange service with "nondiscriminatory access to . . . directory listing . . . ."[126] ADP asserts that incumbent LECs receive subscriber list information from competitive LECs pursuant to section 251(b)(3) as part of the incumbent LECs' provision of telephone exchange service. ADP claims that section 222(e) therefore obligates incumbent LECs to provide the competitive LECs' subscriber list information to requesting directory publishers.[127] YPPA maintains that section 222(e) gives independent directory publishers the right to obtain a competitive LECs' subscriber list information directly from the competitive LECs and that the Commission lacks statutory authority to compel incumbent LECs to provide competitive LECs' subscriber list information to directory publishers.[128]

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

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[125] 47 U.S.C. § 251(b)(3).

[126] *Id.*

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

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

[129] 47 U.S.C. § 222(e).

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

service -- directory listing -- to "competing providers of telephone exchange service and telephone toll service."[131]

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

G. Provision of Subscriber List Information

1. Overview

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

2. Discussion

57. ADP asserts that despite the enactment of section 222(e), some carriers refuse to make subscriber list information, including updates, available to directory publishers.[134] Such failures violate section 222(e), which obligates each telecommunications carrier to "provide subscriber list information gathered in its capacity as a provider of [telephone

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[131] 47 U.S.C. § 251(b)(3).

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

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

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

exchange] service . . . to any person upon request for the purpose of publishing directories in any format."[135]

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

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

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[135] 47 U.S.C. § 222(e).

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

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

factors, such as differences in the costs of providing subscriber list information to particular directory publishers, warrant differences in the rates, terms, and conditions under which the carrier provides that information to those publishers.[138]

60. ALLTEL and U S WEST suggest interpretations of section 222(e) under which a carrier would only have to refrain from discriminating between its own and independent directory publishers in order to comply with that section.[139] We reject those interpretations. In addition to requiring nondiscrimination, section 222(e) requires carriers to provide subscriber list information to requesting directory publishers "on a timely and unbundled basis" and "under . . . reasonable rates, terms, and conditions."[140] We conclude that the statutory terms "timely," "unbundled," and "reasonable" have meanings independent from that of the statutory term "nondiscriminatory." Had Congress intended the terms to have the same meaning, there would have been no need to include the timeliness, unbundling, and reasonableness requirements in section 222(e). We therefore emphasize that not only must carriers treat all directory publishers on a nondiscriminatory basis, as set forth in paragraph 58, but carriers also must provide to all requesting directory publishers subscriber list information "on a timely and unbundled basis" and "under . . . reasonable rates, terms, and conditions."[141]

61. The record in this proceeding does not provide a sufficient basis for defining all the standards that a carrier must meet in order for the terms and conditions under which it provides subscriber list information to be considered "reasonable" within the meaning of section 222(e). We therefore decline to specify comprehensive reasonableness standards at this time.[142] We conclude, however, that a carrier would be acting unreasonably if the terms and conditions under which it provides subscriber list information were to restrict a directory

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[138] *See id.*

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

[140] 47 U.S.C. § 222(e).

[141] *Id.*

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

publisher's choice of directory format.[143] Any such restriction would be inconsistent with the requirement in section 222(e) that carriers make subscriber list information available to directory publishers "under . . . reasonable . . . terms[] and conditions . . . for the purpose of publishing directories *in any format*."[144]

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

63. ADP alleges that, despite the unbundling requirement in section 222(e), some carriers continue to require directory publishers to purchase more listings than they want at considerable additional expense.[148] USTA argues that the unbundling requirement does not

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

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

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

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

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

[148] ADP Comments at 21-22.

obligate carriers to sort or otherwise manipulate listings on demand.[149] We conclude that section 222(e) precludes a carrier from bundling listings that the carrier is able to sell separately.[150] In enacting section 222(e), Congress expressed concern that some carriers had required directory publishers to purchase listings in addition to those the requesting publisher had determined were most likely to suit its needs.[151] Consistent with the legislative history, we require carriers to unbundle subscriber list information, including updates, on any basis requested by a directory publisher that the carrier's internal systems can accommodate. A carrier whose internal system can accommodate a directory publisher's request for particular listings thus will have to provide only those listings. In unbundling subscriber list information for directory publishers, however, the carrier shall not disclose customer proprietary network information, such as information relating to telephone exchange service subscribers' usage patterns, except as permitted by sections 222(c) and (d) of the Act.[152] A carrier, in addition, must not require directory publishers to purchase any product or service other than subscriber list information as a condition of obtaining subscriber list information.[153]

64. MCI contends that carriers must make updated subscriber list information available to directory publishers on a daily basis as well as on other regularly recurring bases, such as weekly, monthly, quarterly, and annually.[154] YPPA argues some carriers may

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

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

[151] *1995 House Report, supra* note 12, at 89 (some LECs "have imposed unreasonable conditions such as requiring that the listings be purchased only on a statewide basis . . . ."); *1994 Senate Report, supra* note 13, at 97 (same); *see also* ADP Comments at 21 (carriers should not be able to force directory publishers to purchase subscriber list information for areas other than those the directory publisher requests); SBC Comments at 17, n.16 ("a publisher should be able to obtain subscriber list information separately for residences or business, new or existing listings, listings by geographic area such as NXX or area code, or other criteria, so long as technically feasible and economically reasonable").

[152] 47 U.S.C. §§ 222(c)-(d). Although the Commission adopted implementing rules, (*CPNI Report and Order*, 13 FCC Rcd at 8079-8200, ¶¶ 21-203; 47 C.F.R. §§ 64.2001-64.2009), they were recently vacated by the United States Court of Appeals for the Tenth Circuit. *U S WEST v. FCC, supra* note 45.

[153] *USTA Jan. 14, 1999 Letter, supra* note 149, at 2.

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

not be able to make updates available on a daily basis.[155] Consistent with the standards set forth in paragraphs 62 and 63, above, we conclude that, upon request, a carrier must provide subscriber list information on any periodic basis that the carrier's internal systems can accommodate. Because many carriers provide updated subscriber list information to their directory publication or directory assistance operations on a daily basis,[156] this approach will allow directory publishers to receive subscriber list information regarding many telephone exchange service subscribers on a daily basis, as MCI urges. Requiring a carrier to provide subscriber list information only on the periodic basis that the carrier uses for its own directory publishing operations, as a nondiscrimination standard would mandate, would not recognize variations in directory publishing schedules. Restricting directory publishers to the periodic basis that the carrier uses for its own directory publishing operations thus would be inconsistent with the requirement that carriers provide subscriber list information on a "timely . . . basis."[157] For instance, an independent publisher that updates its directories every six months might need to receive subscriber list information more often than a carrier affiliate that publishes yearly.

65. We reject USTA's and Vitelco's argument that the Communications Act does not mandate that carriers provide subscriber list information more than once for each directory or edition thereof that is published.[158] Section 222(e) requires that carriers provide subscriber list information gathered in their capacity as providers of telephone exchange service to "*any person upon request* for the purpose of publishing directories in any format."[159] This statutory language makes clear that a directory publisher may obtain subscriber list information repeatedly, as long as that information will be used for directory publishing purposes. As discussed elsewhere in this *Third Report and Order*, directory publishers use updated subscriber list information for at least two directory publishing purposes: to ensure that their directories are as complete and as accurate as possible as of the publication date; and to solicit advertisers for yellow pages directories.[160] Limiting directory publishers to obtaining subscriber list information only once per directory edition would make it difficult, if not impossible, for them to accomplish these purposes. Because

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[155] YPPA Comments at 11.

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

[157] 47 U.S.C. § 222(e).

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

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

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

section 222(e) contains no such limitation, but instead makes clear that a directory publisher may obtain subscriber list information "upon request," we conclude that USTA's and Vitelco's argument lacks merit.

66. These requirements should accommodate most requests for subscriber list information for directory publishing purposes without imposing undue burdens on any carrier and thus should be of particular benefit to small directory publishers and carriers. We, of course, do not preclude a directory publisher from requesting that a carrier provide subscriber list information on any given schedule. Nor do we preclude a directory publisher from requesting that a carrier unbundle subscriber list information, including updates, on bases other than those that a carrier's internal system can accommodate. If the carrier's systems cannot accommodate the delivery schedule or the level of unbundling requested by a directory publisher, the carrier must inform the directory publisher of that fact, tell the publisher which delivery schedules or unbundling levels can be accommodated, and adhere to the schedule or unbundling level the publisher chooses from among those available. The carrier must provide this information within thirty days of when it receives the publisher's request. If this process results in the provision of listings in addition to those the directory publisher requested, the carrier may impose charges for, and the directory publisher may publish, only the requested listings. These requirements will prevent a carrier from profiting from shortcomings in its internal systems and a directory publisher from profiting from requesting fewer listings than it intends to publish.

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

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

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

[162] 47 U.S.C. § 222(e).

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

70. MCI proposes that we require carriers to provide notice of changes in their subscriber list information as those changes occur.[163] To the extent changes in subscriber list information reflect customers' decisions to cease having particular telephone numbers listed, notice of the changes is necessary to enable directory publishers to avoid listing those numbers. We therefore require carriers to provide requesting directory publishers with notice of changes in subscriber list information in this limited circumstance. We decline to require notice of other types of changes in subscriber list information because we are not convinced that the benefits would exceed the costs. Except where subscribers request that previously listed numbers cease to be listed, notice of changes in subscriber list information would seem to serve no purpose other than to inform directory publishers of the need to request updated subscriber list information regarding particular subscribers from carriers. Directory publishers are well aware that carriers' subscriber list information databases change on an ongoing basis. To the extent changes do not involve customer requests that their numbers cease to be listed, we believe that publishers will request periodic subscriber list information updates from carriers rather than relying on any notice of changes in that information, which would have to be followed by requests for updates.[164] Except where subscribers request that previously listed numbers cease to be listed, we conclude that the benefits of a notice requirement likely would be minimal and do not warrant requiring carriers to incur the costs of providing directory publishers with notice of changes in subscriber list information.

[163] MCI Comments at 22.

[164] *See* para. 64, *supra*.

H. Reasonable Rates

1. Background

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

2. Overall Approach

72. After reviewing the language of section 222(e), its legislative history, the broader statutory scheme, and Congress' policy objectives, we conclude that $0.04 per listing is a presumptively reasonable rate for base file subscriber list information and that $0.06 per listing is a presumptively reasonable rate for updated subscriber list information that carriers

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[165] 47 U.S.C. § 222(e).

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

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

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

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

[170] *ADP Mar. 30, 1999 Letter*, *supra* note 169, at 18-19.

provide directory publishers. Our presumption of reasonableness will apply regardless of the format in which the publisher intends to publish the subscriber list information and regardless of the number of times the publisher intends to publish that information.

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

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

3. Cost Structure

75. As indicated previously,[172] many LECs maintain computerized subscriber list information databases. The LECs update these databases as individuals and businesses start or stop telephone exchange service, change the number of lines they receive, request unlisted status, or add new listings for existing lines. LECs typically provide requesting directory publishers with either "base file" subscriber list information or "updates" to that information.[173] LECs generally transmit subscriber list information to directory publishers electronically, on magnetic tape, or on paper.[174]

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

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

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

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

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

77. According to the various incumbent LECs, the incremental costs of responding to individual subscriber list information requests include such costs as those incurred in taking and scheduling orders for such information and ensuring that the orders are properly filled, the cost of downloading the requested subscriber list information from the database (which may involve computer operator time, processing time, and programming time), the cost of the magnetic tape or paper on which the subscriber list information will be transmitted, and mailing costs.[176] We note that some of these costs may be spread over multiple downloads. For example, an incumbent LEC that provides updated subscriber list information to directory publishers on a daily basis does not take a new order or reprogram its computer each time it transmits a daily update. Similarly, if additional directory publishers request daily or monthly updates that the carrier's internal system can accommodate, only *de minimis* additional computer operator or processing time should be required to produce the updates. Based on the record, we would expect the incremental costs of generating a download to be fairly low.[177] We also would expect, in almost all instances, that the incremental cost of adding an additional listing to a given download is virtually zero.

78. Incumbent LECs argue that their subscriber list information-related costs also include substantial allocations of common costs and overheads. More specifically, the incumbent LECs argue that subscriber list information rates should allow them to recover the

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

[176] *See, e.g.*, Letter from George L. Frazier, Regulatory Relations, Southern Bell, to Walter D'Haeseleer, Florida Pub. Serv. Comm'n, at Att., p. 4 (Feb. 8, 1993) (*BellSouth Feb. 8, 1993 Letter*) (*reproduced in ADP Mar. 30, 1999 Letter*, *supra* note 169, at Att B) (BellSouth's estimated cost per download for base file subscriber list information is $113.68 or $0.003 per listing).

[177] *See id. See also ADP Mar. 30, 1999 Letter*, *supra* note 169, at 21-22.

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

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

4. Method for Determining "Reasonableness"

80. The parties to this proceeding present sharply contrasting methodologies for determining what are "reasonable" subscriber list information rates. At one extreme, ADP and MCI urge incremental cost methodologies and provide data suggesting that subscriber list information rates should be significantly below $0.01 per listing.[180] Other parties contend that subscriber list information rates should be set through "competitive market" negotiations,

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

[179] *See* para. 96, *infra*.

[180] *E.g.*, ADP Comments at 19-21; ADP Reply at 9-10 (alleging incremental costs of 0.01 and 0.003 per listing for SBC and BellSouth, respectively); *ADP May 20, 1998 Letter*, *supra* note 35, at 2; *see also* MCI Comments at 23 (arguing that subscriber list information should be priced no greater than the total service long run incremental cost). *But see* YPPA Reply at 7 (contending that the Commission must explicitly reject incremental costs as the only required basis for pricing subscriber list information); *YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 2 (incremental costs have nothing to do with reasonable pricing).

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

81. To resolve this question, we look first to the text of the statute. In requiring that subscriber list information rates be "reasonable," Congress was using a word previously used in numerous statutes, including the Communications Act, to describe the desired end result of a ratemaking process.[183] ADP argues that Congress' use of "reasonable" in section 222(e) mandates that subscriber list information rates be based on costs and urges that we use an incremental cost methodology.[184] In making these arguments, ADP does not claim that the statutory language itself requires that subscriber list information rates be based on costs.[185] Instead, ADP maintains that the Commission has a long history of using costs for calculating reasonable rates and that courts have repeatedly referred to costs as the basis for establishing reasonable rates. ADP asserts that we must presume that Congress was aware of this administrative and judicial history. ADP contends that Congress' failure to specify in section 222(e) that reasonable subscriber list information rates may be based on a non-cost methodology means that a subscriber list information rate is reasonable only if it is based on costs, which ADP would determine using an incremental cost methodology.[186]

82. YPPA and several carriers argue, in contrast, that the Commission must permit subscriber list information rates that compensate the carrier for the value of the listings themselves as well as the costs of gathering and maintaining the listings and

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

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

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

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

[185] *See id.*

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

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

83. We reject the arguments that the 1996 Act requires that subscriber list information rates be based on either an incremental cost or a value-based methodology. As an initial matter, the statutory language does not state that subscriber list information rates must be cost-based, value-based, or even set in accordance with any particular methodology. Because the statutory language on its face does not require any particular methodology for determining reasonableness, we look to the broader statutory scheme, its legislative history, and the underlying policy objectives stated by Congress to determine Congressional intent. Section 222(e) was enacted as part of the 1996 Act. As mentioned previously, Congress intended that Act "to provide for a pro-competitive, de-regulatory national policy framework" that would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."[191] We believe that this broad statutory goal

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

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

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

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

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

provides a framework against which we should evaluate any approach for determining reasonable rates for carrier provision of subscriber list information to directory publishers.

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

85. We reject ADP's proposal that subscriber list information rates should only allow for the recovery of the incremental costs of providing that information to directory publishers. As discussed above, the incremental costs are very low relative to the common costs and overheads. Moreover, we recognize that, in setting rates, this Commission generally allows a contribution to common costs and overheads. We see no reason to depart from this long-standing practice in this area.

86. We also reject the idea that incumbent LECs be allowed to charge either whatever they want or value-based prices for subscriber list information. Congress enacted section 222(e) to correct a perceived failure in the market for subscriber list information. All directory publishers require timely and complete access to accurate subscriber list information in order to compete effectively. Because LECs obtain subscriber list information

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

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

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

"quite easily" during the order-taking process for telephone exchange service,[195] they have immediate and total access to "a uniquely complete and current body of listing information" for their customers.[196] This access helps incumbent LECs, which dominate the provision of telephone exchange service as well as the directory publishing industry, ensure that their directories are complete and up-to-date when published, and delivered to each newly connected telephone exchange service subscriber.[197] Incumbent LECs' directory publishers also use subscriber list information to identify new businesses in order to target them for specific yellow pages marketing efforts.[198]

87. Alternative providers of subscriber list information, in contrast, generally must rely on sources, such as published directories, that do not include many of the listings in carrier databases. As individuals and businesses start or stop telephone exchange service, published directories become inaccurate over time.[199] Other potential sources of listing information, such as Chambers of Commerce and marketing list providers, either rely on published directories or do not include many of the residential and business listings in a geographic area.[200] Directory publishers that rely on these sources cannot publish directories that are as accurate and complete as those incumbent LECs and their affiliates publish. These directory publishers also are unable to ensure that newly connected subscribers receive directories and that newly connected businesses are targeted for yellow pages marketing because they do not have ready access to information about new customers.[201] Subscriber list

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

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

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

[198] ADP Reply at 6.

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

[200] *See ADP Dec. 11, 1998 Letter*, *supra* note 199, at Att., pp. 9-10.

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

information obtained from non-carrier sources thus is not a close substitute for LEC-provided subscriber list information.

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

89. We also reject YPPA's and certain incumbent LECs' argument that subscriber list information rates should include an increment above cost to reflect the "value" of that information.[205] In so arguing, these parties rely on a statement in the *1995 House Report* that a reasonableness requirement for subscriber list information rates "would ensur[e] that the telephone companies that gather and maintain [subscriber list information] are fairly compensated for the value of the listings."[206] That report does not suggest, however, that rates that enable carriers to recover their incremental costs of providing subscriber list information plus a reasonable allocation of common costs and overheads would not fairly compensate carriers for the value of subscriber list information.[207] Given that Congress

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

[203] *See ADP Mar. 30, 1999 Letter*, *supra* note 169, at 12-13; *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (recognizing that prevailing contract prices for natural gas do not necessarily result in just and reasonable rates).

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

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

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

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

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

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

91. Finally, we note that courts have consistently held that statutory language similar to the language of section 222(e) leaves agencies free to "devise methods of regulation capable of equitably reconciling diverse and conflicting interests."[210] Indeed, the

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

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

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

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

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

5. Presumptively Reasonable Rates

93. We now turn to the determination of presumptively reasonable rates for subscriber list information that carriers provide directory publishers. We first examine the cost data in the record, which consists of data regarding Ameritech's, BellSouth's, Bell

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at 769-70 (just and reasonable standard in Natural Gas Act coincides with the applicable constitutional standards).

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

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