

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554**

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In the Matters of)
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Implementation of the)
Telecommunications Act of 1996) CC Docket No. 96-115
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Telecommunications Carriers' Use of Customer)
Proprietary Network Information and Other)
Customer Information)
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Provision of Directory Listing Information)
Under the Telecommunications Act of 1996,)
As Amended) CC Docket No. 99-273
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**THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION'S
COMMENTS IN OPPOSITION
TO THE PETITION FOR RECONSIDERATION
FILED BY THE ASSOCIATION OF DIRECTORY PUBLISHERS**

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Pursuant to 47 C.F.R. §1.4(b)(1), the National Telephone Cooperative Association ("NTCA"),¹ hereby files its comments in opposition to the petition for reconsideration filed by the Association of Directory Publishers ("ADP") in the above-captioned proceeding.

¹ NTCA is a national association of over 500 local exchange carriers that provide service primarily in rural areas. All NTCA members are small carriers that are defined as "rural telephone companies" in the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 151, *et. seq.* Approximately half of NTCA's members are organized as cooperatives. National Telephone Cooperative Association, CC Docket Nos. 96-115, 96-98 and 99-273, January 11, 2000. FCC 99-227

The Federal Communications Commission (“FCC” or “Commission”) should reject ADP’s request that the FCC allow directory publishers to pay a \$0.04 per subscriber list rate to a carrier pending the resolution of a publisher’s section 208 complaint against a carrier concerning its list rate. ADP has failed to demonstrate that the interim relief it seeks meets the FCC’s requirements for granting such relief. Moreover, the Commission’s current complaint procedures concerning subscriber list rates are fair and equitable.²

I Introduction

In its Third Report and Order, the FCC recognized the fact that a rate of \$0.04 per directory listing may not always permit a small telephone company to recover all of its incremental costs plus a reasonable share of common costs and overheads. ¶¶ 102-105. Based on these existing circumstances, the Commission allowed small carriers to charge higher directory listing rates than those determined by the FCC to be presumptively reasonable for large carriers. ¶ 105.

² *In the Matters of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, and the Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-98 and 99-273, FCC 99-227, ¶¶ 105-107, Published in the Federal Register October 5, 1999, (Third Report and Order); 47 U.S.C. § 208, 47 C.F.R. § 1.711 *et seq.*

The FCC further ruled that if a directory publisher filed a complaint against a small carrier regarding its directory list rates, the small carrier would be required to present a cost study providing credible and verifiable cost data to justify the challenged rate. In the absence of cost data showing that the carrier's costs exceed the FCC's presumptively reasonable rates, the Commission, depending on the circumstances, held that it may find in favor of the publisher and award damages accordingly. ¶ 106. On November 4, 1999, ADP filed a petition for reconsideration of the FCC's Third Report and Order. In the petition, ADP seeks interim relief from the Commission to allow publishers to pay carriers \$0.04 per directory listing pending the resolution of a section 208 complaint against a carrier.³

II ADP has Failed to Meet the Commission's Criteria for Granting Interim Relief

The requirements for interim relief include the following: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent a grant of preliminary relief; (3) the degree of injury to the other party if relief is granted; and (4) whether the issuance of the order is in the public interest.⁴ ADP has failed to meet each requirement.

ADP claims that the likelihood of a publisher's success on the merits will be high if a carrier chooses to charge a higher rate than the Commission's \$0.04 presumptively reasonable rate. ADP's claim is without merit. First, the FCC has already acknowledged the fact that a rate of \$0.04 per listing may not be enough for small carriers to cover the costs associated with providing base file listings. ¶ 105. Second, NTCA's petition for reconsideration filed in this proceeding demonstrates that many small carriers charge a cost based rate on average of \$0.36

³ *ADP Petition for Reconsideration*, pp. 14-15, (November 4, 1999).

⁴ *AT&T Corp v. Ameritech Corp. and Quest Communications Corp.*, 13 FCC Rcd. 14508, 14515 (1998).

per directory listing.⁵ Therefore, these small carriers will likely be able to demonstrate that the Commission's presumptively reasonable \$0.04 per subscriber list rate for large carriers does not permit a small telephone company to recover all of its incremental costs plus a reasonable share of common costs and overheads. Thus, likelihood of success on the merits would be with the small carrier, not the directory publisher.

ADP asserts that if publishers are prevented from purchasing subscriber list information because the carrier's rates exceed the benchmark, their directories will be less accurate than the carrier's affiliate directories and result in irreparable harm to competing publishers through loss of customers and goodwill. This claim is disingenuous. Many directory publishers, who are now claiming that small carrier directory list rates are unreasonable, have for years purchased directory listings at the current rates from these carriers and have never before claimed irreparable harm or unreasonable rates. Moreover, many publishers who have chosen not to purchase directory listing from small carriers in the past have never claimed that the lack of customer listings in their directory has caused them irreparable harm. The harm either does not exist or is so small that it is not worthy of such relief. Furthermore, since damages can be obtained through the Commission's current complaint procedures to adequately correct any harm describe by ADP, the claimed harm therefore would be reparable. ¶ 106.

ADP further claims that if the FCC requires small carriers to charge publishers \$0.04 per listing pending the outcome of a section 208 complaint against a carrier, the degree of injury to the carrier will not be great because the publisher will merely pay the difference between the

⁵ *NTCA Petition for Reconsideration*, pp. 3-9, (November 4, 1999).

higher rate and the benchmark rate, if the higher rate is found appropriate. This claim too is without merit. The harm to the carrier is much greater than the harm measured by the difference of the carrier's directory listing rate and the FCC's presumptive rate. Managers from small rural carriers will be forced to take time from their very busy schedules to travel to Washington hire attorneys and spend significant amounts of money, energy and resources to defend frivolous claims filed by directory publishers. The cost for attorney fees alone would in many instances exceed the annual revenues received from directory publishers. Given these circumstances, it is no wonder why directory publishers are using the FCC's ruling in an attempt to coerce directory listings from rural carriers through the threat of litigation. The FCC never intended for its ruling to be used by directory publishers in this manner nor result in this type of harm to small and rural carriers.

Lastly, ADP claims that it requested interim relief will serve the public interest because it will promote competition in the directory publishing market. The only interest ADP is seeking to promote is its own self-interest. By requiring small carriers to charge below cost rates for directory listings to directory publishers pending resolution of a complaint, these publishers are seeking to provide themselves with unfair competitive advantage over other publishers who have purchased the listings at the carrier's rate. This is not promoting cost efficient competition in the directory publishing market, this is attempting to gain an unfair competitive advantage in the market. Competition does not mean that ADP should benefit from obtaining listings below cost.

Given the fact that the cost of providing directory listings for many small carriers is greater than \$0.04 per listing, the Commission's current procedures for resolving directory listing rate disputes are fair and equitable. To require small carriers to provide directory listing at below cost pending resolution of a section 208 complaint would only increase the harm imposed on a carrier

who would have already expended significant amounts of money and resources to defend a claim filed by directory publisher. In addition, requiring carriers to charge \$0.04 per listing pending resolution of a complaint would remove any leverage that a small carrier may have to negotiate a settled rate with a publisher and also remove any incentive for a publisher to negotiate a rate prior to litigation. The interim relief sought by ADP will only increase directory publishers' ability to threaten and intimidate small carriers and increase the likelihood of litigation before the FCC.⁶

Allowing for a presumptively reasonable \$0.42 per subscriber list rate of rural telephone companies as recommended by NTCA's in its petition for reconsideration, or the cost based rates of individual carriers, will allow for the continued efficient development of a competitive directory publishing market in America, while fairly compensating rural carriers for the subscriber list information they provide to publishers. The \$0.42 rate will minimize the number of threats of litigation by directory publishers in an attempt to take directory listings from small and rural telephone carriers at a price below cost. The \$0.42 rate will also significantly reduce the regulatory and litigation costs to small and rural carriers, directory publishers, and the Commission, which is a primary goal of the Third Report and Order.

III Conclusion

Based on the reasons stated above, NTCA urges the Commission to reject ADP's request that the FCC allow directory publishers to pay \$0.04 per subscriber list rate and \$0.06 per updated list rate to a carrier pending the resolution of a publisher's section 208 complaint against a carrier concerning the rates charged by the carrier. In addition, NTCA urges the Commission

⁶ *NTCA Petition for Reconsideration*, Attachments 1, 2, and 3 (November 4, 1999).

to amend its rules to allow small and rural telephone companies a \$0.42 presumptively reasonable subscriber list rate for base list and updated list information.

Respectfully submitted,

NATIONAL TELEPHONE COOPERATIVE
ASSOCIATION

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January 11, 2000

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments in Opposition to the Petition for Reconsideration filed by the Association of Directory Publishers of the National Telephone Cooperative Association in CC Docket No. 96-115, CC Docket No. 96-98 and CC Docket No. 99-273, FCC 99-227 was served on this 11th day of January 2000 by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

—

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Gail C. Malloy

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