

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
MCLEODUSA PUBLISHING COMPANY,)	
)	
Complainant,)	
)	
v.)	File No. EB-01-MD-004
)	
WOOD COUNTY TELEPHONE)	
COMPANY, INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 2002

Released: March 29, 2002

By the Commission: Commissioner Martin issuing a separate statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant the formal complaint that McLeodUSA Publishing Company ("McLeod") filed against Wood County Telephone Company, Inc. ("Wood County") pursuant to section 208 of the Communications Act of 1934, as amended ("Communications Act" or "Act").¹ In particular, we grant McLeod's claim that, under section 222(e) of the Act² and our *SLI Order*,³ Wood County must charge no more than the Commission-prescribed presumptively reasonable rate of four cents (\$0.04) per listing for "base file" subscriber listing information ("SLI"), rather than its proposed rate of \$0.6527 per listing (over 1600% above the presumptively reasonable rate). We do so because Wood County has failed to meet its burden of providing credible and verifiable cost data supporting a rate for base file SLI in excess of the presumptively reasonable rate. For similar reasons, we also grant McLeod's claim that Wood County must charge no more than the presumptively reasonable rate of six cents (\$0.06) per listing for "update" SLI listings.

¹ 47 U.S.C. § 208.

² 47 U.S.C. § 222(e).

³ *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order, 14 FCC Rcd 15550 (1999) ("*SLI Order*").

II. BACKGROUND

2. Wood County is a local exchange carrier (“LEC”) that provides telecommunications services in several areas in Wisconsin.⁴ McLeod is a telephone directory publisher that publishes white and yellow page directories in competition with large and small LECs, like Wood County, in numerous states across the country, including Wisconsin.⁵

3. SLI refers to telephone company subscribers’ names, addresses, and telephone numbers, as well as headings under which businesses are listed in the yellow pages.⁶ Thus, SLI forms the foundation of the directory publishing business. Telephone companies, like Wood County, develop SLI when they initiate service to local telephone exchange customers.⁷ Independent directory publishers, like McLeod, generally must obtain SLI from LECs in order to publish current and accurate directories containing listings for the areas served by the LECs.⁸ In addition, LECs, including Wood County, generally use SLI that they develop during the ordinary course of providing exchange access service to publish their own directories of residential and business customers.⁹

4. Section 222(e) of the Act requires 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.”¹⁰ The *SLI Order* adopted rules implementing section 222(e).¹¹

5. In those rules, the Commission established presumptively reasonable rates for LECs’ provision of “base file” SLI and “update” SLI services to directory publishers.¹² “Base file” SLI refers to the initial load of SLI listings that a directory publisher obtains from a LEC.¹³ “Base file” also encompasses a “refresh” service, which consists of a complete set of SLI listings that a LEC provides to a publisher who has already previously received a complete set of listings

⁴ Formal Complaint of McLeodUSA Publishing Company, File No. EB-01-MD-004 (filed Feb. 12, 2001) (“Complaint”) at ¶ 5; Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-01-MD-004 (filed Mar. 29, 2001) (“Joint Statement”) at ¶ 3.

⁵ Joint Statement at ¶ 1.

⁶ *SLI Order*, 14 FCC Rcd at 15554, ¶ 2.

⁷ *Id.* at 15554, ¶ 3.

⁸ *Id.* at 15554, ¶ 2.

⁹ *Id.* at 15554, ¶ 3.

¹⁰ 47 U.S.C. § 222(e).

¹¹ The implementing rules include, *inter alia*, section 64.2309 (requiring carriers to provide SLI on a nondiscriminatory basis and under reasonable rates, terms, and conditions); 64.2325 (establishing presumptively reasonable rates of \$0.04 per listing for base file SLI and \$0.06 per listing for update SLI); and 64.2333 (placing the burden of proof in a complaint proceeding arising under section 222(e) of the Act on the carrier to the extent that it seeks to charge rates for SLI higher than the presumptively reasonable rates). 47 C.F.R. §§ 64.2309, 64.2325, and 64.2333.

¹² *SLI Order*, 14 FCC Rcd at 15607, ¶ 105; 47 C.F.R. § 64.2325.

¹³ *SLI Order*, 14 FCC Rcd at 11562-63, ¶ 16; 47 C.F.R. § 64.2305.

from the LEC.¹⁴ “Update” SLI service includes only changes to the SLI listings that have occurred between specified dates.¹⁵ Updates include “new connects” registered after a publisher has obtained the base file SLI from the LEC.¹⁶ The Commission set the presumptively reasonable base file rate at \$0.04 per listing and the update rate at \$0.06 per listing.¹⁷

6. Although the Commission established presumptively reasonable rates in the *SLI Order*, the Commission acknowledged that those rates might not be reasonable for all LECs. The Commission recognized the possibility that “[i]n certain circumstances, the actual cost per listing could be higher than the presumptively reasonable rates. . . .”¹⁸ The Commission pointed out that “for some smaller carriers a presumptively reasonable rate of \$0.04 per listing may not be enough to cover the costs associated with providing base file listings, since the number of listings involved could be small.”¹⁹

7. Because of these concerns, the Commission did not prohibit LECs from charging rates higher than the presumptively reasonable rates set forth in the *SLI Order*. The Commission made clear, however, that any LEC that seeks to charge more than the presumptively reasonable rates for SLI must justify those rates in the event that a directory publisher challenges them in a section 208 complaint proceeding.²⁰ In such a proceeding, “the carrier must present a cost study providing credible and verifiable cost data to justify each challenged rate.”²¹ The LEC’s cost study must, *inter alia*, “clearly and specifically identify and justify” the following costs related to the creation, maintenance, and provision of SLI: incremental costs, common costs, and overhead.²² The Commission emphasized that, “[i]n any future federal subscriber list information rate proceeding, the burden of proof will be on the carrier to the extent it charges a rate above the presumptively reasonable rates.”²³ Further, the Commission concluded that, “[i]n the absence of cost data showing that the carrier’s costs exceed the presumptively reasonable rates, the Bureau or the Commission, depending on the circumstances, shall find in favor of the plaintiff”²⁴

8. The *SLI Order* clearly stated, therefore, that although LECs may attempt to justify a rate higher than the presumptively reasonable rate, any such attempt must be detailed and specific. The Commission did not prescribe any particular methodology that LECs must employ to develop cost studies to justify the higher rate, but mandated that the cost data used in any such

¹⁴ *SLI Order*, 14 FCC Rcd at 11562-63, ¶ 16.

¹⁵ *SLI Order*, 14 FCC Rcd at 11562-63, ¶ 16; 47 C.F.R. § 64.2305.

¹⁶ *SLI Order*, 14 FCC Rcd at 11562-63, ¶ 16.

¹⁷ *Id.* at 15599-607, ¶¶ 93-103; 47 C.F.R. § 64.2325.

¹⁸ *SLI Order*, 14 FCC Rcd at 15607, ¶ 105.

¹⁹ *Id.*

²⁰ *Id.* (citing 47 U.S.C. § 208).

²¹ *Id.* at 15607, ¶ 106.

²² *Id.* These categories are defined, *infra*, at Sections III(B)(1)-(3).

²³ *Id.* at 15607, ¶ 105; 47 C.F.R. § 64.2333.

²⁴ *SLI Order*, 14 FCC Rcd at 15607, ¶ 106.

study be *credible* and *verifiable*.²⁵ Further, the Commission explained that the LEC, in its cost study, must “describe how its methods for allocating common costs compare to those the [LEC] uses in other contexts.”²⁶

9. After release of the *SLI Order*, McLeod and Wood County negotiated about rates for Wood County’s provision of base file and update SLI. Wood County asserted that its costs associated with maintaining and providing SLI justified a rate exceeding \$0.50 per listing (over 1200% above the presumptively reasonable rate of \$0.04 per listing for base file SLI), and offered to provide SLI to McLeod at a negotiated rate of \$0.42 per listing (over 1000% above the presumptively reasonable base file rate) for both base file SLI and SLI updates.²⁷ Wood County added that it would assess a minimum charge of \$100 per transmission for providing updated SLI to McLeod.²⁸ McLeod disputed Wood County’s cost estimates and sought to obtain SLI from Wood County at the presumptively reasonable rates.

10. McLeod and Wood County failed to reach a negotiated agreement, whereupon McLeod filed the instant complaint. In its complaint, McLeod asserts that Wood County’s refusal to provide SLI at the presumptively reasonable rates violates section 222(e) of the Act.²⁹ McLeod requests that the Commission order Wood County to charge the presumptively reasonable rates of \$0.04 per listing for base file SLI and \$0.06 per listing for updates.³⁰

III. DISCUSSION

A. Although It is the Defendant, Wood County Bears the Burden of Proving the Reasonableness of Its SLI Rates.

11. As stated above, the *SLI Order* and our rules require that a LEC seeking to charge more for SLI than the presumptively reasonable rate bears the burden of proof in a complaint proceeding concerning the reasonableness of the asserted rate. Wood County challenges that requirement here. Wood County argues that, as the defendant in this complaint proceeding, it should not have to bear the burden of proving the reasonableness of its SLI rates; rather, in Wood County’s view, the complainant, McLeod, should bear the burden of proving the *unreasonableness* of such rates.³¹ According to Wood County, because the complainant ordinarily bears the burden of proof in section 208 complaint proceedings, the Commission erred by shifting that burden of proof to LEC defendants in complaint proceedings concerning SLI rates.³²

²⁵ *Id.*

²⁶ *Id.*

²⁷ Complaint at ¶ 12 and Exhibit 13; Joint Statement at ¶ 9.

²⁸ *Id.*

²⁹ Complaint at ¶¶ 1-2 and Prayer for Relief.

³⁰ Complaint at Prayer for Relief.

³¹ Answer of Wood County Telephone Company, File N. EB-01-MD-004 (filed Mar. 19, 2001) (“Answer”) at ¶ 2; Initial Brief of Wood County Telephone Company, File No. EB-01-MD-004 (filed Sep. 14, 2001) (“Wood County Brief”) at 6-7.

³² *Id.*

12. We disagree. To the extent that Wood County indirectly challenges the Commission's rules adopted in the *SLI Order*, we reject that challenge. The Commission has broad authority to conduct section 208 proceedings "in such manner and by such means as it shall deem proper,"³³ and more generally to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."³⁴ In establishing presumptively reasonable rates in the *SLI Order*, the Commission expressly sought to promote certainty and reduce the likelihood that parties would expend their own and the Commission's resources in litigating the reasonableness of SLI rates.³⁵ The Commission's allocation of the burden of proof to the party seeking to charge more than the presumptively reasonable rate helps achieve this objective by motivating the party with easier access to critical information to refrain from charging rates in excess of the benchmarks unless fully prepared to defend such rates.³⁶ Moreover, the Commission has engaged in this same burden allocation in other circumstances in which the Commission has prescribed presumptively reasonable rates.³⁷ The *SLI Order's* shift in the burden of proof is well within the Commission's authority to establish procedures for complaint cases. Accordingly, we affirm the *SLI Order* and rule that Wood County must bear the burden of proving the reasonableness of its proposed SLI rates in this proceeding.³⁸

B. Wood County Has Failed to Meet Its Burden of Justifying a Rate for Base File SLI That Exceeds the Presumptively Reasonable Rate.

13. In the *SLI Order*, the Commission set forth three categories of costs that a carrier

³³ 47 U.S.C. § 208(a).

³⁴ 47 U.S.C. § 154(j).

³⁵ *SLI Order*, 14 FCC Rcd at 15607-08, ¶ 106.

³⁶ We note that Wood County has unique access to information concerning its costs. The Commission has previously concluded in other similar circumstances that the party with unique access to crucial information may have to bear the burden of proof. *See In re Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22615, n.782 (1997) (subsequent history omitted) (explaining that, in cases alleging discrimination under section 202(a), the burden shifts to the defendant to justify discrimination once the complainant has presented *prima facie* evidence that discrimination in the provision of like services exists); *see also, National Communications Assoc., Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) (explaining that it is generally appropriate to shift the burden to the party with easier access to relevant information). Wood County cites a recent Commission decision in which the Commission did not shift the burden of proof to the party with easier access to relevant information. *See AT&T Corporation v. Bell Atlantic – Pennsylvania*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 7467, 7471-72 ¶ 10 (2000). However, that case did not involve a Commission-prescribed presumptively reasonable rate or a rulemaking proceeding in which the Commission established specific cost-study requirements for carriers seeking to exceed a presumptively reasonable rate.

³⁷ *See* 47 C.F.R. § 76.1504(d) (assigning the burden of proof to the defendant open video system operator in complaint proceedings involving claims that the operator is not charging the presumptively reasonable rate).

³⁸ Wood County also contends that McLeod waived its right to argue the burden of proof issue by purportedly failing to address it in its initial brief. Reply Brief of Wood County Telephone Company, File No. EB-01-MD-004 (filed Sep. 28, 2001) ("Wood County Reply") at 9 (citing 47 C.F.R. § 1.732(b) (providing that, unless otherwise directed, all claims and defenses must be included in the parties' briefs or will be deemed abandoned). We do not agree that McLeod was obligated to address the burden of proof issue in its opening brief, because the burden is clearly specified in Commission rules. In any event, McLeod did assert in its initial brief that Wood County bore the burden of proof in this proceeding, and, accordingly, we reject Wood County's contention. Initial Brief of Complainant McLeodUSA Publishing Company, File No. EB-01-MD-004 (filed Sep. 14, 2001) ("McLeod Brief") at 4-5, ¶¶ 10-11.

should address in any cost study attempting to support a rate higher than the presumptively reasonable rate for the provision of SLI: incremental costs, common costs, and overhead costs.³⁹ In its answer to McLeod's complaint, Wood County provided a cost study that addresses those three cost categories. In doing so, the cost study purports to justify a rate for the provision of base file SLI of \$0.6527 per listing, over 1600% above the presumptively reasonable rate of \$0.04.⁴⁰ Wood County developed its proposed rate by adding together per listing incremental costs of approximately \$0.04, common costs of approximately \$0.50, and overheads of approximately \$0.11.⁴¹ McLeod challenges Wood County's data and the cost justification provided for each of the three relevant categories, which we analyze in sequence below.

1. Wood County Has Failed to Provide Adequate Data Concerning the Incremental Costs Associated with Its Provision of Base File SLI.

14. In the *SLI Order*, the Commission required that the LEC in an SLI complaint proceeding identify in its cost study "[e]ach specific function the carrier performs solely to provide subscriber list information to the complainant; and the incremental costs the carrier incurs in performing each of these specific functions."⁴² Thus, incremental costs are restricted to those costs the LEC incurs to provide SLI to the complainant. Examples of incremental costs include the costs of taking specific orders for SLI, the costs of downloading the requested SLI, the costs of the magnetic tape or paper on which the SLI is recorded, and the costs of mailing.⁴³

15. Wood County asserts that its incremental costs of providing base file SLI to McLeod amount to \$0.0408 per listing.⁴⁴ This amount consists entirely of the fee that Wood County's directory publisher agent, The Berry Company ("Berry"), charges Wood County for providing formatted base file SLI to third parties who request that information from Wood County.⁴⁵ Wood County did not provide any data from which we could ascertain whether the \$0.0408 figure is reasonable or how it compares to Berry's underlying costs.

16. McLeod argues that Wood County has failed to justify any incremental costs that can be included in a reasonable rate for SLI. McLeod argues that the *SLI Order* limits allowable incremental costs to those costs incurred by the LEC for functions that the LEC *itself* actually performs.⁴⁶ According to McLeod, incremental costs do not include (1) the fee that a LEC pays a third party to perform SLI functions on the LEC's behalf, or (2) costs that a third party, such as Berry, might incur to provide SLI on the LEC's behalf.⁴⁷

³⁹ *SLI Order*, 14 FCC Rcd at 15608, ¶ 106.

⁴⁰ Wood County's SLI Cost Study, File No. EB-01-MD-004 (filed Mar. 19, 2001) ("Wood County Cost Study"), attached as Exhibit 1 to the Answer.

⁴¹ Wood County Cost Study at Schedule 1.

⁴² *SLI Order*, 14 FCC Rcd at 15608, ¶ 106.

⁴³ *Id.* at 15591, ¶ 77.

⁴⁴ Wood County Cost Study at Schedules 2 and 2a.

⁴⁵ *Id.* at Schedule 2a.

⁴⁶ Report of Stephen E. Siwek, File No. EB-01-MD-004 (filed Jun. 26, 2001) ("McLeod Report") at 11-12.

⁴⁷ *Id.*

17. We disagree that allowable incremental costs are as narrowly defined as McLeod argues. We believe that it may be appropriate for a small carrier, like Wood County, to utilize a third party agent to provide formatted SLI to directory publishers who request SLI from Wood County. Wood County justifies its reliance on Berry to provide that service as a reasonable and efficient way to respond to isolated requests for base file SLI.⁴⁸ Such justification might prove persuasive in particular cases.

18. We conclude, however, that if a LEC chooses to rely on an agent to respond to requests for SLI, then the LEC must, consistent with our *SLI Order*, provide credible and verifiable information supporting the reasonableness of the amount that the LEC pays the agent charges for the provision of SLI to the requesting party. Thus, Wood County cannot avoid the obligation set forth in the *SLI Order* to justify proposed incremental costs of providing SLI merely by relying on an agent to perform the functions from which the incremental costs are derived. Such an outcome would invite abuse by LECs and their third party publisher agents. For example, a LEC could agree with its directory publisher agent to set an exorbitant rate for the provision of SLI to independent publishers. Unless we require the LEC to justify that rate as reasonable, the LEC could simply include the rate, as Wood County has done here, as the “incremental cost” the LEC incurs to provide SLI to independent publishers. This would undermine the statutory goal of fostering a competitive directory publishing market.

19. The need for information justifying the \$0.0408 rate paid to Berry is particularly important here, given that this purported incremental cost dramatically exceeds the incremental costs that the Commission envisioned in the *SLI Order*. There, the Commission determined that the presumptively reasonable rate of \$0.04 per listing would be adequate to compensate a LEC, in all but “relatively rare” situations,⁴⁹ for *both* its incremental costs *and* a reasonable allocation of common costs and overheads.⁵⁰ Moreover, Wood County has indicated that if it were to calculate its own incremental costs associated with providing SLI directly to McLeod in at least one format, such costs would likely be *less* than the \$0.0408 per listing rate cited by Berry.⁵¹ Finally, the *SLI Order* notes that commercial list providers typically charge approximately \$0.04 per listing and that commercial list providers’ costs in acquiring and maintaining SLI likely exceed those of a LEC.⁵² If commercial list providers with generally higher costs than LECs can typically recover not only their incremental costs, but also a reasonable allocation of common costs and overheads and a reasonable profit, by selling their listings for approximately \$0.04 per listing, then Wood County’s \$0.0408 incremental cost projection based on the Berry rate

⁴⁸ Rebuttal Cost Report prepared by Douglas Meredith and Scott Duncan of John Staurulakis, Inc. File No. EB-01-MD-004 (filed Aug. 15, 2001) (“Wood County Rebuttal”) at 8-9.

⁴⁹ *SLI Order*, 14 FCC Rcd at 15606, ¶ 102.

⁵⁰ *Id.* at 15592, ¶ 79.

⁵¹ Wood County Rebuttal at 14. Wood County points out that its costs would be less than the Berry rate if it provided unformatted SLI to McLeod, and that the Berry rate is based on the provision of formatted SLI to publishers. *Id.* However, Wood County does not attempt to calculate the formatting costs associated with Wood County’s provision of formatted SLI directly to McLeod; nor does Wood County state that such costs would raise the total incremental cost calculation above \$0.0408 per listing. Wood County simply says that the formatting costs “may” lead to an incremental cost calculation exceeding the Berry rate. *Id.*

⁵² *SLI Order*, 14 FCC Rcd at 15602-03, ¶ 96. Commercial list providers differ from directory publishers in that they obtain SLI from sources other than a LEC (*e.g.*, already published directories or information maintained by local Chambers of Commerce). *Id.* at 15596, ¶ 87.

certainly requires substantial supporting evidence.

20. We recognize that it may be difficult in some instances for a LEC to obtain from a publishing agent information concerning the costs incurred by that agent for performing various functions. However, Wood County could have offered certain other information that might have supported the reasonableness of the rate it pays Berry. For example, Wood County could have explained how it selected Berry to perform the functions for which it seeks to charge McLeod and whether that selection was made through a competitive bidding process. Further, Wood County could have described how the Berry rate compares to rates charged by other publishing agents for similar services. Wood County proffered no such information.

21. Because the incremental cost calculation Wood County proposes (*i.e.*, the Berry \$0.0408 rate) is facially questionable for the reasons described above, Wood County has a significant burden to provide adequate information supporting the reasonableness of this calculation. Wood County failed, however, to provide *any* information supporting the Berry rate, much less credible and verifiable cost data.⁵³ Further, the record contains insufficient information from which we could, *sua sponte*, ascertain Wood County's incremental costs of providing base file SLI to McLeod. Accordingly, we cannot consider the alleged incremental costs of \$0.0408 in determining whether Wood County has justified a departure from the presumptively reasonable rate for base file SLI.

2. Wood County Has Failed to Provide Adequate Data Concerning a Reasonable Allocation of Common Costs.

22. In the *SLI Order*, the Commission defined common costs as “the cost[s] the carrier incurs in creating and maintaining its subscriber list information database and the methods the carrier uses to allocate [those] cost[s] among supported services.”⁵⁴ Thus, common costs, within the meaning of the *SLI Order*, are those costs that the LEC incurs in connection with all SLI-related activities that are in addition to those activities performed *solely* to provide SLI to the complainant. Consistent with that definition, the parties agree that some portion of Wood County's costs of entering SLI information into a database and maintaining the database may properly be allocated to SLI for purposes of calculating a reasonable cost-based rate for the provision of SLI to McLeod.⁵⁵ The parties disagree, however, concerning the proper allocation of such common costs.

23. Wood County maintains its SLI information in a single SLI/directory assistance (“DA”) database.⁵⁶ According to Wood County, SLI information makes its way into the SLI/DA database in the following manner: a Wood County customer service representative obtains SLI information during the order-taking process and enters that information into a service order

⁵³ For example, Wood County could have ascertained how long it took for Berry employees to provide the requested SLI to McLeod, the costs associated with the time to perform the required tasks, and the cost of the material used to prepare and send the information to McLeod.

⁵⁴ *SLI Order*, 14 FCC Rcd at 15608, ¶ 106.

⁵⁵ Reply Brief of McLeodUSA Publishing Company, File No. EB-01-MD-004 (filed Sep. 28, 2001) (“McLeod Reply”) at 2-3; Wood County Brief at 17-18.

⁵⁶ Wood County's Answers to Interrogatories, File No. EB-01-MD-004 (filed Apr. 23, 2001) at Response to Interrogatory 1.

system database.⁵⁷ Some of the information collected by the customer service representatives automatically populates the SLI/DA database.⁵⁸ On a daily basis, a directory clerk processes all new service orders affecting the SLI/DA database and modifies automatically populated data to reflect specific requests from subscribers (for example, for an additional listing for a child's phone).⁵⁹ A verification clerk then reviews the directory clerk's work.⁶⁰

24. Wood County's cost study analyzes these activities and their attendant costs to support a purported reasonable rate for the provision of SLI. The categories of common costs that Wood County seeks to include in its calculation of a reasonable SLI rate are: service order processing costs, directory clerk expenses, computer expenses, and computer investment expenses.⁶¹ Wood County arrives at its common cost allocation by determining the service order processing costs, directory clerk expenses, computer expenses, and computer investment costs that are related to SLI/DA activity. Wood County totals those costs and then allocates half of the total costs to SLI activity (Wood County asserts that the SLI/DA expenses are evenly allocable to SLI and DA activities).⁶² Wood County then divides the SLI-related costs by an annual demand figure of 81,267 SLI listings to arrive at the \$0.5004 per listing figure for its common cost allocation.⁶³

25. The cost categories described above seem generally appropriate for Wood County to consider in formulating a cost study. McLeod argues, however, that Wood County cannot include any of the service order processing costs as common costs, because Wood County would incur such costs wholly apart from the need to create and maintain an SLI database.⁶⁴ According to McLeod, service order processing is an integral part of providing telephone exchange service, and information related to SLI, although it may initially be collected in the service order process, does not become part of the SLI database until it is entered into the database by the directory clerk.⁶⁵ Thus, in McLeod's view, there are no service order processing costs unique to SLI, only directory clerk costs.

26. We agree with McLeod that recoverable common costs, as defined in the *SLI Order*, should include only those costs that Wood County incurs because of the need to create and maintain an SLI database. We do not agree, however, that Wood County has failed to identify any such costs in its service order processing. Wood County has explained that its customer service representatives spend a discrete amount of time in the service order process obtaining information that is used exclusively for the SLI/DA database.⁶⁶ For example, Wood

⁵⁷ Wood County's Answers to Interrogatories at Response to Interrogatory 2.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Wood County Cost Study at Schedule 3. The service order processing and directory clerk expenses comprise over 95% of the calculated common costs.

⁶² Wood County Cost Study at Schedule 3.

⁶³ *Id.*

⁶⁴ McLeod Report at 20-21; McLeod Brief at 13-14.

⁶⁵ McLeod Report at 20.

⁶⁶ Wood County Rebuttal at 27-28.

County explains that customer service representatives ask new customers how they want their listings to read in the directory or whether they want additional listings.⁶⁷ Wood County persuasively argues that, but for the need to create and maintain an SLI database, some identifiable amount of time spent by the customer service representatives would be eliminated.⁶⁸ Accordingly, we will consider those service order processing costs that Wood County incurred because of the need to create and maintain an SLI database as recoverable common costs, within the meaning of the *SLI Order*.

a. Service Order Processing Costs

27. Wood County identifies six types of service orders that involve SLI activity: 1) new installation, not requesting non-published status; 2) new installation, requesting non-published or non-listed status; 3) disconnects; 4) requests by established subscribers for non-published status; 5) requests by established subscribers for return to published status; and 6) requests by established subscribers for additional listings.⁶⁹ Wood County predicates its service order processing costs on estimates of time that its customer service representatives spend performing SLI activities for each of these six service order types listed above.⁷⁰ For example, Wood County estimates that it takes its customer service representatives an average of 21 minutes per service order to process a new installation request that does not include a request for non-published status;⁷¹ Wood County further estimates that 3 minutes of the 21-minute total is spent on SLI/DA related activities.⁷² Wood County maintains, therefore, that the costs associated with this three-minute activity must be considered in ascertaining a reasonable SLI rate.

28. For the reasons described below, we conclude that Wood County's time estimates for four of the six service order categories are unverifiable; we also conclude that Wood County improperly failed to account for end user revenues from the remaining two service order categories in developing its cost allocation methodology. Consequently, we cannot consider any service order processing costs in determining whether Wood County may exceed the presumptively reasonable rates for providing base file SLI.

⁶⁷ *Id.*; Wood County Answer's to Interrogatories at Response to Interrogatory 2.

⁶⁸ Wood County Rebuttal at 27-28; Wood County Brief at 18-19.

⁶⁹ *Id.* at Schedule 3a.

⁷⁰ Wood County Cost Study at Schedule 3a, Column D.

⁷¹ *Id.* at Schedule 3a, Column B.

⁷² *Id.* at Schedule 3a, Column D. Wood County provides the following times estimates for the remaining five categories of service orders: Wood County estimates that it takes an average of 19 minutes to process new installation requests that include requests for non-published or non-listed status, of which 3 minutes consists of SLI/DA activity; 6 minutes to process disconnects, of which 3 minutes consists of SLI/DA activity; 14 minutes to process requests by established subscribers for non-published status, of which 3 minutes consists of SLI/DA activity; 8 minutes to process requests by established subscribers for return to published status, which consists entirely of SLI/DA activity; and 6 minutes to process requests by established subscribers for additional listings, which consists entirely of SLI/DA activity. *Id.*

(i) Wood County's Time Estimates for Four of the Six Service Order Categories are Unverifiable And the Process Used to Develop the Estimates is Not Credible.

29. Wood County states that it obtained estimates of the time spent on SLI activities for four of the six service order types from a senior customer service representative at the company with expertise in service order processing.⁷³ However, the customer service representative apparently did not conduct any research or make any attempts to develop verifiable time estimates or averages in providing her estimates.⁷⁴ It appears that she arrived at her estimates extemporaneously during the course of a thirty-minute conversation with Wood County's chief financial officer.⁷⁵ Moreover, although Wood County performed a sampling exercise to calculate the total service order processing time spent on various customer service activities, Wood County did not track, as part of that exercise, how much of that time was spent on SLI-related activities.⁷⁶ In fact, the customer service representative was not even informed of the results of the sampling exercise so that she could compare her estimates of time spent on SLI-related activity to the total service order processing time.⁷⁷ Therefore, we conclude that the process used to develop the SLI-related time estimates for these four service order categories is not credible and cannot produce reliable data. Merely asking an employee to provide a subjective, extemporaneous estimate of time associated with specific activities, without conducting any research or reviewing any data whatsoever, does not provide an adequate foundation for figures used in Wood County's cost study. Moreover, we cannot verify the time estimates associated with the service order processing activities for these four service order categories, because Wood County has proffered no documents to support the SLI-related portion of the time estimates. Thus, we do not consider costs associated with these four service order categories in determining whether Wood County has justified a rate exceeding the presumptively reasonable rate for base file SLI.⁷⁸

(ii) Wood County Improperly Fails to Account for Revenue Received From Its End User Customers In Its Cost Allocation Methodology for the Remaining Two Service Order Categories.

30. With respect to the remaining two service order types (requests by established subscribers for additional listings, and requests by established subscribers for return to published

⁷³ Wood County Rebuttal at 22-24. These four service order categories are: 1) new installation – not requesting non-published status; 2) new installation – requesting non-published or unlisted status; 3) disconnection; and 4) requests by established subscribers for return to published status. Wood County Cost Study at Schedule 3a.

⁷⁴ McLeod Report at 15-16 (citing Deposition of Jerold R. Johnson, File No. EB-01-MD-004 (Jun. 5, 2001) ("Johnson Dep.") at 123-25, 133).

⁷⁵ Johnson Dep. at 123-25.

⁷⁶ McLeod Report at 15.

⁷⁷ Johnson Dep. at 123-25, 133.

⁷⁸ We also question whether costs related to honoring requests for non-published or non-listed status are appropriately included in a cost study seeking to establish rates for the provision of SLI. The definition of SLI in the Commission's rules does not include non-published or non-listed information. 47 C.F.R. § 64.2305(e). In any event, we need not decide this issue here, because we find the cost information to be defective for other reasons.

status), Wood County maintains that the time spent on SLI activity equals the total time spent on service order processing (*i.e.*, the service order processing time allegedly consists wholly of SLI-related activity (a “pure SLI function”).⁷⁹ These time estimates appear to be derived from the same sampling exercise described above, and stem from samples of four and five service orders, respectively.⁸⁰ We question whether such small sample sizes could adequately justify the resulting time estimates. We need not decide that question here, however, because we conclude that the cost allocations for these two service order categories are deficient for another reason – Wood County’s cost study fails to account adequately for revenues received from its own end user customers for these two activities.

31. Pursuant to its state tariff, Wood County receives from its end user customers \$5.00 per request and \$0.50 per month for each additional directory listing requested.⁸¹ Wood County did not account for these revenues in calculating an allocation of common costs upon which to base a rate to charge directory publishers for SLI.⁸² For the following reasons, this failure precludes us from considering Wood County’s costs associated with processing additional listing requests in determining whether Wood County may exceed the presumptively reasonable rates for SLI.

32. The Commission explained in the *SLI Order* that a LEC may recover “fair compensation” and a “reasonable profit” for the creation, maintenance, and provision of SLI.⁸³ It is neither fair nor reasonable for a LEC to earn a complete double recovery for these SLI activities. In other words, a LEC can choose to recover its costs associated with a pure SLI function from either its end user customers or its directory publisher customers, but it cannot recover all such costs from both. Accordingly, where a LEC charges its own end user customers to perform a pure SLI function, and the revenues earned pursuant to those charges exceed the costs incurred to perform this function, the LEC cannot rely on the same costs in attempting to justify a departure from the presumptively reasonable rates chargeable to directory publishers.

33. We cannot determine from the record whether the revenues Wood County receives from its end user customers for performing the pure SLI function of processing requests for additional listings exceeds Wood County’s costs associated with performing this function. This is because, although Wood County’s discovery responses provide the total revenues allegedly received from the \$5.00 non-recurring charge, the responses fail to state the revenues received from the \$0.50 monthly recurring charge. This omission is material, given the costs and revenue figures contained in Wood County’s study.⁸⁴ Thus, Wood County has failed to meet its

⁷⁹ “Pure SLI function” in this case refers to functions performed in connection with maintaining the single SLI/DA database that Wood County uses for SLI purposes. Thus, a “pure SLI function,” as defined here, does not involve activities that are unrelated to Wood County’s maintenance of the SLI/DA database, such as billing or maintenance and repair activities.

⁸⁰ McLeod Report at 15.

⁸¹ Wood County Answers to Interrogatories at Response to Interrogatory 2-3; McLeod Report at 23; Wood County Rebuttal at 30.

⁸² Rather, Wood County argued that revenues need not be considered at all. Wood County Brief at 15-17.

⁸³ *Id.* at 15590, ¶ 73, and 15595, ¶ 84.

⁸⁴ As McLeod points out, Wood County’s cost study does not indicate the number of additional listings that its customers request annually. McLeod Report at 23. Although Wood County indicates that it processes 444 service orders annually that contain additional listings (Wood County Cost Study at Schedule 3a), it is quite possible

(continued....)

burden of proving compliance with the threshold requirement of demonstrating that its costs exceed its revenues with respect to the pure SLI function of processing requests for additional listings. Accordingly, we cannot consider such costs in determining whether Wood County may charge more than the presumptively reasonable rate.

34. Similarly, with respect to the service order category of requests by established subscribers for return to published status, Wood County also did not properly account for the revenue received from its end user customers for such pure SLI function (five dollars per request) in computing its recoverable costs. In particular, Wood County apparently did not subtract these revenues from its costs in developing its common cost allocation to support its SLI rate.⁸⁵ Although Wood County at least made a superficial showing that its costs exceed its revenues for this service order category, the amount of un-recovered costs is so low (approximately \$700 annually) that it, standing alone, is insufficient to justify a rate for SLI higher than presumptively reasonable rate.⁸⁶

35. Wood County argues that we should not consider revenues for these pure SLI functions, because the tariffed charges were not set to recover the specific costs associated with those functions.⁸⁷ Wood County's explanation, however, is not sufficient. Wood County does not explain how the end-user charges *were* set by the state commission and what specific costs the charges *were* intended to cover. Wood County does not assert that the charges were designed to compensate Wood County entirely for other costs unrelated to the SLI-activities for which the charges are levied. Nor does Wood County assert that the charges do not defray at least some of the costs associated with the SLI activities. Accordingly, we reject Wood County's contention that it is improper to consider revenues earned with respect to these service order categories in evaluating Wood County's cost study.

36. In sum, given Wood County's failure to submit sufficient evidence supporting its estimates of the costs allocable to the SLI portion of four of the six service order processing functions, and Wood County's failure to account for customer revenues for the two pure SLI

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that a portion of these service orders contain multiple requests for additional listings. McLeod Report at 23. If less than half of these service orders contain requests for more than one additional listing, the revenues received entirely offset the alleged costs. For example, if the 444 service orders resulted in 650 additional listings, then Wood County's revenues would exceed the asserted costs: 444 service orders times \$5.00 per service order plus 650 listings times \$0.50 per listing times 12 months totals \$6120.00; Wood County's alleged costs for this service order category total \$6083.00. Wood County Answers to Interrogatories at Response to Interrogatory 2-3. Even if the revenues did not entirely offset the costs for this category, the shortfall would be too insignificant, standing alone, to justify a rate above the presumptively reasonable rate. *See* analysis, *infra*, at n.86.

⁸⁵ Again, Wood County elected not to engage in such an analysis, because it argued that revenues need not be considered at all, an argument we reject, *infra*.

⁸⁶ Wood County Answers to Interrogatories at Response to Interrogatory 2-3. If we applied Wood County's methodology to the \$700 cost described above, we would find a per listing SLI rate much lower than the presumptively reasonable rate: if we assume \$700 in total common costs attributed to SLI/DA activities, allocate those costs evenly between SLI and DA, and divide the SLI portion (\$350) by the 81,267 demand estimate used by Wood County, we arrive at a per listing figure of \$0.004. We assess the effect of these costs "standing alone" because, as described throughout this Order, Wood County has failed to meet its burden of proof regarding consideration of any other category of costs.

⁸⁷ Wood County Rebuttal at 30.

functions, we conclude that Wood County's service order processing costs are unverifiable and unreliable.⁸⁸ Further, with respect to at least four of the service order categories, although we acknowledge that Wood County reasonably asserts that *some* of these service order costs stem from SLI activities, Wood County provides insufficient information from which we can independently determine the amount of those costs. Accordingly, we find that Wood County has not met its burden of providing credible and verifiable cost data supporting the allocation of service order processing costs to SLI. Therefore, we decline to consider these costs in ascertaining whether Wood County may charge McLeod a rate higher than the presumptively reasonable rates for the provision of SLI.

b. Directory Clerk Costs

37. A large portion of Wood County's common cost calculation stems from costs allegedly incurred in connection with Wood County's entry of information into the SLI/DA database and verification of the accuracy of that information. The most critical component of these costs, similar to the service order costs discussed above, is Wood County's estimate of the time that its directory clerks spend on these activities. Despite Wood County's heavy reliance on such time estimates, Wood County again fails to provide credible and verifiable data supporting such estimates.

38. Wood County estimates that it takes an average of eight minutes per service order for Wood County's directory clerk and verification clerk to modify SLI data obtained in the service order process and ensure that the appropriate information is contained in the SLI database.⁸⁹ The eight-minute estimate consists of a five-minute estimate for initial processing time by the directory clerk and a three-minute estimate for verification by the verification clerk.⁹⁰ Again, Wood County proffers no records or documents to support these estimates. Although two Wood County employees apparently performed sampling exercises to develop the estimate provided, the exercises were too flawed to produce reliable data, and the employees failed to keep any records from which the data could be verified. As McLeod points out, the directory clerk and verification clerk apparently decided, on their own, to conduct the sampling exercises in question.⁹¹ Wood County's chief financial officer, who appears to have been responsible for gathering information for the cost study, did not instruct the clerks on how to perform the exercise or what to measure, and neither did any other Wood County officer.⁹² In fact, the chief financial officer was not aware that the two clerks had performed any sampling exercises until after the exercises were concluded.⁹³ Wood County could not explain what type of service orders were sampled, how the timing of those service orders was measured, whether the timing

⁸⁸ The SLI-related costs that Wood County includes in its interrogatory response for the two pure SLI functions include both service order processing costs *and* directory clerk expenses. Thus, Wood County's failure properly to consider revenues associated with these two functions applies to our consideration of both service order processing costs and directory clerk expenses. In any event, as discussed, *infra*, we do not consider Wood County's directory clerk costs as a whole because they are unverifiable and are derived from a flawed process.

⁸⁹ Wood County Cost Study at Schedule 3b.

⁹⁰ Wood County Answers to Interrogatories at Response to Interrogatory 2-4.

⁹¹ McLeod Report at 16-17.

⁹² *Id.* (citing Johnson Dep. at 214-25 and 221-22).

⁹³ *Id.*

was interrupted if the employee's work was temporarily interrupted, or what conventions the clerks may have used in measuring the processing time.⁹⁴

39. Further, although Wood County alleges that the eight-minute estimate is an average derived from the sampling exercises just described, Wood County provides no information or documents showing how that average was calculated or even whether it resulted from a mathematical calculation. The average may have simply been a subjective estimate that the directory clerks provided after the sampling exercises but without performing any mathematical calculation (similar to the subjective estimate provided by the customer service representative described above). How the average was calculated in this case is critical, because the record indicates that there is a wide disparity in the amount of time it may take to process and verify different service orders.⁹⁵ Whether Wood County properly considered that range, and the probable mix of service orders therein (*i.e.*, 95% of service orders are "simple" ones requiring only a minute of directory clerk time to complete and 5% are more complicated, requiring additional time to complete) is important in determining the reliability and credibility of the resulting average.⁹⁶ Wood County offers us nothing from which we can determine how it calculated the average and whether it considered these critical factors in making the calculation. The record does indicate, however, that if the directory clerks did perform a mathematical calculation to develop the eight-minute time estimate, they did so without any guidance, direction, or instruction from either the Wood County officer responsible for the cost study or Wood County's expert.⁹⁷ For all the foregoing reasons, we find Wood County's process for developing its directory clerk time estimate to be not credible and, therefore, do not consider the estimate in determining whether Wood County may exceed the presumptively reasonable rate.

40. Moreover, Wood County inexplicably failed to keep its notes or records of the sampling exercises. Wood County's failure to provide any documents which McLeod and the Commission could use to verify both the process used to obtain the time estimates and the resulting time estimates themselves also renders the estimates unreliable, because they cannot be verified.⁹⁸

41. After the close of discovery, and after McLeod had already submitted its

⁹⁴ *Id.*

⁹⁵ For example, Wood County indicates that the directory clerk has taken as long as four hours to perform the activities related to SLI for a single listing and as little as one-minute for a simple, one-line listing. McLeod Report at 18 (citing Johnson Dep. at 213).

⁹⁶ It is also unclear whether Wood County properly excluded certain activities not related to SLI in developing its eight-minute average. In particular, Wood County points out that the directory clerk references the customer's credit history when processing service orders. McLeod Report at 17. We agree with McLeod that this activity is unrelated to SLI and should not be included in any time estimate designed to capture SLI-related activity. Wood County has not indicated whether it removed time associated with this activity in developing its eight-minute estimate.

⁹⁷ McLeod Report at 17-18.

⁹⁸ Johnson Dep. at 214-15, 221-22. McLeod also challenges the adequacy of the sampling exercises themselves: Wood County's directory clerk sampled fifty different service orders to develop a time estimate for entry of information, and the directory verification clerk performed a self-timing exercise over a four-hour period to develop an estimate of verification time. McLeod Report at 16-17 (citing Johnson Dep. at 214-15, 221-22). We do not decide whether the scope of the sampling exercises Wood County performed is sufficient, because we find that the estimate that purportedly resulted from the sampling exercises is unverifiable for the reasons described above.

responsive expert report, Wood County proposed in its rebuttal report an entirely different methodology for ascertaining recoverable directory clerk expenses than was contained in its previous cost study. In doing so, Wood County unfairly prevented McLeod from timely inquiring into the basis for this new analysis.⁹⁹ In any event, this tardy analysis suffers from the same flaw that permeates much of Wood County's analysis – it lacks the requisite underlying support. Wood County states that, “as part of [its] preparation of [its] rebuttal report,” Wood County conferred with one of its executives with respect to accounting for the directory clerk's time.¹⁰⁰ The executive indicated that “the directory clerk charged 53.66% of her time on the processing of directory listing orders (based on a two-month analysis of the directory clerk's time coding).”¹⁰¹ Wood County then estimated the number of hours worked annually by the directory clerk, applied the percentage referenced above to the total estimated service orders with SLI activity, and arrived at an estimate for time spent by the directory clerk on SLI activities per service order. Although this may be a reasonable way to develop a time estimate for recoverable directory clerk expenses, Wood County offers no underlying data that McLeod or we could review for verification purposes. Wood County does not identify the months used to develop the 53.66% figure, does not explain why those months are representative, does not produce the time coding documents to support the calculation, and does not explain how the time coding documents support the resulting calculation. We are left solely with Wood County's bald assertion that the calculation on which it relies is correct, and Wood County asks us, and McLeod, to accept that assertion on faith. We decline to do so.

42. Wood County contends that we cannot reject Wood County's estimates based on alleged inadequacies in how Wood County developed or recorded the time estimates or conducted the sampling that support the estimates.¹⁰² We disagree. Where, as here, there are no records or notes supporting critical time estimates that make up a portion of the cost data upon which a carrier relies to justify a certain SLI rate, we simply cannot conclude that such estimates are reasonable and verifiable and, accordingly, will not consider them. Allowing or relying on such estimates without supporting data or documents from which a third party could verify the estimates would lead to inevitable abuse and is precisely what the Commission sought to avoid when the *SLI Order* required that supporting data be both credible *and* verifiable.

43. For the foregoing reasons, we conclude that Wood County has failed to meet its burden of producing credible and verifiable costs associated with directory clerk activities related to SLI. Because Wood County has failed to meet its burden, we do not consider any directory clerk expenses in determining whether Wood County may exceed the presumptively reasonable rate for base file SLI.

⁹⁹ McLeod understandably moved to strike the new information. Motion of Complainant McLeodUSA Publishing Company for an Order Striking From the Record the Portions of Wood County Telephone Company's Rebuttal Cost Report That Introduce New Supporting Information for Wood County's Costs, File No. EB-01-MD-004 (Filed Aug. 23, 2001) (“McLeod Motion to Strike”) at 2. Because we find that the new analysis does not meet the requirements for submission of cost data set forth in the *SLI Order*, we need not and do not rule on McLeod's Motion to Strike.

¹⁰⁰ Wood County Rebuttal at 24.

¹⁰¹ *Id.*

¹⁰² Wood County Brief at 18-19.

c. Computer Expenses and Computer Investment Costs

44. Wood County allocates a portion of computer expenses and computer investment costs to SLI.¹⁰³ However, the allocations of both computer expenses and computer investment costs depend on Wood County's estimates of time spent by directory clerks entering SLI information into the SLI/DA computer database and verifying the accuracy of that information.¹⁰⁴ These are the same time estimates addressed in section III(B)(2)(b) above. Because we have concluded that those time estimates are not verifiable, the allocations of computer expenses and computer investment costs that depend on those time estimates are equally flawed. Accordingly, we conclude that Wood County has failed to meet its burden of providing credible and verifiable cost data supporting its allocation of computer expenses and computer investment costs. Thus, we do not consider such costs in determining whether Wood County may exceed the presumptively reasonable rate for base file SLI.

3. Wood County Has Failed to Provide Adequate Data Concerning Overhead Costs Associated with the Provision of Base File SLI.

45. In the *SLI Order*, the Commission defined overheads as "[a]ny other costs the carrier incurs to support its provision of subscriber list information to the complainant; the other activities those costs support; and the methods the carrier uses to allocate those costs."¹⁰⁵ Wood County develops its allocation of overhead expenses attributable to SLI activities by determining an overhead allocation factor and applying that factor to the service order processing and directory clerk expenses it developed separately.¹⁰⁶ These are the same service order processing and directory clerk costs we discuss and reject in sections III(B)(2)(a) and (b) above. Because we find those calculations to be flawed and, therefore, do not consider them, we also conclude that the overhead calculation is flawed for the same reasons. Thus, we do not consider such costs in determining whether Wood County may exceed the presumptively reasonable rate for base file SLI.

* * *

46. In sum, based on the analysis above, we conclude that Wood County has failed to meet its burden of proving, with credible and verifiable cost data, that its proposed rate for the provision of base file SLI to McLeod is reasonable. Accordingly, we grant McLeod's claim related to base file SLI and rule that Wood County must charge McLeod no more than the presumptively reasonable rate of \$0.04 per listing for base file SLI.¹⁰⁷

¹⁰³ The computer expenses and computer investment costs represent only three percent of the total common costs. Wood County Cost Study at Schedule 3.

¹⁰⁴ Wood County developed its allocation of computer expenses and computer investment costs by calculating a computer usage factor related to SLI activities. See Wood County Cost Study at Schedules 3c and 3d. The computer usage factor was based, in part, on the estimate Wood County used for the time spent by directory clerks on service orders. See Wood County Rebuttal at Schedule JSI(c).

¹⁰⁵ *SLI Order*, 14 FCC Rcd at 15608, ¶ 106.

¹⁰⁶ See Wood County Cost Study at Schedule 4.

¹⁰⁷ McLeod also argues that Wood County's proposed rate for the provision of SLI is discriminatory. McLeod Brief at 24-25. Wood County contends that we should not consider McLeod's discrimination allegations because

(continued....)

47. We emphasize that we are fully aware that “for some smaller carriers a rate of \$0.04 per listing may not be enough to cover the costs associated with providing base file listings, since the number of listings involved could be small.”¹⁰⁸ Thus, we do not conclude in this Order that Wood County could not have cost-justified a rate for base file SLI higher than the presumptively reasonable rate. Further, this Order should not be construed as limiting the ability of LECs in the future to charge more for SLI than the presumptively reasonable rates, assuming they are prepared to justify those rates in accordance with the *SLI Order*. We simply conclude here that, for the reasons described above, Wood County’s effort to support a rate higher than the presumptively reasonable rate for base file SLI is too deficient to be credited. Had Wood County not engaged in the fundamental errors described above, which rendered unreliable many of the most critical components of its cost study, we might have concluded that Wood County was justified in exceeding the presumptively reasonable rate. However, that is not the record before us.

C. Wood County Has Failed to Meet Its Burden of Justifying a Rate for Update SLI That Exceeds the Presumptively Reasonable Rate.

48. In its complaint, McLeod also requests that we declare that Wood County’s proposed rate of \$0.42 per listing for SLI updates is unlawful and order Wood County to charge no more than the presumptively reasonable rate of \$0.06 per listing for updates.¹⁰⁹ Wood County concedes that it did not attempt to justify a proposed rate for updated SLI in its cost study.¹¹⁰ Wood County asserts that it could not attempt to justify a proposed update rate without knowing the frequency with which McLeod wanted to receive updated SLI.¹¹¹ We agree with Wood County that the frequency of provision of updated SLI may be relevant in justifying a rate for the provision of SLI. We note, however, that Wood County proposed to McLeod a rate of \$0.42 per listing for updated SLI without regard to the frequency or format that McLeod might request.¹¹² Thus, Wood County must have believed that it could roughly cost-justify this rate, even without knowing exactly how often it would provide update SLI to McLeod. Nevertheless, Wood County subsequently failed in this proceeding even to attempt to justify that or any other rate for updated SLI services. Accordingly, we conclude that Wood County has failed to meet its burden of proving its entitlement to a rate exceeding the presumptively reasonable rate for update SLI. Therefore, we grant McLeod’s claim related to update SLI and order Wood County to charge no more than the presumptively reasonable rate of \$0.06 per listing for updated SLI.¹¹³

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McLeod did not allege a discrimination claim in its complaint. Wood County Brief at 20-22. We need not consider either contention here because we have resolved McLeod’s claims on other grounds.

¹⁰⁸ *SLI Order*, 14 FCC Rcd at 15607, ¶ 105.

¹⁰⁹ Complaint at ¶¶ 2, 23-24, and Prayer for Relief.

¹¹⁰ Answer at ¶ 5.

¹¹¹ *Id.*

¹¹² Complaint at ¶ 12, Exhibit 13.

¹¹³ We note that McLeod’s complaint does not challenge the minimum transmission charge of \$100 that Wood County proposed for the provision of SLI updates. Accordingly, although we find that Wood County can charge no more than \$0.06 per listing for updated SLI, we make no ruling on the reasonableness of Wood County’s proposed transmission fee, because it is not at issue here.

IV. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 208, and 222(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 222(e), that the formal complaint of McLeodUSA Publishing Company is GRANTED.¹¹⁴

50. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 208, and 222(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 222(e), that Wood County must charge McLeod no more than the presumptively reasonable rate of \$0.04 per listing for base file SLI and \$0.06 per listing for update SLI.¹¹⁵

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹¹⁴ After the record closed in this proceeding, Wood County filed a “Suggestion to Inquire Into McLeodUSA’s Ability to Go Forward and Whether This Case is Stayed.” Suggestion to Inquire Into McLeodUSA’s Ability to Go Forward and Whether This Case is Stayed, File No. EB-01-MD-004 (filed Feb. 6, 2002) (“Wood County’s Suggestion”). Wood County inquired as to whether the Commission would stay the formal complaint proceeding in view of the fact that McLeod’s parent company, McLeodUSA, Inc., had filed for re-organization under Chapter 11 of the bankruptcy code. McLeod responded to Wood County’s filing and argued that this proceeding should not be stayed. Opposition of McLeodUSA Publishing, File No. EB-01-MD-004 (filed Feb. 8, 2002) (“McLeod’s Opposition”). We agree with McLeod that a stay is inappropriate here. First, complainant McLeodUSA Publishing Company is not a party to the bankruptcy proceeding. Second, even if McLeod were considered a “debtor” in the bankruptcy proceeding, the stay provision of the bankruptcy code applies to actions brought against the debtor, not actions brought by the debtor. See 11 U.S.C. § 362(a)(1); *Farley v. Henson*, 2 F.3d 273, 274 (8th Cir. 1993) (“Because the automatic stay applies to ‘the commencement or continuation . . . of a judicial proceeding against the debtor,’ it is well established that it does not apply to a proceeding brought by the debtor that inures to the benefit of the debtor’s estate.”). Accordingly, we reject Wood County’s suggestion that we stay this action.

¹¹⁵ McLeod’s expert included in his report a request that the Commission award damages to McLeod to cover the costs associated with litigating the complaint. See McLeod Report at 38. However, McLeod’s complaint does not contain a claim for damages. Accordingly, we reject McLeod’s expert’s request and do not award any damages to McLeod in this order.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: McLeodUSA Publishing Company v. Wood County Telephone Company, Inc.,
Memorandum Opinion and Order, File No. EB-01-MD-004

While I support the result in this case, I write separately today to emphasize two points. First, I encourage carriers to submit specific cost information when attempting to justify a rate higher than the presumptively reasonable rate set out in the Commission's rules. I recognize that the presumptively reasonable rates were based on data from the largest carriers and may not adequately compensate smaller and rural carriers. Thus, our rules allow carriers to provide data justifying a higher rate. I am committed to ensuring that smaller and rural carriers are fairly compensated, and I strongly recommend that carriers develop and submit the requisite cost data in future cases. While the data in this case was inadequate for the reasons discussed in the Order, I hope that we have provided some guidance on the kind of showing that would be sufficient.

Second, I am concerned about the presumptively reasonable rates established by the Commission for updates to directory information. Even though the Commission conceded that costs for providing updates to subscriber list information would vary widely depending on the exact nature of the request, it nevertheless set a single, presumptively reasonable rate. I have concerns with this approach. While this case does not present an appropriate opportunity to revisit the Commission's decision, I look forward to considering the issue in future proceedings.