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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAY 19 1994

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WASHINGTON, DC 20554

In the Matter of)
)
Computer III Remand Proceeding:)
Bell Operating Company Safeguards)
and Tier 1 Local Exchange Company)
Safeguards)

CC Docket No. 90-623
CC Docket No. 92-256 ✓

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

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May 19, 1994

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I. INTRODUCTION AND SUMMARY

The comments urging an extension of the Federal Communications Commission's ("Commission") Customer Proprietary Network Information ("CPNI") Rules demonstrate how far and for how long certain advocates can press arguments without the benefit of any facts.¹ Those commentators continue to make undocumented and

¹Comments were filed by the following parties in response to the Commission's Public Notice (Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, 9 FCC Rcd. 1685 (1994) ("CPNI Public Notice")): American Public Communications Council ("APCC"); Ameritech; The Bell Atlantic Telephone Companies ("Bell Atlantic"); BellSouth Telecommunications, Inc. ("BellSouth"); California Bankers Clearing House, The New York Clearing House Association and MasterCard International, Incorporated ("BCH/NYCHA/MasterCard"); Centex Telemanagement, Inc. ("Centex"); Cincinnati Bell Telephone Company ("Cincinnati Bell"); CompuServe Incorporated ("CompuServe"); Cox Enterprises, Inc. ("Cox"); Independent Data Communications Manufacturers Association, Inc. ("IDCMA"); Information Industry Association ("IIA"); Information Technology Association of America ("ITAA"); National Association of Regulatory Utility Commissioners ("NARUC"); National Cable Television Association, Inc. ("NCTA"); National Exchange Carrier Association, Inc. ("NECA"); Newspaper Association of America ("NAA"); North American Telecommunications Association ("NATA"); Pennsylvania Office of Consumer Advocate ("PaOCA"); NYNEX Telephone Companies ("NYNEX"); Pacific Bell and Nevada Bell ("Pacific"); Prodigy Service Company ("Prodigy"); Public Utility Commission of Texas ("Texas PUC"); Puerto Rico Telephone Company ("PRTC"); Southern New England Telephone Company ("SNET"); Southwestern Bell Telephone Company ("SWBT"); Telecommunications Resellers Association ("TRA"); Tele-Communications Association (continued...)

undemonstrable claims, often solely to buttress competitive agendas,² that the current formulation of the CPNI Rules violates consumer "privacy" expectations. What the comments clamoring for "equal" treatment of CPNI demonstrate is the extent to which unsupported rhetoric can extend debate on any subject indefinitely, when permitted by a regulatory agency.

The Commission's task will be to sort out the facts about consumer expectations from the unsubstantiated third-party "beliefs,"³ suppositions⁴ and "suggestions"⁵ about such

¹(...continued)
("TCA"); U S WEST Communications, Inc. ("U S WEST"); United States Telephone Association ("USTA"); United and Central Telephone Companies ("United"); and the Utilities Telecommunications Council ("UTC"). Supplemental comments were filed by Bell Atlantic on May 5, 1994 ("Bell Atlantic Supplemental Comments").

²See BellSouth at 9-10.

³The Comments of the Texas PUC are replete with "belief" statements about customers and their expectations. Nowhere is there any demonstration that the Texas PUC's "beliefs" are accurate. See, e.g., Texas PUC at 4 ¶ 6 (stating that the Texas PUC believes that sharing of CPNI among affiliates "creates privacy concerns for customers" and that "there are significant privacy concerns when CPNI is made available to [additional] entities and individuals because the customers of the telephone company do not expect that their information will be utilized by anyone other than the telephone company for the provisioning of local exchange service"), 10 ¶ 21 (the Texas PUC "believes that residential and small business customers' expectations of privacy include having their customer-specific CPNI used only for the purposes of providing local exchange telephone services unless the customers give written authorization"), 11 ¶ 22 (to protect customers expectations, affirmative consent is necessary). See also Prodigy at 3-4.

⁴See, e.g., CompuServe at 8; Cox at 4-5, 9; IDCMA at 3, 6, 8.

⁵The Comments of the PaOCA contain numerous "suggestions" about consumer expectations regarding privacy and the use of information. PaOCA at 3 ("PaOCA suggests that, as BOCs enter video entertainment and other fields, consumers' concern with the use of their CPNI to market such services is increased. . . .

(continued...)

expectations. Fortunately for the Commission, on this record, that is not hard to do.

Proponents of restrictive CPNI access and use rules on customer "privacy" grounds provide no factual evidence to support their position. They simply congratulate the Commission on its insight in recognizing that changing conditions might affect customer expectations,⁶ offering no independent support for their self-promoting positioning.

Additionally, those arguing that greater access to the Bell Operating Companies' ("BOC") customer information is necessary to

⁵(...continued)

PaOCA suggests that BOC customers already have a great deal of sensitivity concerning the type of customer information that the BOC regularly assembles on their use of the network and are concerned that its usage not be proliferated.", 5 ("PaOCA suggests that a customer would not necessarily consent to a video provider having access to the customer's telephone usage and toll bill in order to improve its marketing ability to that customer."). PaOCA does not provide a tad of evidence to support its suggestions.

⁶Indeed most of the commentators applauding the Commission's sensitivity in this area convert the Commission's expression of interest with regard to this matter (see CPNI Public Notice, where the Commission states "[i]n this changing environment, access to CPNI among affiliated companies may raise additional privacy concerns" (id. at 2-3)(emphasis added)) into a tentative conclusion that such changed conditions do create or exacerbate or materially increase consumer privacy "concerns" or anxieties. See, e.g., BCH/NYCHA/MasterCard at 2 ("commend[ing]" the Commission for acknowledging that changed conditions in the telecommunications industry "have implications for the rules governing access to CPNI"), 3 (noting that the pace of diversification "has been dizzying"). While BCH/NYCHA/MasterCard cite to certain Commission Orders which they claim set the factual predicate for the Commission's current CPNI Rules, and assert that those "factual predicates" are now "undermined" (id. at 3-5), they provide no analysis -- from a customer expectation perspective -- why such is the case. See also ITAA at 2, 4; PaOCA at 1, 3-4; UTC at 3; TCA at 1, 2-3; NAA at 2; CompuServe at Summary, 4, 8; Texas PUC at 3-4. These commentators do not, apparently, appreciate that there is no rule of "evidence" establishing that "saying it makes it so."

achieve competitive parity ignore the current robustness of the information services market,⁷ and the payphone market,⁸ as well as the other markets which have developed and which the commentators address in their filings.⁹ Those markets have all developed without substantial access to CPNI information, and there has been no demonstration that future access to such information is necessary to promote further the growth of those industries. Indeed, every competitive telecommunications market has developed without the benefit of competitors substantially sharing an incumbent's customer information.¹⁰

⁷Over 13 years ago, this Commission found "that the enhanced services market was fully competitive[,]" (In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958, 1010 ¶ 95 (1986) (citing to an earlier finding in the Computer II Final Decision, 77 FCC 2d 384 (1980)). The Ninth Circuit concurred in this finding. See People of State of Cal. v. FCC, 905 F.2d 1217, 1232-33, 1234 (9th Cir. 1990) -- not partially competitive, not a bit competitive, but fully competitive. Thus, it is obvious that enhanced service providers ("ESP") -- as a market -- do not and have never needed access to BOC information in order to aggressively enter the market and flourish there. Indeed, the remarks of CompuServe and Prodigy tout their robust subscriber penetration. See Prodigy at 1 (approximately 2 million subscribers); CompuServe at 2 (CompuServe has more than 1.8 million subscribers, is growing at a rate of about 60,000 customers per month, and has enjoyed an average annual growth rate of 25 percent a year).

⁸APCC addresses this market. APCC at 3.

⁹See, e.g., IDCMA at 4-7 and NATA at 10-12 (the customer premises equipment ("CPE") market); TRA at 1-2 (the switchless resale market); CENTEX at 8-11 (telemangement services).

¹⁰We obviously do not support the positions of those commentators who seek to vest ownership of our customer information in the hands of the customers themselves. See, e.g., CENTEX at ii, 2, 8; CompuServe at 5, 8; UTC at 4. Compare BCH/NYCHA/MasterCard at 8. We oppose any such declaration by the Commission.

While there remains a fundamental and overriding issue with respect to the need for any Commission-compelled CPNI Rules at all, and there certainly are amendments/modifications to those current Rules that would increase former BOC or local exchange carrier ("LEC") efficiency and quality customer service,¹¹ the Commission should put any consumer "privacy" concerns with respect to its CPNI Rules to rest. The Commission has already resolved the CPNI issue from a "privacy" perspective in an overprotective fashion.¹²

Should the Commission be inclined, however, to give even greater weight to customer expectations than it has in the past, it should focus on both customers' privacy and purchasing expectations. While the Commission's CPNI Rules might currently "protect" consumer privacy, those Rules do not actually advance customer privacy expectations (allowing, as they do, simply for the continuation of past BOC practices). Those Rules do, however, operate to impede and retard customer purchasing expectations.¹³ Any extension of the CPNI Rules can be expected to only exacerbate an already complex and confusing purchasing environment for consumers.¹⁴

¹¹See Ameritech at 4-5, 9-11; Bell Atlantic Supplemental Comments at Attachment 2; U S WEST at 31-32.

¹²Compare NYNEX at 2-3, 8, 9 (observing that the Commission's current CPNI Rules already exceed customers' reasonable expectations).

¹³See, e.g., Ameritech at 4-5; Bell Atlantic Supplemental Comments at 3, Attachment 2 at A-2 to A-3; U S WEST at 29-30 n.57.

¹⁴See Bell Atlantic at 8-9.

Therefore, the Commission should begin a process to vacate or abandon its CPNI Rules, and to permit the BOCs/LECs to access/use their customer information similarly to all other American businesses. The Commission can be confident that such companies would remain sensitive to their customers' expectations about the use of such information internally; and would remain vigilant with regard to the release of information to unaffiliated third parties, as history has demonstrated them to be.¹⁵

Short of total vacation of the Rules, the Commission should decline to extend the scope of the existing CPNI Rules any further.¹⁶

II. CUSTOMER PRIVACY EXPECTATIONS ARE FRAMED BY RELATIONSHIPS

Despite continued objections to the Commission's acknowledgement that an existing business relationship fashions customer expectations about information access and use,¹⁷ there

¹⁵See, e.g., Ameritech at 3; BellSouth at 10; U S WEST at 3-4. Traditionally, former BOCs have not generally released customer information to third parties absent a customer's request or concurrence or in response to lawful process.

¹⁶As USTA pointed out, the Commission has already -- without any evidence of abuse of customer information or customer complaints -- imposed CPNI Rules on GTE. See USTA at 5-6. Such regulatory compulsion was totally unwarranted other than to advance some kind of abstract ideology despite any market phenomena requiring action.

¹⁷See, e.g., In the Matter of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 1150, 1163 ¶ 98 (1988) (wherein the Commission stated that it anticipated that "most of the BOCs' network service customers . . . would not object to having their CPNI made available to the BOCs to increase the competitive offerings made to such

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can be no doubt that this view is correct. Polling customers about the particular dynamism of these expectations will not change the fact that companies with an existing business relationship will have more and greater access to customer information than companies without such relationships. Relationships, however formed, are not confounded by cries for competitive parity or superfluous customer notifications.

On the matter of consumer privacy, commentators arguing that the Commission's currently framed CPNI Rules do not go far enough

¹⁷(...continued)
customers."); In the Matter of the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, 2738 ¶¶ 13-14 (1992) ("If a party already has chosen to do business with a particular caller, a contact by that caller to offer additional products or services is not as intrusive as a call from a business with whom the called party has no relationship. . . . The Commission tentatively concludes that the privacy rights the [Telephone Consumer Protection Act ("TCPA")] intends to protect are not adversely affected where the called party has or had a voluntary business relationship with the caller."); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752, 8770 ¶ 34 (1992) ("TCPA Report and Order") ("We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship." (emphasis added)). While certain of the Commission's remarks appear to be restricted to the TCPA proceeding and its associated legislative history, other of its remarks appear to stem from common sense observations about the nature of the commercial relationships (see underlined material); In the Matter of Rules and Policies Regarding Calling Number Identification Service - Caller ID, CC Docket No. 91-281, Report and Order and Further Notice of Proposed Rulemaking, FCC 94-59, rel. Mar. 29, 1994 ("Caller ID/ANI Order") ¶ 58 (concluding that "an ANI services subscriber may use ANI to offer products or services to an established customer that are directly related to products or services previously provided by the ANI services subscriber to that customer."). While the "directly related" restriction does not necessarily appear to be required by customer privacy expectations, the relevancy of the existing business relationship in assessing consumer privacy expectations in the first instance is specifically acknowledged.

to protect consumers' privacy expectations provide nothing supportive of their position, other than rhetoric, assertions and assumptions. Opponents to the existing resolution of the customer consent component of the Commission's CPNI Rules demonstrate the most stark kinds of denial and overstatement -- often simultaneously.

With no evidence those commentators argue, variously, that customer privacy expectations are compromised or violated by a LEC's use of its own customer information to provide product/service offerings to its customers;¹⁸ that those same customers' privacy expectations would not be compromised by providing customer information to third parties;¹⁹ that

¹⁸See, e.g., CENTEX at ii, 15-17; CompuServe at Summary, 8; Prodigy at 3-4; APCC at 9; IDCMA at 2-3, 6-7, 8; ITAA at 4-6; NAA at 2; UTC at 5-6; TCA at 2-3.

¹⁹See Cox at 6 (arguing that a BOC's access to customer information should amount to a blanket disclosure to all ESPs). See also TCA and NATA, who make the most incredible statements of all the commentators in this regard. TCA alleges that the Commission's current CPNI Rules "rest on the untenable assumption that the expectation of privacy is greater when such information is disclosed to a third party vendor of unregulated products and services than when it is disclosed to telephone company personnel responsible for marketing such products and services. . . . The degree of sensitivity [of CPNI] does not vary depending on whether the information is disclosed to telco marketing personnel or unaffiliated companies." TCA at 2. TCA continues, "[i]t is absurd to require that consent precede disclosure of information to a third-party vendor, but to eliminate the consent requirement if a BOC buys that vendor." Id. at 3.

NATA claims that "CPNI access does not raise significant privacy concerns only when the disclosures is [sic] made to parties unaffiliated with the telephone company. . . . If such use of CPNI by a carrier's CPE personnel does not violate users' privacy expectations, then the same is true of similar use of CPNI by independent CPE providers." NATA at 9.

TCA and NATA are simply incorrect on all counts. Not surprisingly, neither ever offers any evidence to support its
(continued...)

customers expect the same level of control/consent regarding the access/use of information about them regardless of whether there is an existing relationship or not;²⁰ and that customers do not find affiliations material with respect to the sharing of information within an integrated company or operation.²¹ All of these observations defy logic, as they have no precedent in any other business-to-consumer relationship and are entirely counter-intuitive. In certain cases, they are also factually in error.

An existing relationship between a business and a customer is probably the most material aspect of a customer's expectation regarding the accumulation and use of information about that individual. Even Congress has recognized this fact.²² Arguments to the contrary lack any credibility.²³

¹⁹(...continued)
statements. Furthermore, they both appear ignorant of all evidence (including anecdotal, survey, legislative, and regulatory) contrary to their assertions.

²⁰TCA at 3; NATA at 9; CompuServe at 8; NAA at 2.

²¹See, e.g., Prodigy at 3-4; BCH/NYCHA/MasterCard at 2; IDCMA at 3, 6; ITAA at 4; PaOCA at 4-5; TCA 2-3; NAA at 2; CompuServe at 8; Texas PUC at 4, 6.

²²See 47 USC § 227(a)(3), where Congress exempted from the term "telephone solicitation," those calls "to any person with whom the caller has an established business relationship." Compare 47 CFR § 64.1200(f). See also Bell Atlantic at 3-4 (noting that the referenced statute was passed at a point in time in which mergers and acquisition activity was very volatile, suggesting that the established business relationship exemption extends to relationships established through affiliation). Compare Ameritech at 3.

²³See supra note 19.

While individuals often consider solicitations from entities with whom they have no relationship as "invasive,"²⁴ similar solicitations from businesses with whom they engage is entirely acceptable and oftentimes welcome.²⁵ This is true not just with respect to the business with the primary business relationship with the customer but also with respect to its affiliated companies.²⁶

Absent an existing relationship, customers and suppliers often connect with each other not as a result of Supplier 1 (who has customer information) sharing information with Supplier 2 (who lacks the individual's information), but through the mechanism of competing supplier advertising, referrals or the like.²⁷ While this market phenomenon might be said, theoretically, to "retard" the growth of Supplier 2's business in the short term, it reflects accurately market phenomena in the long term. Such an approach, being the status quo ante, never

²⁴Compare Commission comments and findings in the TCPA Report and Order, 7 FCC Rcd. 8752 (1992). See also Prodigy at 3-4 (observing that customers might object to solicitations unrelated to their business purposes, and concluding (erroneously) that communications between LECs and their customers for services beyond local exchange services are objectionable).

²⁵See, e.g., NYNEX at 6-8; Bell Atlantic Supplemental Comments at Attachment 2 at A-1 to A-2.

²⁶See, e.g., NYNEX at 5-6, 7-8; Bell Atlantic at 1-6; Bell Atlantic Supplemental Comments at 3 & Attachment 1.

²⁷Cox alleges that BOCs do not make available mailing lists for new residential and small business subscribers. Cox at 3, 4-5, 6. See also IIA at 2. This is incorrect with respect to U S WEST. Through our Expanded Use Subscriber List ("EUSL") product, U S WEST does make such information available to interested purchasers.

operates to frustrate consumer "expectations." That is the market model that the Commission should continue to endorse.

III. COMMENTORS CONTINUE TO OVERSTATE THEIR RIGHT TO COMPETITIVE PARITY OR EQUAL ACCESS TO CPNI

Many commenting parties demonstrate their ignorance of fundamental marketplace rules by continuing to argue for the promotion of "competitive parity." What these commentors seek is not fair competition, but decreased competition; not entrepreneurial reward, but subsidized market entry.

Rather than engage in any serious consumer behavioral or market analysis, such commentors simply continue to complain about the very existence and operation of these fundamental marketplace "rules." First, for a non-vertically integrated company, finding customers is a significant cost of entering a market and doing business.²⁸ It is not a cost incurred by a vertically integrated business offering various products and services (whether that vertical integration is secured through internal organization or by merger/acquisition). This "cost" of market entry (i.e., finding customers) is not a cost that a business with no existing business relationship with consumers can expect to forego by the receipt of customer information from a business with an existing business relationship with those consumers.

Second, there is absolutely no evidence that the information or enhanced services market has suffered from "inequity" as a

²⁸See, e.g., APCC at 8; CompuServe at Summary, 7-8 n.10; IDCMA at 5; IIA at 4; NATA at 8; Prodigy at 4-5.

result of the Commission's CPNI Rules.²⁹ Thus, "parity" in those Rules is totally unnecessary for market stimulation or growth.

These marketplace rules are observed in operation every day. Fundamentally, the comments urging the adoption of rules providing "equal access" to CPNI, or suggesting the imposition of a customer "prior consent" or "authorization" requirement for the BOCs (and other LECs) before they can use their own customer information, ignore virtually every fact associated with customer expectations and the efficient operation of markets. In doing so, the commentators completely disregard business efficiency.³⁰

It is not efficient for a vertically integrated company to poll its customers about that company's internal use of information. It is not efficient for that company to poll its customers about providing customer information to third parties³¹ -- especially as all the evidence suggests that the customers would, in most instances, decline the "invitation" to release the information³² (if they responded at all). Nor would

²⁹See supra note 6.

³⁰It is easy to argue, as do IDCMA, TCA, and the Texas PUC, that were customer notification and prior authorization requirements imposed on the LECs with regard to all of their subscribers, no inefficiencies would result. See IDCMA at 2; TCA at 5; Texas PUC at 9. It is, apparently, much more difficult to prove, as none of these commenting parties attempt to do so. The argument defies economic logic and is capable of being made only by entities which would not be required to participate in the economically irrational behaviors they advocate.

³¹Compare Texas PUC's "ballot" approach. Texas PUC at 3, Exhibit 1, 17 TexReg 2992, 2996, Apr. 24, 1992. See also Cox at 6.

³²See U S WEST at 19-22.

it be efficient for a company with an existing business relationship with a customer to try to explain the kind of relationship that other businesses would like to have with that customer -- whether such explanation is done in writing or orally. It is not efficient for a vertically integrated company with an existing business relationship with a consumer to "segregate" CPNI information into various components so that customer "notifications" or "solicitations" can be more "refined"³³ (and, certainly, more confusing). Fundamentally, in each of the above situations, the company with the existing relationship with customers expends time, money and resources subsidizing the market entry costs of an alternative supplier.

Those demanding parity of CPNI treatment, however, ignore all of the above. They simply repeat their overstated (and incorrect) arguments regarding LEC "cross subsidies,"³⁴ and how limited access to CPNI by third parties somehow impedes market development and/or growth. But such claims cannot be correct.

Other businesses, including those with dominant positions, access and use customer information all the time. Most of those businesses have not, traditionally, formally advised customers about such access or use because such is understood within the

³³See BCH/NYCHA/MasterCard at 7-8; Cox at 4-5.

³⁴See, e.g., Prodigy at 5; APCC at 8-9; NATA at 2, 8. See also Attachment A to this filing wherein U S WEST attaches the relevant pages of our Computer III Remand Reply Comments filed Apr. 8, 1991, in which we address the incorrect use by commentators of the term "cross-subsidy."

parameters of the relationship.³⁵ Nor do those companies advise their customers that there are other suppliers available to them.

Those same businesses are often affiliated with other businesses -- sometimes closely aligned in terms of product offering and market served, sometimes not. Whether information is shared in such circumstances will depend on internal management judgment, educated and informed as much by consumers' expectations regarding product/service development and delivery as it will on the formal corporate organization of the business.³⁶

While many of the commentators contend that they would maintain contrary positions were the BOCs/LECs not in a monopoly position, their cavalier treatment of customer expectations regarding use of consumer information is appalling and their logic is fundamentally flawed. If one wants to do right by customer expectations and market efficiencies, then the "monopoly" status of the BOCs/GTE/LECs should have nothing to do with how BOCs can use their own customer information. They should not be restricted in their internal use of such information because such a restriction impedes their ability to develop products and services of potential interest to their customers and compromises their customers' purchasing options. Nor should they be compelled to adopt a disclosure type of equal access approach to CPNI (i.e., if the LEC uses the information, others

³⁵Compare IIA at 4 (suggesting that BOCs should notify customers of their internal usage). See U S WEST at 23, 43-44 (disagreeing with this proposition).

³⁶Compare Ameritech at 3.

do as well), because all evidence demonstrates that such an approach would compromise consumer privacy expectations.

If the argument were legitimate that dominant providers, to protect their customers' privacy expectations, should secure affirmative consent before using their own business information about their customers, then the American Telephone and Telegraph Company ("AT&T") would have been required to secure such consent. It was not required to do so.³⁷ If "equal access" principles with regard to information were necessary to facilitate competitive entry into markets, then AT&T would have been required to provide customer information to MCI Telecommunications Corporation and Sprint Communications Company, L.P., or to limit its own integrated use of the information. AT&T was required to do neither.³⁸ If such proposition had any legitimacy, then a

³⁷See, e.g., IDCMA at 8, n.10; NARUC at 4. While AT&T is subject to certain CPNI Rules, those Rules contain no affirmative consent provisions and no mechanical access restriction provision. See also In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company, Order, 102 FCC 2d 655 (1985), modified in part on recon., In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 739 (1986). See NYNEX at 2, 9 (observing that "privacy" rules would be expected to apply to all providers, regardless of market share). Accord Ameritech at 9; Bell Atlantic at 2, 7-8; BellSouth at 8-9.

³⁸It is somewhat surprising that the main interexchange carriers ("IXC") did not file in this proceeding.

A review of the comments filed by these three IXCs before the National Telecommunications and Information Administration ("NTIA") in its recent proceeding (see Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications-Related Personal Information, Notice of Inquiry, 59 Fed. Reg. 6842 (Feb. 11, 1994) ("NTIA NOI")) is insightful. AT&T opined that "industry self-regulation, supplemented by the existing legal framework, adequately protects reasonable expectations of privacy (continued...)

fledgling, non-dominant video dialtone ("VDT") provider seeking to create competition in the cable market would be able to demand equal access to the monopoly cable provider's information.

Either the cable provider would share its customer information, or it would be restricted in its ability to use that information in either the cable market or the telephony market. No one has ever suggested such a thing. Undoubtedly, the suggestion would be vigorously attacked.

³⁸(...continued)

in telephone usage and in transactional data generated as a result of using the telephone." AT&T Comments to NTIA NOI filed Mar. 30, 1994, at 3 (emphasis added). See also Bell Atlantic at 9-10, in its comments filed herein. While AT&T expressed dissatisfaction with its own CPNI-rule restrictions (AT&T Comments to NTIA NOI at 4, n.4), it argued that LECs should remain subject to such restrictions because of their monopoly control. Id. at 7, n.8. (This is, of course, a different position than AT&T took when it held a monopoly status. See U S WEST at 11-12.) Furthermore, AT&T acknowledged that it uses customer information "internally within the carrier and affiliated entities for both service/product development and marketing purposes" and argued that such was not improper but acceptable from a consumer standpoint. AT&T Comments to NTIA NOI at 5-6, 8-9.

MCI urged CPNI-type regulation with respect to "network providers possessing market power". MCI Comments to NTIA NOI filed Mar. 30, 1994, at 2, 8-9. They made no attempt to rationalize the validity of such rules on privacy grounds, arguing only the need for such rules for purposes of competitive promotion.

While those IXCs supporting CPNI-type restrictions did so only within the context of network providers with "market power," Representative Markey's recent Amendment to H.R. 3626 (H.R. 3626, 103d Cong., 1st Sess. Title II (Communications Reform Act of 1993) (Nov. 22, 1993)) appears to have gone in a different direction. Pursuant to that Amendment, all carriers -- not just BOCs/GTE -- would become subject to CPNI-type rules. Id. at Section 232. Certainly, the carriers cannot be looking forward to that kind of regime and would be at some risk suggesting that such was "proper" only for LECs but not for themselves -- or their increasingly expanding family of affiliates. Compare Ameritech at 6-8; BellSouth at 8, n.12.

Competitors do not enter markets, and do not sustain themselves in markets, by demanding to share the business information of their competitors. There simply is no such thing as an "information bottleneck."³⁹ If there were, an electronic appliance supplier competing with an electric utility providing appliances would be able to demand "equal access" to customer information or communications avenues. No such requirement exists.⁴⁰ If the arguments of our competitors were to be believed, a non-dominant retailer in a non-telecommunications market would be able to demand access to customer information owned by vertically integrated dominant retailers. No such requirement exists.

³⁹See Texas PUC at 6.

⁴⁰See Catlin v. Washington Energy Co., 791 F.2d 1343, 1345 (9th Cir. 1986) (public gas utility's use of its mailing list to advertise vent dampers in its gas billings was not unlawful, but rather an advantage available to the utility as an integrated business; competing vent damper supplier was not entitled to "equal time" to advertise its products in the utility's mailings). With regard to the matter of CPNI access, it is clear that no principle of antitrust jurisprudence would require BOCs/LECs to share customer information with third-party competitors or forego the benefit of the information itself. Indeed, just the contrary is true. "So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity. . . . These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power." Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

See also Grason Elec. v. Sacramento Municipal Utility Dist., 571 F. Supp. 1504 (E.D. Cal. 1983). As the Court in Grason implied, demands by competing providers for the advantages enjoyed by a large firm or a dominant provider often take on aspects of an aggressive disinformation campaign. It makes one feel as if one "had ventured through the looking glass." Id. at 1512.

Thus, neither an electric utility wishing to enter the telecommunications business nor a telecommunications business wishing to enter the electrical utility business can demand that customer information from the respective businesses be shared with the potential new entrant.⁴¹ Similarly, a phone company wishing to enter the cable market cannot demand that the cable company provide it with customer information, or that it poll its customers about providing such information, or that the cable company notify its customers of a new potential provider. The phone company either gets into the business from the ground up (a formidable task in view of the existing market configuration) or it "buys in." That is the way of markets and of businesses.

Arguments that additional "modifications" are required as a result of LECs' entry into the VDT or other markets lack foundation in fact, presume things about customer expectations that are not currently demonstrable, and ignore other convergent market configurations as well as the market efficiencies and customer satisfaction associated with such convergences and integration.⁴² Certain commentators would deprive the LECs of the use of telephony-type customer information in the provision of

⁴¹In the abstract, it is easy to complain about this cost of market entry. Yet, it is highly unlikely that CompuServe, undoubtedly one of the dominant providers of on-line information services to residential subscribers, would be willing to share its customer data with a start-up entrepreneur or a BOC "gateway" provider so as to promote competitive parity. The suggestion would be considered absurd.

⁴²See Bell Atlantic at 5. Compare NYNEX at 3-5 (noting that the current formulation of the CPNI Rules, growing out of the Computer Inquiry III and Computer Inquiry III Remand proceedings, already has taken into account a changing telecommunications environment with dynamic competitive developments).

cable-type services or vice-versa. The theory advanced to support such a limitation is twofold. First, that such information uses compromise customer expectations.⁴³ Second, that allowing telephony companies unregulated use of subscriber information secured through VDT offerings creates an unlevel playing field because cable companies do not have such unfettered discretion with regard to subscriber viewing information.

With respect to the customer expectation argument, there is no record evidence to support the fact that customers would feel compromised by a telephone company's use of either its telephony customer information or its subscriber viewing information (to the extent that such information was collected at all),⁴⁴ if such information was used only internally and was used to provide superior and new product and service offerings of interest to

⁴³See PaOCA at 5 ("a customer would not necessarily consent to a video provider having access to the customer's telephone usage and toll bill record in order to improve its marketing ability to that customer."); Texas PUC at 3 (future CPNI might include a subscriber's political views (e.g., what on-line news services does he subscribe to?) and cinematic preferences (e.g., what on-line movies did she order this week?)); NCTA at 5-8.

⁴⁴Part of the difficulty in analyzing those commentators expressing concern about a LEC's use of subscriber "viewing" information or programming choices is that it is not yet clear what information a LEC basic VDT common carriage offering will capture. To the extent that the basic offering does capture "usage" information, one would expect that such would be CPNI. Under such circumstances, unrestricted CPNI could be shared with a LEC's affiliated Level II VDT provider but would not be released to unaffiliated third-party providers absent express customer consent.

The information collected on the affiliated LEC Level II VDT offering is clearly not CPNI, but is the proprietary information of the enhanced service offeror itself. What that offeror chooses to do with the information is, obviously, up to that offeror, just as it will be up to other offerors utilizing the basic common carriage offering to make similar decisions.

consumers. Here, as in most cases, a consumer's expectation is educated and informed by the relationship the consumer has with the service provider. If there is some lack of clarity with the precise contours of that relationship, both ongoing customer contacts, as well as general commercial advertising and speech, are certain to address those ambiguities.

More fundamentally, however, the suggestion that because certain individuals might not appreciate or approve of certain business conduct that the conduct should be proscribed across the board is a fairly dangerous starting point for information policy development. Information policy regulation that is driven by minority idiosyncracies severely minimizes the value of information networks and services. The marketplace is much better equipped than regulation to accommodate such idiosyncracies. It should be permitted to perform its functions.

With respect to the objection regarding the equality of use of telephony transactional information versus subscriber viewing transactional information, the objection itself lacks clarity. It is not clear, for example, whether NCTA objects to the fact that a telephone company could use its telephony data when fashioning certain cable offerings or targeting potential subscribers; or whether it objects to the fact that there currently is no law against a telephone company making subscriber viewing information (to the extent that such information is captured at all by a basic common carriage VDT offering) available to third parties without the subscriber's consent, while such legislation does constrain cable companies -- or both. NCTA worries that LECs offering VDT will become privy to "television viewing habits

of residential subscribers" and that "telcos will gain access to specific program selection information relating to individual customers."⁴⁵ NCTA suggests that such LECs could sell this information to interested third parties. NCTA argues that the Commission should establish CPNI Rules for LEC VDT services more in line with the kind of regulations currently adopted for cable companies.⁴⁶

As U S WEST stated in our earlier-filed comments,⁴⁷ at this point in time, cable companies entering the telephony market could use their subscriber information to target potential customers or fashion certain kinds of packaged offerings, provided the telephony service was offered over the cable facilities.⁴⁸ Thus, we assume that NCTA is not actually attacking the fact that the Commission's current CPNI Rules would permit the BOCs/GTE to use their telephony information in any VDT offerings they might fashion, as cable companies enjoy a similar prerogative with respect to shared telephony/cable market entry or penetration.

Given that fact, what could possibly be the objection of a telephone company being able to benefit from telephony information (assuming any benefit is actually demonstrable) when developing a VDT offering? There is nothing inherently wrong, either from a customer privacy perspective or from an antitrust perspective, with an integrated business supplier (whether

⁴⁵NCTA at 6.

⁴⁶Id. at 7-8.

⁴⁷U S WEST at 38-39.

⁴⁸See 47 USC § 551(b)(2)(A), (a)(2)(B).

telco/cable or cable/telco being able to discuss both telephony and viewing/entertainment habits with a consumer. This is true despite concerns from consumer advocates such as the PaOCA.⁴⁹ While some customers might be concerned about such an inquiry, many others would not be.⁵⁰

It is possible, however, that NCTA's basic objection to the current formulation of the CPNI Rules is that LECs could sell subscriber viewing information to third parties (if such information was collected in the first instance by the LEC basic common carriage VDT offering), perhaps not necessarily straight out (although this would not be precluded) but through the vehicle of "lists" culled from individually identifiable information. Cable companies, on the other hand, cannot make subscriber viewing information available to third parties without the subscriber's written or electronic consent.⁵¹

NCTA's concerns ignore more than a few material facts. First, traditionally, LECs have not made consumer transactional information available to third parties, and there is nothing to suggest that such practices would change. Since the current practice is the same as that legislatively mandated for cable companies, there is a level playing field, albeit a de facto one. Unless it is demonstrated that something about the LEC practices

⁴⁹PaOCA at 4-5 (suggesting that a customer would be disturbed by an integrated company offering both telephony and VDT inquiring of a customer that, "[w]e noticed that you seem to enjoy viewing certain types of films, would you be interested in viewing some more of those which our video affiliate has available for some of our customers?").

⁵⁰See U S WEST at 16 n.29.

⁵¹47 USC § 551(c)(1).

is changing, no further legislative or regulatory action in this area is required. Second, it is possible that a LEC might provide third parties with name and address information about certain subscribers who "match" some pre-determined criteria. However, one can assume -- knowing their customers and their markets as well as they do -- that such activity would be done only with their customers' knowledge and concurrence.

Third, it is also possible that some LECs might act as intermediary information brokers between their customers and third parties interested in reaching those customers. Without ever specifically divulging to third parties the "universe" of potentially interested subscribers (i.e., those found to "match" the criteria), a LEC might later inform the third party about those customers affirmatively choosing to deal (or the customers might contact the third party directly). As far as we can determine, cable companies are free to do the same.

In essence, NCTA's concerns regarding customer privacy expectations are speculative, their claims of potential consumer harm undemonstrated and not predictable. The expressions of paternalistic concern lack any market evidence and ignore all evidence of LECs' traditional conservative and cautious use of their customers' information. They hardly represent the kind of sound analytical foundation or demonstrable evidence necessary to support a change in rules.