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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:)
)
Implementation of the Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use of Customer Proprietary)
Network Information and Other Customer Information)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 96-115

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits its comments in the above referenced proceeding. USTA is the principal trade association of the exchange carrier industry. Its members provide over 98 percent of the exchange carrier-provided access lines in the United States.

On February 14, 1996, USTA, in conjunction with the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), had written to the Chief of the Common Carrier Bureau to "...recommend that the Commission ultimately adopt rules to implement Section 222 after receiving public comment on a notice of proposed rulemaking."¹ These Associations expressed concern with the scope of permissible activities under Section 222 and the organizational and financial impacts to those companies which were never subjected to Customer Proprietary Network Information (CPNI) or similar restrictions. These Associations sought guidance from the Bureau with respect to implementation of Section 222 so as to avoid the imposition of unreasonable regulatory burdens which would be detrimental to those companies in particular. As USTA, NRTA, NTCA, and OPASTCO pointed out, until the 1996 Act, no local exchange carriers other than the Bell Operating companies and GTE were subject to CPNI or similar restrictions. Promulgating CPNI rules as proposed by the Commission, will require the vast majority of exchange carriers with the least amount of resources to distinguish among three types of telecommunications services and will force them to incur substantial, detrimental

¹ Letter to Regina Keeney from USTA, NRTA, NTCA, and OPASTCO, dated February 14, 1996.

organizational and financial impacts.

USTA sees merit to the Commission's conclusion that Congress sought to address both privacy and competitive concerns by enacting Section 222. However, there is a delicate balance and co-dependency between these issues which the Commission must be mindful of so that the interests of one will be complemented and enhanced by the interests of the other. These issues can be accommodated if the Act is implemented as recommended in those comments.

Procedures for all Telecommunications Carriers

The Commission correctly notes that "Neither Section 222 nor the definition of the terms 'telecommunications' and 'telecommunications service' set forth in the 1996 Act provide explicit guidance as to the scope of the term 'a telecommunications service,' as used in Section 222."² However the Commission concludes that the use of the singular in Section 222(c)(1) "...suggests that Congress...intended...to prohibit a carrier from using CPNI obtained from the provision of one service for marketing or other purposes in connection with the provision of another service."³ The Commission then states that references in Section 222 (a) and (b) support its "...reading that Congress contemplated that a single carrier provides different telecommunications services."⁴ While an argument could be made that Congress contemplated such a conclusion, it would be taking a giant leap of faith to say that Congress, by simply contemplating that a single carrier provides different telecommunications services, also intended a very restrictive interpretation to surround implementation of Section 222. Such an interpretation would mean that each and every service category, from dialtone to Caller ID to Call Waiting, should be discreetly defined and categorized. USTA believes that such an interpretation could be neither a sound conclusion nor would it be conducive to advancing the goals of privacy and competition.

The Commission tentatively concludes that it would be reasonable to distinguish among

² NPRM, para. 20, p. 1 .

³ Ibid, para. 22, p.12.

⁴ Ibid.

telecommunications services based on traditional service distinctions. However, traditional service distinctions is not what was contemplated by the pro-competitive spirit of the 1996 Act. For example, cellular and PCS services will further enhance the technological choices for consumers to obtain services. The promise of the 1996 Act is the elimination of traditional service enclaves so that telecommunications firms, both those which currently exist and those that wish to enter the field, will be free to offer a multitude of service offerings including local, interexchange, wireless, and cable. When the immediate future dictates that the traditional walls between and among telecommunications entities will come tumbling down, the logic, if any, to three distinctive types of services for the sake of implementing Section 222 will cease to exist.

There will be considerable impacts upon all LECs (with no discernible public benefit) and the disservice paid to existing and potential customers of all telecommunications service providers if the term "telecommunications service" is not broadly interpreted.

The organizational and financial changes required of exchange carriers, particularly companies who have never had to deal with CPNI requirements, will not be inconsequential. They will entail establishing internal business procedures to differentiate between the "discrete" services; explaining and educating employees on the differences between the "discrete" services (differences that may be disappearing at the same time they are being explained); explaining to customers why the request to use the information is being made (thereby delaying the service representative's ability to handle the next call); and designing and deploying (hardware and software) systems to track the "approval granted." If one considers the designation of special employees to work with customers who "restrict" their CPNI the costs rise further still.⁵ These costs are all short-term immediate-hit costs, with no long term, discernible public benefit. The financial implications would be prohibitive for most of these companies. Furthermore, these carriers will be competing in these "discrete" service market segments with carriers operating nationwide, and could be at a disadvantage as a result. USTA asks that the FCC be particularly mindful of the burdens that are placed on small carriers. In a number of other contexts (e.g. Class A and Class B

⁵ Such a designation could be considered a cut-back in service for the many small and rural LECs who have only a minimum number of employees in their business office, if only a certain employee had that designation.

Accounting; Part 64 Cost Allocation Manuals; and the Tier 1/Tier 2 distinctions) small carriers are subject to the Commission's rules, but the applicable compliance requirements recognize their resource limitations and the small scale of their operations.

USTA believes the marketplace realities and expectations of all telecommunications users, existing and potential, must be made a major component of CPNI rules. The FCC has noted more than once the benefits of "one-stop shopping" to promote efficiency and avoid customer confusion. Customers expect that the companies with whom they have an ongoing relationship, such as their telephone, power, and cable companies, will advise them of new products and services as they become available, offer services designed to help them, and meet their demands with ease and professionalism. Customers are not inclined to think or make decisions in terms of regulatory fiat of distinctive service offerings. Customers will be challenged enough to understand the metamorphosis of the telecommunications industry as they see companies offering product and service mixes which had previously been prohibited. A customer will think in terms that are the most familiar -- where can I get products and services I desire at the best price -- unconstrained with the esoterica that surround distinctions such as local, interexchange, and CMRS.⁶

Just as a customer does not think in terms of regulatory fiat nor does she/he think in terms of legal and corporate jurisdictional separations, such as those which may exist between and among affiliates. If the Commission wishes to enhance competition, it should strive to enhance and promote one-stop shopping. This can be accomplished by interpreting the phrase "the telecommunications service" as a single telecommunications package obviating the requirement that a customer "approve" CPNI for the various product/service mixes of that package. Sharing such information will also permit customers to shop around for similar or better offerings, again by seeking out those companies which offer one-stop shopping. If a true comparison means a customer has to make several calls, the chances are lessened that she or he will want to engage in comparison shopping. The force of this

⁶ USTA would note that even the issue of short-haul toll is a bit blurred as outlined in the Commission's service distinctions. At least 15 states permit 2 PIC intraLATA competition while another 14 states had opened intraLATA presubscription dockets prior to passage of the 1996 Act. If customers think of toll calls, either intraLATA or interLATA, merely as long distance calls (indifferent or oblivious to the regulatory distinctions) then forcing a company to engage in such distinctions will be of no public benefit to such customers and may confuse them as to why some discussions of toll calling are readily permitted while others are not.

argument is strengthened when one considers the disruption that would occur in the relationships between LECs that have never been subjected to CPNI requirements and their customers. They have historically enjoyed one-stop shopping to the full extent that the LEC was able to provide it.

The Commission should strive to create for telecommunications service providers subject to Section 222 the same environment that exists for cable companies under the 1992 Cable Act. A cable operator is permitted to collect and use personally-identifiable information for providing cable service (a singular term). The Cable Act does not categorize service into "traditional" offerings. The same broad-based interpretation should be given to the term "telecommunications service" in Section 222.

Authorization Requirements

The Commission seeks comment on how Section 222 should be interpreted in light of privacy requirements for telecommunications carriers, disclosure on request by customers, and exceptions for inbound telemarketing, referral, or administrative services.

The statute already specifies when approval is required. Under Section 222 C(1)(A) and C(1)(B) no disclosure authorization is necessary. This reflects the fact that TACIT customer authorization has been an implicit part of the business relationship between a customer and a company, and is the appropriate standard to allow broad CPNI use. It is the standard upon which the current CPNI rules are based and reflects the current relationship that exists between LECs which have never been subject to CPNI rules and their customers. Therefore no regulations are necessary for the services encompassed within (C)(1)(A) and (C)(1)(B). Companies offering other services should be permitted flexibility in seeking customer authorization which will enhance the customer's pursuit of one-stop shopping and not impose unnecessary burdens on LECs.

In no event should the Commission impose an affirmative customer written approval requirement. Past experience, as well as Commission predictions of customer behavior, demonstrates that obtaining customer approval is extremely difficult. Consequently, requiring written customer approval would hold a carrier's ability to use its own commercial business information hostage to the whims of customers' behavior and diminish that

information's value and total economic use.

A written request is only appropriate in instances when a customer requests a telecommunications carrier to disclose CPNI to a person designated by the customer. Obviously this is a protective measure for both the carrier and the customer, ensuring that the information is provided only to the parties the customer designates and will prevent overzealous and unscrupulous marketers from making oral requests to various carriers for such information. A written request when CPNI information is to be provided to a third party (person designated by the customer) is reasonable. The Commission should not impose an affirmative written customer requirement for the use of CPNI between the carrier and its own customers. Such a requirement is not necessary for either privacy or competitive concerns and would only add a layer of complexity, confusion, and cost to existing business relationships. This is especially true for fledgling new telecommunications entrants and those who have never been subjected to CPNI or similar restrictions.

Applicability of Computer III CPNI Requirements

The Commission need not place additional burdens upon a group or category of LECs. Privacy and competitive considerations will be sufficiently addressed in Section 222. In no instance should the Computer III requirements be applied to LECs which were not subject to Computer III.

Availability of Subscriber List Information

The Commission need not specify such terms as "timely and reasonable." The marketplace can make those determinations. Flexibility and innovation should be fostered. The Commission should clarify that Section 222(e) permits, but does not require, a carrier to provide listing information for purposes other than publishing directories. These other purposes may include selling directory advertising, or sending information to new subscribers. And, while Section 222(e) clearly does require carriers to provide subscriber list information once for each directory (or edition thereof) that is published, more frequent updates are not mandated. For example, if a company publishes a directory once a year, then the carrier must provide listing information once a year for that

publication. Certainly, carriers and publishers may enter into voluntary agreements for six-month, one-month, one-week, or even one-day intervals. But such arrangements are outside the scope of the Section 222(e). Otherwise, publishing companies could place unreasonable burdens on carriers or use Section 222(e) to obtain information for purposes other than the publication of a directory.

With respect to the issue of unbundling, a carrier should only be required to provide subscriber list information in the same manner as it provides to itself. A carrier should not be required to bear the costs of unbundling information for another carrier, unless the other carrier is willing to reimburse the company for the costs associated with that unbundling request.

In Implementing Section 222, the Commission Should Not Infringe on the Constitutional Rights of LECs

In determining the correct interpretation of Section 222, the Commission must bear in mind two things: the fact that a carrier's commercial business information is the underpinning for the commercial speech between it and its customers and that commercial speech is protected by the First Amendment.⁷ Section 222 must be construed in a constitutionally-permissible manner so that commercial speech can occur in a meaningful and unfettered manner. The Commission can accomplish this by broadly interpreting the term "telecommunications service" to permit internal commercial use across those elements that comprise a telecommunications service package. Were the Commission to interpret Section 222 more narrowly, implied consent to use information should exist between and among its "discrete services" classifications. Alternatively, disclosure of CPNI practices by a telecommunications service provider, with the opportunity for a customer to designate a different CPNI treatment, should be permitted.

Although common carriers are regulated entities that devote their property to public use, the Supreme Court has long recognized that a carrier's property remains private property and is entitled to the same protection

⁷ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) at 761-62. The Court noted that the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" (Id. at 765) and that "a particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." (Id. at 763). See, also, Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).

from unlawful taking as any other property.⁸ While Section 222 is entitled "Privacy of Customer Information," the information addressed within the section is commercial business information, an extremely valuable asset of any business. It is generally kept confidential and accorded protection as a trade secret, rendering it the intellectual property of those businesses who hold the information. Confidential business information is protected against a governmental taking.⁹ The commissioner should steer clear of a "discrete" services concept (unless a concomitant aspect of rules is an implied consent or a disclosure/opt-out approval process) because it deprives a telecommunications carrier of its ability to make reasonable business use of one of its assets. A broader reading of the term "the telecommunications service" would not so deprive a carrier -- either with respect to individually-identifiable CPNI or aggregated CPNI.

As USTA has noted, there is a delicate balance and co-dependency between the issues of privacy and competitive concerns. While Section 222 authorizes the Commission to adopt regulations to protect consumer privacy, the Commission would violate the Equal Protection Clause of the Fifth Amendment should it adopt CPNI rules that discriminate against certain telecommunications service providers to promote competition by another class of providers.¹⁰ For example, as the Commission acknowledges in its Notice, the cable industry is currently subject to a privacy statute, the Cable Subscriber Privacy Act. Several aspects of the Cable Act warrant discussion, particularly as Section 222 parallels it. First, there is clearly implied consent for the cable operator to use its commercially-valuable asset within the context of business, providing either cable services or other services provided over the cable network.¹¹ Secondly, a cable operator, upon appropriate notification, is permitted to use its cable information with respect to the design and development of other services, including telephony. Finally, to

⁸ Western U. Teleg. Co. v. Pennsylvania R. Co., 195 U.S. 540, 569 (1904) and Colorado Springs Prod. Assoc. v. Farm Credit Admin., 967 F.2d 648, 655 n.8 (D.C. Cir. 1992).

⁹ See Rukelshaus v. Monsanto Co., 104 S.Ct. 2862, 2872-73, 2877 (1984) (a taking occurs when the government mandates the disclosure of one entity's intellectual property to others).

¹⁰ Metropolitan Life Ins. Co. V. Ward, 470 U.S. 869 (1985).

¹¹ The Cable Act does not specifically address implied consent. But, neither does it require a cable operator to secure consent to use its information. Rather, the cable operator is only required to disclose its information practices.

the extent that a cable company will be operating as both a cable company and a telecommunications carrier, consistent obligations should be imposed.

As with implementing the Cable Act, the Commission should determine that a single notice, disclosing the collection and use practices of the integrated operator or carrier, is optimal. To avoid market confusion and to advance equality of treatment between telecommunications carriers and cable operators, the Commission should adopt the disclosure/opt-out model.

Conclusion

USTA strongly urges the Commission not to promulgate any rules which would impose greater regulatory burdens on LECs than what is required by the statute as interpreted herein. This is of particular importance given the fact that the vast majority of LECs have not been subjected to any CPNI requirements.

Respectfully submitted,

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