

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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)

CC Docket No 96-115

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BELLSOUTH COMMENTS

BellSouth Corporation

William B. Barfield
M. Robert Sutherland
A. Kirven Gilbert III

Its Attorneys

Suite 1700
1155 Peachtree Street, N.E.
Atlanta Georgia 30309-3610

DATE: June 11, 1996

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SUMMARY

The Commission's stated objective in this proceeding is to "balance[] consumer privacy and competitive considerations" in determining the appropriate interpretation of Section 222. BellSouth believes the Commission's proposals are generally a positive step toward satisfying that objective. BellSouth urges the Commission, however, to avoid detailed requirements that inhibit carriers' relationship with their customers contrary to customers' reasonable expectations, or that stifle carriers' abilities to respond in the marketplace to changes in technology and regulation. Instead, BellSouth suggests that the Commission consider characterizing any rules adopted as "safe harbor" provisions only.

Any rules the Commission does adopt in this proceeding should reflect reasonable customer expectations of information use by entities with whom the customer has a business relationship. Moreover, in light of the substantial marketplace changes customers are going to experience and observe as a result of the Act, any rules adopted should be carefully crafted to minimize customer confusion. Finally, any rules should advance the Act's and this Commission's common objective of facilitating one-stop shopping.

The proposal in the Notice to interpret "telecommunications service" for purposes of Section 222 as referring to very broad service categories reflects the Commission's apparent recognition of these principles, and BellSouth is supportive of the Commission's attempt to accommodate these concerns through the breadth of its proposed categories. BellSouth agrees with US West, however, that the better view is

that "telecommunications service" under Section 222 is appropriately interpreted as the full range of telephony products a carrier offers to customers in its role as a telecommunications service provider. If the Commission nevertheless maintains its "distinct service" categories approach, BellSouth would agree with the Notice that the mechanisms for providing customer notification and obtaining any requisite approval should be the "least burdensome" for both service providers and customers. A "notice and opt out" approach would satisfy this standard as well as the literal requirements of the Act.

Finally, BellSouth agrees with the Commission's observation that the statutory CPNI requirements appear to supplant those previously crafted by the Commission through the Computer III and related proceedings

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BellSouth Corporation, on behalf of BellSouth Enterprises, Inc., BellSouth Telecommunications, Inc. and their affiliated companies ("BellSouth"), hereby responds to the Commission's Notice in the above referenced proceeding.¹

Section 702 of the Telecommunications Act of 1996² added a new Section 222 to the Communications Act of 1934, as amended³. Among other things, Section 222 sets forth requirements regarding telecommunications carriers' use of "customer

¹ Implementation of the Telecommunication Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (May 17, 1996) ("Notice").

² Pub. L. No. 104-104, 110 Stat. 56, to be codified at 47 U.S.C. §§ 151 et seq. ("the Act" or "the 1996 Act")

³ 47 U.S.C. §§ 151 et seq. References herein will be to provisions of the 1996 Act as it will be codified. e.g., Section 222.

proprietary network information" ("CPNI"), as that term is defined in the Act.⁴ In response to both formal and informal requests from carrier organizations and individual carriers for "guidance" under Section 222, the Commission proposes in this proceeding to adopt "regulations to specify in more detail and [to] clarify the obligations of telecommunications carriers with respect to the use and protection of CPNI."⁵

In soliciting comments on its proposals, the Commission notes its objective to "balance[] consumer privacy and competitive considerations" in determining the appropriate interpretation of Section 222. BellSouth believes the Commission's proposals are generally a positive step toward satisfying that objective. Nonetheless, BellSouth also asks the Commission to be mindful that considerations of consumer privacy and competition do not necessarily or always fall on opposite sides of a balancing scale.

As this Commission has previously recognized, customers generally do not expect or intend carriers or any other business to disclose information about the

⁴ 47 U.S.C. § 222(f)(1).

⁵ Notice at ¶ 1. Section 222 also includes requirements regarding the terms of availability of telecommunications carriers' subscriber list information to directory publishers, 47 U.S.C. § 222(e), and the Commission solicits comment on those requirements. Notice at ¶¶ 43-46. Although BellSouth does not address those issues directly in this filing, BellSouth generally endorses the views expressed in the comments of Yellow Pages Publishers Association. The Commission also solicits comment on procedures it might require for LECs' compliance with Section 275(d), 47 U.S.C. § 275(d), which prohibits LECs from using "the occurrence or content of calls received by providers of alarm monitoring services" for marketing such services themselves. Notice at ¶ 47. BellSouth believes this provision is self-explanatory and needs no required "procedures" for its implementation.

customer to third parties⁶ Even in the context of reasonable privacy expectations, however, this Commission has found that customers generally may be deemed to permit or invite businesses with whom they have a business relationship to use information about that relationship to offer new services to that customer⁷

Correspondingly, a business enterprise's use of information about its relationship with its customers can increase the business's ability to respond to or anticipate its customers' needs, thereby promoting competition through one-stop shopping opportunities or more carefully tailored service offerings. BellSouth believes that Section 222 -- adopted in the context of sweeping telecommunications industry reforms designed to foster competition in all telecommunications markets -- is properly read consistent with these principles to permit broad use of customer information by a carrier to achieve procompetitive results, while constraining dissemination to unaffiliated parties absent customer approval

Any requirements adopted in this proceeding should reflect customers' previously recognized reasonable expectations of information use by entities with whom they have a business relationship. Moreover, in light of the substantial marketplace changes customers are going to experience and observe as a result of the Act, any rules adopted should be carefully crafted to minimize customer confusion. Finally, any rules should advance the Act's and this Commission's common objective of facilitating one-stop shopping.

⁶ See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, n. 159 (1991).

⁷ See notes 14-15 and associated text. infra

The proposal in the Notice to interpret “telecommunications service” for purposes of Section 222 as referring to very broad service categories reflects the Commission’s apparent recognition of these principles, and BellSouth is supportive of the Commission’s attempt to accommodate these concerns through the breadth of its proposed categories. BellSouth agrees with US West, however, that the better view is that “telecommunications service” under Section 222 is appropriately interpreted as the full range of telephony products a carrier offers to customers in its role as a telecommunications service provider. If the Commission nevertheless maintains its “distinct service” categories approach, BellSouth would agree with the Notice that the mechanisms for providing customer notification and obtaining any requisite approval should be the “least burdensome”⁸ for both service providers and customers. Finally, BellSouth agrees with the Commission’s observation that the statutory CPNI requirements appear to supplant those previously crafted by the Commission through the Computer III and related proceedings.

I. THE COMMISSION SHOULD CONSIDER ADOPTION OF RULES AS SAFE HARBOR PROVISIONS ONLY.

The Commission requests comment on its tentative conclusion that “regulations that interpret and specify in more detail a telecommunications carrier’s obligations under Section 222 would be in the public interest.”⁹ Although “specif[ic] . . . detail” might provide some benefit as an expression of the Commission’s current understanding of Section 222, rigid rules (particularly if based on the “distinct services”

⁸ Notice at ¶ 28.

⁹ Notice at ¶ 15.

approach of the Notice) would quickly become cumbersome and counterproductive as the complexion of the industry changes. Accordingly, BellSouth urges the Commission to consider designating any rules adopted herein as “safe harbor” provisions and not to preemptively preclude other reasonable interpretations of Section 222.

The Commission’s proposal in the Notice to distinguish among telecommunications services based on traditional service distinctions may be a “reasonable” one in the short term, but other reasonable interpretations exist as well. Still others will develop as markets evolve. The Commission effectively recognized this conclusion in soliciting input on other possible service distinctions. As these comments will show, the “distinct services” identified by the Commission are not necessarily so “distinct” and, over time, are likely to become less distinct. Nor are service distinctions that do exist necessarily “traditional” across members within a given category of carriers. Additionally, the Commission has recognized that its proposals may be affected by “changes in telecommunications technologies and regulation that allow carriers to provide more than one traditionally distinct service.”¹⁰ Given that these are the very types of changes that are the intended consequence of the Act, any rules adopted with respect to Section 222 must be accommodating of such changes and of multiple reasonable interpretations.

As the Commission indicates, it has initiated this proceeding in response to individual carriers’ and associations’ requests for “guidance” under Section 222. The Commission should not confuse these appeals for “guidance” with a need for detailed

¹⁰ Notice at ¶ 22

regulation of carrier-customer relationships. BellSouth urges the Commission to avoid rules that inhibit carriers' relationships with their customers or that stifle carriers' abilities to respond to "changes in technology and regulation". Accordingly, BellSouth recommends that any rules that the Commission adopts in this proceeding be presented as safe harbor guidance based on current circumstances and not unduly constrain carriers ability to adapt their compliance with Section 222 as circumstances change.

II. "TELECOMMUNICATIONS SERVICE" MUST BE INTERPRETED IN A WAY THAT DOES NOT UNDERMINE THE OBJECTIVES OF THE ACT.

The 1996 Act establishes "a pro-competitive, de-regulatory national policy framework"¹¹ intended to promote competition in all facets of the telecommunications industry through the elimination of regulatory and other barriers that artificially constrained competition. As Senator Pressler observed, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves."¹² According to Representative Fields, through the 1996 Act, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly giving consumers choice."¹³ Section 222 must be interpreted against the backdrop of this express objective of achieving consumer benefit through "decompartmentalizing"

¹¹ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

¹² 141 Cong. Rec. S7881-2, S7886 (June 7, 1995).

¹³ 142 Cong. Rec. H1149 (Feb. 1, 1996).

the telecommunications industry and eliminating regulations that perpetuate “balkanize[d] . . . enclaves.”

BellSouth believes that the “distinct service” approach to interpreting “telecommunications service” under Section 222 is at odds with this objective. Granted, the Commission has attempted to satisfy this objective through identification of broad service categories. Unfortunately, the very categories the Commission would establish on the basis of “traditional” service distinctions are the same ones Congress intended to “decompartmentalize.” In BellSouth’s view, the better interpretation is that “telecommunications service” under Section 222 refers to the full range of telephony products a carrier offers to customers in its role as a telecommunications service provider. Alternatively, if the Commission nevertheless concludes that some service distinction is necessary, BellSouth urges the Commission to retain its broad service classification approach, but allow services in addition to “short-haul toll” to “float” between service categories.

A. The Single Telecommunications Service Concept Advanced by US West Is Reasonable and Best Achieves the Objectives of the Act.

As the Notice indicates, US West responded to NYNEX’s petition for a declaratory ruling regarding the meaning of “telecommunications service” by letter advocating a broader interpretation than NYNEX had asked the Commission to approve. It is BellSouth’s understanding through discussion with counsel for US West that US West will expound upon its proposed interpretation in its comments in this proceeding. Moreover, as a result of those discussions, BellSouth concurs that Section 222 does not require delineation of distinct service sectors but instead properly may be

interpreted to include all telephony products that a carrier offers as “telecommunications service” under Section 222.

A “single telecommunications service” concept is consistent with both the consumer privacy and competition principles Congress sought to preserve and advance through the Act. From a consumer privacy standpoint, a “single telecommunications service” concept is consistent with customers’ reasonable expectations of use of business information by entities with whom the customer has a business relationship. That is, consumers reasonably expect entities with whom they have a business relationship to use internally information about that relationship to improve the range and level of service provided to that customer. Conversely, customers do not as readily accept that a business enterprise with whom they have a relationship will disseminate that information to unrelated third parties.

Section 222, read as referring to a single telecommunications service category, squares precisely with this customer expectancy. That is, Section 222(c)(1) facilitates use of CPNI by a carrier in developing complete and integrated or tailored service offerings, but limits the carrier’s ability to use that information to promote services that do not include or are not integral to the provision of a telecommunications service absent customer approval. In addition, Section 222(c)(2) reinforces the customer’s expectation that a carrier will not release information about the business relationship absent prior written direction from the customer.

Recognition and protection of customer expectations in this manner is also consistent with laws and regulations in similar contexts. For example, in adopting rules

to implement the Telephone Consumer Protection Act of 1991¹⁴ this Commission concluded that customers expect, and may even be deemed to invite, use of information about past transactions by businesses hoping to initiate a new transaction.¹⁵ Similarly, cable operators appear unlimited in their ability to use information collected in the course of providing cable service or “other services” to a customer, even in the context of statutory provisions specifically tailored to the protection of subscriber privacy interests¹⁶. Thus, a “single telecommunications service” interpretation of Section 222 is fully compatible with past statutory and regulatory schemes for protection of reasonable customer privacy expectations.

A “single telecommunications service” concept will also advance the pro-competition objectives of the Act. As observed above, the purpose of the Act is to eliminate traditional distinctions in service offerings and to allow carriers to fashion service packages that will best meet the need and desires of customers. A “single telecommunications service” interpretation will allow carriers to function in the

¹⁴ Pub. L. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227 (“TCPA”).

¹⁵ The Commission concluded on the basis of public comments and on the TCPA’s 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. . . . Finally, . . . we find that a consumer’s established business relationship with one company may also extend to the company’s affiliates and subsidiaries.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 8752 (1992) (emphasis added) (“TCPA Order”).

¹⁶ 47 U.S.C. § 551

marketplace as any other business does using information available to it to compete vigorously for customer loyalty by operating as a one-stop shopping source

B. If the Commission Does Require Recognition of “Distinct Services,” Broad Service Categories Are Appropriate. CMRS Should Not be a Separate Service Category.

In lieu of consideration of a single service interpretation, the Commission proposes in the Notice to adopt broad, but distinct, service categories. BellSouth believes that this approach is driven by many of the same considerations that support adoption of the single service concept, so BellSouth is generally supportive of the Commission's proposal as an alternative solution. Even so, however, BellSouth does not believe the divisions between the service categories are as distinct as the Notice suggests. In particular, BellSouth urges the Commission not to require CMRS to be treated as a separate telecommunications service for purposes of Section 222.

The Commission proposes to distinguish between service categories for purposes of Section 222 on the basis of “traditional” service distinctions. Principally, the Commission proposes to distinguish between traditional local service, traditional interexchange service, and “traditional” CMRS. The flaw in this breakout of traditional services categories, however, is that the services themselves are not necessarily distinct. Indeed, the Commission has already been forced to reckon with this notion in the Notice and has responded by attributing “short-haul toll service” to both the local and interexchange categories. Instead of traditional service distinctions, it is the historic regulatory classification of certain service providers and their derivative authority to provide services in certain areas or certain ways that form the basis upon

which the Commission's proposed distinctions are drawn. But, as noted above, one of the very purposes of the Act was to eliminate such regulatory effects, not to perpetuate them.

If the Commission is to adopt rules based on historical market segmentation, however, BellSouth concurs that a distinction between local and interexchange service could serve as a current basis for identifying broad service categories. More troubling, however, is the proposal to treat CMRS as yet a third distinct category. And of particular concern is the suggestion that CMRS may be further subdivided in a later proceeding.¹⁷ BellSouth believes that CMRS should be considered to "float" between the local and interexchange categories, just as the Commission has proposed for short-haul long distance.

To require CMRS to be treated as a separate category would thwart the joint marketing relief Congress granted carriers in Section 601(d) of the Act. There, Congress expressly authorized the joint marketing and sale of CMRS "in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services."¹⁸ As this Commission has recognized on prior occasion, sharing of CPNI is crucial to effective joint marketing.¹⁹ Any distinction created by regulation between CMRS and other services that would interfere with the sharing of information between a carrier's CMRS

¹⁷ Notice at n. 58.

¹⁸ 1996 Act, sec. 601(d).

¹⁹ See, Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571, [para. 130] (1991).

and non-CMRS operations would undermine the very specific joint marketing authority granted by Congress²⁰

Nor does CMRS lend itself well to history-based separate service classification. Although BOCs have historically been subjected to separate subsidiary requirements for their cellular operations, other LECs, other cellular providers, and IXC's have not been so constrained. Many of these other service providers have long been able to package their respective services as complementary components. Moreover, the natural convergence of CMRS with wireline technology-based services is not theoretical, but real, as evidenced by the attached press release and news coverage.²¹ The Commission should not stifle such developments with an unduly narrow interpretation of Section 222.

III. NOTICE AND AUTHORIZATION PROCEDURES, IF REQUIRED, MUST BE CONSISTENT WITH CUSTOMERS' REASONABLE EXPECTATIONS REGARDING EXISTING BUSINESS RELATIONSHIPS.

Section 222 requires carriers to have customer approval to use CPNI for purposes other than provision of the telecommunications service from which it is derived or related services. As discussed in the foregoing section, any line drawing between offerings that make up telecommunications service will be inconsistent with customer expectations of a business's use of information about its customers. Such

²⁰ Indeed, it is arguable that any such regulation adopted by this Commission would have no operative effect. The joint marketing relief in Section 601(d) is granted "[n]otwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation." 1996 Act, Section 601(d) (emphasis added).

²¹ See Attachment 1.

artificial line drawing also has the potential to introduce inefficiencies and diseconomies into carriers' attempts to become one-stop shopping sources for their customers, contrary to the intent of Congress. As the Commission appears to recognize in the Notice, however, these negative consequences of the "distinct service" approach to interpreting "telecommunications service" may be mitigated somewhat by implementation of procedures that facilitate carriers' ability to obtain customer approval for "cross-category" use of information. BellSouth supports adoption of requirements that do not impose undue burdens on carriers or their customers and which operate to advance carriers' abilities to respond to or anticipate their customers' needs.

A. Notification Requirements Must be Reasonable and Not Confusing to Customers.

The Commission posits in the Notice that customers must know of their right to restrict access to their CPNI before they can waive that right and that, therefore, carriers should be required to provide notice of that right to their customers. On the basis of that tentative conclusion, the Commission seeks comment on acceptable means of communicating the notice, acknowledging that it should be "the least burdensome method of notification that would meet the objective of the 1996 Act."²² Finally, the Commission inquires whether it should specify the content of the notice provided to customers.

BellSouth submits that carrier-provided notice may not be required under the Act. If notice is required, of course, BellSouth urges that methods that are least

²² Notice at ¶ 28

burdensome to both carriers and customers be permitted. Finally, BellSouth strongly urges the Commission to avoid immersing itself in specification of the content of required notifications.

As discussed above, the Commission has previously identified and described customers' reasonable expectations of business's use of information. In the TCPA Order, the Commission concluded that customers can be deemed to invite or permit solicitations by businesses with whom the customer has an established business relationship. Implicit in this scenario is that the business would be using information it has about past transactions and use of the business's products or services when making such an invited or permitted solicitation. Thus, consistent with customers' expectations of all businesses, carriers' use of CPNI to make solicitations or to develop products that may be the subject of future solicitations should be deemed permitted or invited, even without specific notification to the customer.

Of course, the Commission recognized in the context of the TCPA that some customers may want to avoid future solicitations even from businesses with whom they had an established relationship. That is, they may wish to exercise a "right to restrict" use of information by the business notwithstanding the business relationship. To accommodate this desire, the Commission required businesses doing outbound telephone solicitations to establish "do-not-call lists," finding that "company-specific do-not-call list[s] . . . represent[] a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the

continued viability of a valuable business service”²³ The Commission did not require businesses to provide notice to their customers of this right and opportunity, however, in spite of recommendations from commenters that it do so²⁴ Instead, the Commission took on the notification responsibility itself and issued both a consumer alert and an industry bulletin.²⁵ Insofar as customers are already under such a general notice that they may restrict a business entity’s use of past transaction information, additional notification from multiple carriers is likely to be more confusing than beneficial

If the Commission nevertheless imposes a notification obligation, BellSouth urges the Commission not to adopt requirements that would be burdensome for carriers, confusing and aggravating for customers or counterproductive to the Act’s objective of one-stop shopping objective

²³ TCPA Order at 8766. The Commission has described other benefits of company specific do not call lists:

[C]ompany-specific do-not-call lists would allow residential subscribers to selectively halt calls from telemarketers from whom they do not wish to hear. Such lists would also afford residential telephone subscribers with a means to terminate a business relationship in instances in which they are no longer interested in that company’s products or services. Additionally, businesses could gain useful information about consumer preferences, and can comply with such preferences without overly burdensome costs or administrative procedures

Id. at 8765 (emphasis added).

²⁴ See, TCPA Order at 8764.

²⁵ See, “Consumer Alert: Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machine,” Public Notice, 8 FCC Rcd 480 (1993); “Industry Bulletin: Telephone Consumer Protection Act -- Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machine.” Public Notice, 8 FCC Rcd 506 (1993).

For example, the Commission asks whether it should allow notice to be given orally and at the same time the carrier is seeking approval²⁶ or whether the Commission should require prior written notice. The answer is that the Commission should permit both. Section 222(d)(3) only makes sense if oral notification is permitted at the time approval for use of CPNI is being sought on an incoming call. With oral notification obviously permissible under Section 222(d)(3) no reason exists to believe that a carrier capable (through its service representatives) of providing oral notification of a customer's CPNI rights for a single call is unable to provide notification for purposes of Section 222(c)(1)²⁷. Nor is there any alternative indication in the Act that Congress would find oral notification inadequate.

Of course, most carriers are likely to find an oral notification process cumbersome and time consuming and are likely to rely on written notification as the most efficient vehicle for satisfying a notice obligation. For instance, carriers who direct bill their customers may find a bill insert the most effective means of ensuring that all customers receive the notice. Other carriers may work out arrangements with their billing agents. Alternatively, carriers who publish directories may include the requisite notice in their white pages "information" sections. Others may opt for direct mail drops. The Commission should permit carriers to use the vehicle that is best-suited to their circumstances.

²⁶ The Notice's phrasing of this issue in this manner assumes that the notification alone is an inadequate means of acquiring customer approval. As discussed below, approval need not be "affirmative" in order to be effective.

²⁷ Carriers may elect, of course, not to rely on oral notification through service representatives if the process proves cumbersome or is confusing to customers.

Also in keeping with the Commission's objective that notification be the "least burdensome" method consistent with the Act, BellSouth urges the Commission to adopt only a one time notification requirement. Even with a one-time notice, customers are going to be inundated with notification mailings from LECs, IXC's, cellular carriers, and paging companies, and perhaps from more than one provider within any of these categories. Repetitive mailings from this multiplicity of carriers will be confusing and irritating for customers²⁸ costly for carriers²⁹ and unlikely to produce any marginal benefit from one year to the next. A one-time mailing obligation is also consistent with past requirements the Commission has imposed on AT&T³⁰. Accordingly, the Commission should not impose more than a one-time notice obligation under Section 222.

Nor should the Commission immerse itself in the details of the various carriers' notification writings. Past experience shows that wordsmithing of notification letters

²⁸ The record in prior Commission CPNI proceedings -- in particular the most recent CPNI/Privacy Proceeding, Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, Public Notice, CC Docket Nos. 90-623 and 92-256, FCC 94-063 (rel. Mar. 10, 1994), proceeding terminated, FCC 96-222 (rel. May 17, 1996) ("CPNI/Privacy Proceeding") -- shows that customers are confused and irritated by annual mailings even from a single carrier. No reason exists to compound this problem through repetitive mailing from multiple carriers.

²⁹ As NTIA observed in its 1995 treatise on safeguarding telephone subscriber information, "A company generally should not be required to provide its customers with recurrent Notices about its privacy policies. Such requirements would merely impose costs on businesses -- most of which may be passed on to consumers." Privacy and the NII: Safeguarding Telecommunications-Related Personal Information, U.S. Department of Commerce, National Telecommunications and Information Administration (October 1995) ("NTIA Study") at n. 89.

³⁰ Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072, 3096 (1987).

through industry-wide rulemaking proceedings is wholly inefficient, produces letters that are confusing to customers, and constrains senders' abilities to make timely changes to approved letters. Moreover, the Commission simply does not have the resources to micro-manage the notification letters of the hundreds of telecommunications carriers that are subject to Section 222. BellSouth thus urges the Commission not to undertake such a daunting task.

B. Approvals May be Implied, Oral, or Written.

Somewhat akin to the Commission's inquiry with respect to the notification process, the Commission also queries whether carriers are permitted to rely on oral approvals, or whether approvals must be in writing. BellSouth believes the framing of the approval issue in this manner overlooks the optimal result -- and the one endorsed by the NTIA study cited above -- that, having received notice, a customer should be deemed to have given approval absent some affirmative action by the customer. This notice and "opt out" approach best satisfies the Commission's expectation that customers should have notice of a right to restrict use of CPNI and the Act's objective of facilitating development of competitive service packages for customers.

The literal language of the Act is quite obvious in its exclusion of a requirement that carriers obtain "affirmative" approval, either written or oral. Section 222(c)(1) only refers to actions carriers may take "with the approval of the customer." This expression of the predicate approval required of carriers' internal use of CPNI is in stark contrast with the requirement in Section 222(c)(2) that carriers disclose CPNI externally "upon

affirmative written request”³¹ Under fundamental principles of statutory construction, the absence of a requirement that approvals be either “affirmative” or “written” for a carrier’s internal use of CPNI within the same subsection where both “affirmative” and “written” are express conditions on requests for disclosure of CPNI externally provides clear indication that Congress, knowing how to impose those conditions, chose not to do so. The Commission should not assume a requirement of affirmative approvals in Section 222(c)(1) where Congress has plainly chosen not to require it.

Nor does the clause “with the approval of the customer” require by its own terms a conclusion that an approval must be affirmative. Approval easily may be inferred from a customer’s inaction, particularly when that inaction is preceded by notice of the consequences of inaction. This is precisely the conclusion drawn by NTIA in its recent study: “[A] company should be allowed to use non-sensitive TRPI for unrelated purposes unless the customer affected, having been notified of the company’s plans, takes some action stopping such use”³²

Such an opt out approach is also consistent with that imposed by Congress on cable operators. Under Section 551, cable operators are required only to notify their

³¹ 47 U.S.C. § 222(c)(2) (emphasis added).

³² NTIA Study at 25. In NTIA’s vernacular, “TRPI” stands for “telecommunications-related personal information”, but is not precisely defined. Although most CPNI would likely fall into NTIA’s TRPI concept, TRPI is clearly a much broader category of customer information than CPNI. NTIA does conclude that some TRPI that could be considered “sensitive” might appropriately be subject to an affirmative approval requirement. The types of information NTIA would consider to be sensitive include “information relating to health care (e.g., medical diagnoses and treatments), political persuasion, sexual matters and orientation, and personal finances.” *Id.* at n. 98. By no stretch of the imagination, however, is CPNI “sensitive” and deserving of affirmative approval under NTIA’s standards.

subscribers of the cable operator's intended use of "personally identifiable information" in providing cable and "other services" which includes any wire or radio communication service provided over the operator's cable facilities³³ No affirmative response is required of subscribers before cable operators are permitted to use such information internally for these broad purposes. Only when the cable operator desires to disclose such information to someone other than the subscriber or cable operator is affirmative consent of the subscriber required. Again, under basic principles of statutory construction, the Commission should not assume a requirement of affirmative approval under Section 222(c)(1) where one has not been assumed or required under comparable Section 551.

A notice and opt out process also is consistent with the procompetitive objective of the Act and this Commission. As NTIA observed in weighing the public benefits of an opt out approach, "[T]he free flow of information -- even personal information -- promotes a dynamic economic marketplace which produces substantial benefits for consumers and society as a whole."³⁴ Stated conversely, unnecessary restriction on the flow and use of information will hinder development of a dynamic economic marketplace and retard the production of benefits for consumers and society. The Commission should avoid reading into the Act a requirement that would have an effect directly opposite that intended by Congress.

³³ 47 U.S.C. § 551.

³⁴ NTIA Study at 24-25

Nor is an affirmative approval requirement necessary to prevent carriers or any subset of them from having an unfair competitive advantage. All LECs have long operated under an opt out or implied consent procedure for both residential and business customers in their marketing of CPE and enhanced services, and all but the BOCs and GTE have been able to do so with no prior notification obligation. And, even the BOCs' and GTE's notification obligation has been limited to multiline business customers. With or without prior notice, however, the opt out approach has given these LECs no unfair "leverage" that has enabled them to disrupt competitive markets. Indeed, the CPE and enhanced service markets are extraordinarily competitive with thousand of participants, ranging from garage-based entrepreneurs to entrenched goliaths like Microsoft, CompuServe, IBM and AT&T. The Commission should not be swayed by arguments that are likely to be made that an opt out approach will stifle competition in these markets.

In light of Congress's clear exclusion of an affirmative approval requirement in Section 222(c)(1), the debate over whether any approval given may be oral or must be in writing becomes mostly moot. The exception is in the context of a customer who has previously exercised his or her right to restrict a carrier's use of CPNI and wishes to revoke that restriction, whether on a single event basis or for all purposes. As noted above, Section 222(d)(3) permits a carrier to use such a customer's otherwise restricted CPNI for the duration of a call initiated by the customer, if the customer approves. Of course, the very circumstance under which this approval may be given -- a telephone call initiated by the customer -- requires a conclusion that the approval