

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
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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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REPLY COMMENTS OF SPRINT CORPORATION

SPRINT CORPORATION

Jay C. Keithley
Leon M. Kestenbaum
1850 M Street, N.W.
Suite 1100
Washington, DC 20036
(202) 857-1030

Craig T. Smith
P.O. Box 11315
Kansas City, MO 64112
(913) 624-3065

Its Attorneys

June 26, 1996

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S U M M A R Y

Sprint Corporation ("Sprint") disagrees with the two extreme positions on the definition of telecommunications service. Neither the proposal for one large category including all telecommunications services a carrier provides nor the proposal for numerous categories based on a service-by-service approach are reasonable. Rather, Sprint agrees that the Commission's proposed three categories of telecommunications services are appropriate in the short run, provided the Commission also adopts a policy to eliminate the distinction between the local and the interexchange categories for carriers that lack market power and that provide integrated service.

Oral approval is appropriate; Section 222 cannot be read as requiring written customer approval for purposes of Section 222(c)(1)(A). Nor can the Section be read to allow a negative ballot to be the means to obtain customer approval.

While installation, maintenance, and repair are services that are used in or necessary to the provision of telecommunications services, neither CPE nor enhanced services are used in or necessary to the provision of a telecommunications service by a carrier. Accordingly, neither CPE or enhanced services are within the ambit of Section 222(c)(1)(B). Prior, informed customer approval to use CPNI must be obtained before using CPNI in relation to CPE or enhanced services.

Incremental cost is not the appropriate measure for determining reasonable charges for subscriber listings.

Finally, the pre-existing CPNI requirements imposed upon the BOCs and GTE should not be terminated.

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REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint"), on behalf of the Sprint Local Telephone companies and Sprint Communications Company L.P., replies to Comments submitted in response to the Commission's May 17, 1996 Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.

I. INTRODUCTION

The Commission issued this NPRM to interpret and clarify the provisions of Section 222(c)-(e) (47 U.S.C. Section 222(c)-(e)), adopted as part of the Telecommunications Act of 1996.¹

In its Comments, Sprint agreed that the Commission's proposal that there be three categories of telecommunications services (local, long distance, and CMRS) for purposes of

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (the "Act") added new Section 222 to the Communications Act of 1934, codified at 47 U.S.C. Section 222 (hereinafter "Section 222"). Sprint encourages the Commission to expand this proceeding, or to immediately initiate a new one to provide guidance on the application of Sections 222(a) and (b). In particular, the competitive issues and the use of proprietary customer and carrier information associated with RBOC long distance entry require Commission examination.

Section 222(c)(1) is, in the short run, appropriate. However, Sprint urged the Commission to adopt the position that the distinction between local and interexchange services will effectively disappear for an entity selling both services on an integrated basis, if such entity does not possess market power.

Additionally, Sprint argued that oral consent, after notice of CPNI rights, is valid under Section 222(c)(1)(A) for purposes of using CPNI from one telecommunications service for unrelated telecommunications services. Sprint also argued that such oral consent could be granted during an outbound telemarketing call. Further, Sprint agreed with the Commission's tentative conclusion that installation, maintenance, and repair are services that are "necessary to, or used in" the provision of telecommunication services, and thus, under Section 222(c)(1)(B), a carrier can use CPNI for purposes of installation, maintenance and repair without having first obtained the customer's consent.

Finally, Sprint argued that the pre-existing CPNI requirements imposed on the BOCs and GTE in the Computer III proceeding should be continued.

II. ISSUES REGARDING CUSTOMER APPROVAL

Section 222(c)(1) allows a carrier that obtains CPNI by virtue of its provision of a telecommunications service to a customer to use that CPNI for unrelated telecommunications services or other purposes with customer approval. In the Comments, several issues regarding the meaning of customer approval arose.

A. Oral consent, after notice of CPNI rights, is valid.

Sprint argued that oral consent, including oral consent gained during an outbound telemarketing call, is sufficient to constitute customer approval under Section 222(c)(1).² To the contrary, Comptel argues that written consent must be obtained.³ Comptel argues that the Act itself requires this conclusion because Section 222(c)(2) requires an affirmative written request from the customer before CPNI can be released to a third party. Comptel claims that the two sections must be read together because there is no difference between the use of CPNI by the carrier that obtained the CPNI in the provision of the service and the disclosure of CPNI to a third party.

Clearly, Comptel misreads the Statute. Each of the two sections stands on its own and Congress obviously intended a different standard to apply before a carrier discloses CPNI to parties outside of the vendor-customer relationship than when the vendor itself is using the information. Had Congress intended the same standard to apply in both instances, it would have been a simple matter to so state. Congress did not and the Commission should not interpret the statute as if Congress had.

Frontier also argues for written consent, primarily because of a concern over potential disputes between carriers and customers over the issue of valid approval.⁴ However, the carrier that seeks to rely on oral customer approval will necessarily bear the burden of proving that valid approval was obtained. Appropriate business procedures can appropriately satisfy this burden.

² Sprint Comments at pp. 4-5.

³ Comments of the Competitive Telecommunications Association ("Comptel"), filed June 11, 1996 at pp. 6-8.

⁴ Comments of Frontier Corporation ("Frontier"), filed June 10, 1996 at pp. 6-9.

B. Negative Ballots cannot be considered customer approval.

At the other extreme from parties arguing for mandatory written approval are those parties that argue that failure to affirmatively request that access be restricted (a negative ballot) should constitute customer approval. These parties suggest that a customer be provided notice of their CPNI rights and be informed that if the customer does not affirmatively act to restrict their CPNI, the carrier can treat this customer inaction as approval to use the customer's CPNI on an unrestricted basis.

SBC suggests that such a negative ballot is appropriate and cites as support the Commission's previous decision in Computer III, which allowed AT&T to employ such a negative ballot.⁵ GTE also supports a negative ballot and cites as support the Commission's previous decisions on Billing Name and Address ("BNA") and Caller ID.⁶ U S West argues that the Commission's TCPA Order, adopting rules pursuant to the Telephone Consumer Protection Act, supports such a negative ballot.⁷

None of these previous FCC decisions is applicable in the instant proceeding, which is attempting to balance both privacy and competitive concerns.⁸ In contrast, Computer III was focused on competitive concerns, not privacy, while the Caller ID and BNA proceedings were focused on privacy, not competition. Additionally, as U S West acknowledged, the TCPA itself

⁵ *Comments of SBC Communications, Inc.*, ("SBC"), filed June 11, 1996 at p. 11.

⁶ *GTE's Comments* ("GTE"), filed June 11, 1996 at pp. 5-10.

⁷ *U S West, Inc.'s Opening Comments* ("U S West") at 16.

⁸ *NPRM* at para. 15. As the Commission pointed out, "Congress sought to address both privacy and competitive concerns by enacting Section 222."

created the exception for the pre-existing business relationship, while Section 222 recognizes no such exception.⁹

Negative ballots should not be deemed acceptable as customer approval. Such a holding would serve neither customer privacy concerns, nor competitive concerns. It is likely that many customers will never read their notification of CPNI rights and therefore will never know of their CPNI rights or that they have to take affirmative steps to restrict a carrier's use of their CPNI. Given that Congress considered privacy to be a serious enough issue to include specific CPNI rights in the Act, it strains credibility to believe that such important rights can be relinquished through unknowing inaction. As Sprint argued in its Comments, "customer consent should mean informed consent."¹⁰ If customer inaction becomes the rule of the day, it will be impossible to know whether any customer's consent was informed.

Negative ballots also are lacking when competitive concerns are considered. A major driver behind the Act was to open the local telephone monopoly of the BOCs. For years the BOCs have collected a wealth of CPNI from their captive customers. It would be inconsistent with this goal of the Act to simply allow the BOCs to use this wealth of CPNI on the basis that their customers did nothing to acknowledge they knew of their CPNI rights or to affirmatively restrict the use of their CPNI.

Finally, Sprint urges the Commission to further clarify what a carrier may do once it has received customer approval. SBC acknowledges that it is sending negative CPNI ballots to its

⁹ U S West at p. 16, fn. 41. U S West attempts to get around this flaw in its argument by noting that the Commission extended the exception beyond the plain terms of the statute. However, the simple fact is that it was the statute itself that created the exception.

¹⁰ Sprint Comments at p. 4.

customers in several states, including Kansas.¹¹ What SBC doesn't acknowledge or explain is the language "long distance and local service billing records." that is contained in the definition of CPNI in that negative ballot.

It is not clear whether such records include only intraLATA toll long distance provided by SBC or whether such records include long distance information that SBC has in its possession, not because of any service SBC provides the end user, but because SBC provides billing and collection services to numerous IXCs. If it is the latter, then such information is not CPNI, but rather Carrier Information that is covered under Section 222(b), not Section 222(c). The Commission should clarify that an ILEC cannot utilize an IXC's Carrier Information in the ILEC's possession based on the ILEC's end user consent.¹² For this class of information, the IXC is the customer and IXC informed consent must be obtained.

Additionally, when the Commission rejects, as it should, the negative ballot proposal, SBC and any other carrier that have already sent out negative ballots should be directed to send a new notice to customers without the offending negative ballot provisions, and should be required to remove from its marketing records any data tainted by inappropriate use of IXC CPNI or negative ballot CPNI.

C. Making a Primary Local Carrier ("PLC") change represents consent.

Sprint argued that the act of finalizing a PLC change indicates an agency relationship between the new local carrier and the customer, and that relationship constitutes a consent to

¹¹ SBC at p. 11, fn. 12. (A copy of this negative ballot sent to an Overland Park, Kansas SBC local customer is attached as Attachment 1.

¹² Obviously, the end user could give written notice to its IXC directing the IXC to disclose the end user's CPNI in the IXC's possession to SBC under Section 222(c)(2). However, this direction from the end user is different than SBC using end user approval to look at carrier information SBC has in its possession, not because of a service provided to the end user, but because of a service provided to the carrier.

transfer the customer's local service configuration to the new PLC.¹³ Likewise, AT&T argues that the new PLC should receive the customer's local service configuration from the former PLC and that receipt of this CPNI is necessary:

To foster the competitive provision of local exchange services and prevent the incumbent LECs from creating yet another barrier to local exchange competition. The Commission should, as shown in Part III, clarify that Section 222(c)(2) does not require written customer consent for an incumbent LEC to disclose CPNI to an alternative LEC ("ALEC") who has won that customer. Disclosure in this circumstance is expressly allowed by Section 222(d), because such information is necessary for the ALEC to "initiate" service.¹⁴

D. CPNI may only be used in the provision of CPE and Enhanced Information Services if there is customer consent.

Section 222(c)(1)(B) provides that CPNI derived from the provision of a telecommunications service may be used, even without customer approval, in the provision of "services necessary to, or used in, the provision of such service."¹⁵

U S West argued that CPE and enhanced services are also such services and that the Act "permits CPNI use for CPE and certain enhanced services offerings."¹⁶ U S West misreads the statute. The exception in 222(c)(1)(B) is, on its face, for services that are necessary to or used in the carrier's provision of the telecommunications service that generated the CPNI, e.g., carrier provided installation, maintenance, and repair. CPE is rarely if ever used by the carrier in the provision of the telecommunications service, but rather is used by the customer to receive or make telephone calls. Likewise, while telecommunications services are generally used in or a necessary part of the provision of enhanced services, the converse is not true. Accordingly, the

¹³ Sprint Comments at p. 5.

¹⁴ Comments of AT&T Corp. ("AT&T") filed June 11, 1996 at pp. 4-5.

¹⁵ Sprint argued that installation, maintenance, and repair should obviously qualify as components of included services and numerous other parties agreed with this interpretation. See e.g., SBC at 13 and Comments of Pacific Telesis Group ("Pacific Tel"), filed June 11, 1996 at p. 4, fn. 27.

¹⁶ U S West at p. 15. See also, Comments of Ameritech, filed June 11, 1996 at p. 5.

exception to the need for customer approval in Section 222(c)(1)(B) is not applicable in the case of CPE or enhanced services.

III. THE COMMISSION'S PROPOSAL TO ESTABLISH THREE CATEGORIES FOR PURPOSES OF DEFINING TELECOMMUNICATIONS SERVICE IS APPROPRIATE IN THE SHORT TERM.

Sprint agreed with the Commission's proposal for three distinct telecommunications services: local (including short-haul toll); interexchange (including interstate, intrastate, and international long distance offerings, as well as short-haul toll); and commercial mobile radio service ("CMRS"). However, Sprint suggested that a needed modification of the Commission's proposal was for the Commission to acknowledge that the distinction between local and interexchange services will effectively disappear for an entity selling both services on an integrated basis, if such entity does not possess market power.¹⁷ Other commenters also agreed with the Commission's proposed three categories, but suggested that the Commission be aware of changes that would be needed due to changes in the industry with regard to integrated services.¹⁸

Although NYNEX agreed in part with the three categories, it opposed the inclusion of short-haul toll in the interexchange category because short-haul toll service traditionally has been provided by LECs.¹⁹ To the contrary, the Commission's proposed inclusion of short-haul toll in both the local and interexchange categories recognizes that, regardless of the fact that IXC's are not entirely free to provide short-haul toll everywhere, because of regulatory constraints, in many areas "both LECs and IXC's currently market and provide short-haul toll service as part of an integrated package with local and interexchange services respectively."²⁰ Thus, where an IXC is allowed to and does provide short-haul toll, that toll service will, under the Commission's

¹⁷ Sprint Comments at p. 3.

¹⁸ NYNEX Comments ("NYNEX"), filed June 11, 1996 at pp. 10-11.

¹⁹ Id. at pp 8-10.

proposal, quite logically be treated for CPNI purposes just like the IXC's other toll services. The LEC is not disadvantaged because the Commission's proposal allows LECs to include, for CPNI purposes, their short-haul toll with their predominately non-toll, local services.

Other parties argue that the Commission's proposal is too narrow and that telecommunications service should just be one large category of all telecommunications services provided by a carrier.²¹ Sprint believes that such an interpretation is extreme at this time. Had Congress intended such a result, there would have been no reason for Congress to include Section 222(c)(1)(A). Rather, a simple statement that CPNI obtained from the provision of a telecommunications service could not be used for non-telecommunications service would have sufficed.

At the other extreme are commenters that argue that telecommunications service must be defined on an individual service by service basis and that no categories are acceptable. However, such an interpretation is too restrictive and clearly will not foster a competitive market place. Indeed, the legislative history recognizes that customers expect integrated services and expect their current service provider to be knowledgeable about the customer's account:

Customers, . . . rightfully expect that when they are dealing with their carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about the service.²²

Of course, care must be taken to also be mindful of the competitive concerns that, along with privacy concerns, influenced Congress's adoption of Section 222. Thus, for instance, Sprint's suggestion is that the distinction between the local and interexchange baskets only be eliminated

²⁰ NPRM at para. 22.

²¹ See e.g., SBC at pp. 5-10.

²² P.L. 104-104, Communications Act of 1995, House Report No. 104-204(I), July 24, 1995, 104th Cong., 1st Sess, 1995 WL 442504 (Leg.Hist.)

on an entity-by-entity basis, for entities that do not possess market power and that provide integrated services. This recommendation, coupled with the Commission's proposed three categories, strikes the proper balance between competitive and privacy concerns.

IV. INCREMENTAL COST IS NOT THE PROPER MEASURE FOR THE PRICE OF SUBSCRIBER LISTS.

The Association of Directory Publishers argues that the only reasonable rate for subscriber lists is incremental costs.²³ Sprint disagrees. The correct interpretation of what is a reasonable rate in the provision of subscriber lists is that set forth by YPPA:

"Reasonable and nondiscriminatory rates, terms, and conditions" does not mean incremental costs. Contrary to the suggestion of the Association of Directory Publishers (ADP) that Congress intended reasonable rates to mean incremental costs, a simple reading of the legislative history shows that Congress, in spite of ADP's efforts, rejected the notion of incremental costs.

.... The House Commerce Committee report is instructive in determining Congressional intent. It reads, in part:

This section meets the needs of independent publishers for access to subscriber data on reasonable terms and conditions, while at the same time ensuring that the telephone companies that gather and maintain such data are fairly compensated for the value of the listings.

[Citation omitted.] There are essentially three elements to the compensation for subscriber list information, as recognized in the House report language -- the pro rata cost of gathering and maintaining the information, the cost of providing the information to an independent publisher, and the value of the listings themselves. All three of these elements, . . . must be part of any analysis of whether the compensation is reasonable.²⁴

Given this legislative history, Sprint urges the Commission to adopt YPPA's approach and to reject calls for incremental cost as the appropriate rate for subscriber lists.

²³ Comments of the Association of Directory Publishers, filed June 11, 1996 at p. 19.

²⁴ Comments of Yellow Pages Publishers Association ("YPPA") filed June 11, 1996 at pp. 7-8.

V. THE EXISTING CPNI REQUIREMENTS IMPOSED ON THE BOCs AND GTE SHOULD BE CONTINUED.

Several parties argue against the continuation of the pre-existing CPNI requirements imposed on the BOCs and GTE in the Computer III proceeding.²⁵ For example, SBC argues that because "Congress chose not to preserve the Commission's pre-existing Computer III regulatory requirements relating to CPNI, those requirements should be regarded as no longer appropriate...."²⁶ Pacific Tel argues that the requirements should be discontinued because conditions have changed so as to justify discontinuing application of these pre-existing CPNI rules.²⁷

Sprint disagrees. The fact that Congress did not address these pre-existing CPNI requirements is not determinative. Rather, as the Commission noted, these pre-existing requirements are additional to those imposed under the Act. The Act does not preclude additional requirements, and therefore these pre-existing requirements will continue unless the Commission decides otherwise.²⁸

Likewise, Sprint does not believe that conditions are such as to render these pre-existing requirements moot. As Sprint noted in its Comments, these pre-existing CPNI requirements were imposed to:

"protect independent ESPs and CPE suppliers from discrimination by AT&T, the BOCs, and GTE." Sprint believes that the concerns that drove the Commission to adopt these protective measures are valid concerns and Section 222 does not completely alleviate these concerns.²⁹

²⁵ Computer III, 2 FCC Rcd 3072 (1987).

²⁶ SBC at p. ii.

²⁷ Pacific Tel at pp. 14-17.

²⁸ NPRM at paras. 38-39.

²⁹ Sprint Comments at p. 7.

However, Sprint disagrees with MCI's argument that these pre-existing CPNI requirements should be imposed on all incumbent LECs ("ILECs").³⁰ The Commission previously considered and rejected imposing the requirements on the Independent Telephone Companies ("ITOCs") because the ITOCs, other than GTE, lacked the high degree of market power of the BOCs and therefore did not possess the ability to gain a competitive advantage through the misuse of CPNI.³¹ This lack of ITOC market power in the context of the pre-existing CPNI rules has not changed and the rules should not be extended to non-BOC/non-GTE ILECs.

VI. CONCLUSION.

Sprint urges the Commission to interpret and clarify Section 222 as set forth herein and in Sprint's Comments. The Commission's proposed three categories of telecommunications services are appropriate, provided the Commission also adopts a policy to eliminate the distinction between the local and the interexchange categories for carriers that lack market power and that provide integrated services. Oral consent is appropriate to constitute customer approval for the use of CPNI; however, LECs may not use negative ballots to constitute approval. Incremental cost alone is not the proper charge for subscriber listings provided to directory

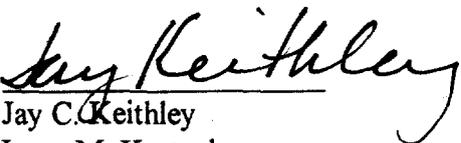
³⁰ Comments of MCI Telecommunications Corporation, filed June 11, 1995 at pp. 19-21.

³¹ See, the NPRM at para. 40 and Computer III, 2 FCC Rcd 3072 (1987).

publishers. And, finally, the CPNI requirements that were imposed on GTE and the BOCs prior to the Act should be continued.

Respectfully submitted,

SPRINT CORPORATION

By: 

Jay C. Keithley
Leon M. Kestenbaum
1850 M Street, N.W.
Suite 1100
Washington, DC 20036
(202) 857-1030

Craig T. Smith
P.O. Box 11315
Kansas City, MO 64112
(913) 624-3065

Its Attorneys

June 26, 1996

ATTACHMENT 1

**YOUR CUSTOMER PROPRIETARY
NETWORK INFORMATION RIGHTS**

In the normal course of providing your telephone service, Southwestern Bell Telephone (SWBT) maintains certain information about your account. This information, when matched to your name, address and billing telephone number, is known as your customer-specific "Customer Proprietary Network Information," or CPNI for short. Examples include the type of line you have, technical characteristics (like Touch-tone or rotary service), class of service (such as residence or business), current telephone charges, long distance and local service billing records, directory assistance charges, usage data, and calling patterns.

Currently, SWBT may use your CPNI to market our services to you. As a valued customer of SWBT, we are pleased to provide you a full range of products, services, and features to meet your telecommunications needs. Unless you have requested that your CPNI be considered "restricted," SWBT may also use your CPNI to market certain telephone products, services or features, that may not have been historically available through SWBT, and/or which may be available to you from a source other than SWBT.

-
• See Reverse

If you wish to have your customer-specific CPNI considered "restricted," please call your Southwestern Bell Telephone Service Center at 1-888-553-7321, during weekday business hours. Simply tell your service representative you wish to restrict our use of your customer-specific CPNI. There will be no charge to restrict your customer information and the restriction will remain in effect until you notify us otherwise.

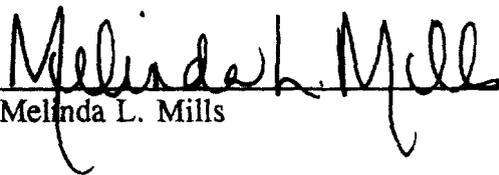
Please note that restricting your customer information will not prevent Telemarketing calls to you from companies other than SWBT. In addition, restriction will not eliminate all SWBT marketing communications with you:

- 1) You could still receive marketing contacts from us that are not based on your customer-specific CPNI.
- 2) SWBT is permitted to use your customer-specific CPNI to market telephone services we offer that are not available to you from another source.
- 3) Even if your CPNI is restricted, we may still use it to market those telephone services or features that may be available to you from a source other than SWBT, if you contact us and inquire about them.

-
• See Reverse

CERTIFICATE OF SERVICE

I, Melinda L. Mills, hereby certify that I have on this 26th day of June, 1996, sent via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing "Reply Comments of Sprint Corporation" in the Matter of Implementation of the Telecommunications Act of 1996, Telecommunication's Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, filed this date with the Acting Secretary, Federal Communications Commission, to the persons on the attached service list.


Melinda L. Mills

Regina Keerney*
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

Jim Schlichting*
Chief, Tariff Division
Federal Communications Commission
1919 M Street, NW, Room 518
Washington, DC 20554

Wilbur Thomas*
ITS
1919 M Street, NW, Room 246
Washington, DC 20554

Joel Ader*
Bellcore
2101 L Street, NW, 6th Floor
Washington, DC 20037

Janice Myles*
Federal Communications Commission
1919 M Street, NW -- Room 544
Washington, DC 20554

Randolph J. May
Bonding Yee
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2404
Counsel for CompuServe

Glenn S. Rabin
AllTel Corporate Services, Inc.
655 15th Street, NW
Suite 200
Washington, DC 20005

Judith St. Ledger-Roty
Lee A. Rau
Reed Smith Shaw & McClay
1301 K Street, NW
Suite 1100 -- East Tower
Washington, DC 20005
Counsel for Paging Network

Dennis C. Brown
Brown & Schwaninger
1835 K Street, NW
Suite 650
Washington, DC 20006
Counsel for Small Business in Telecom

Carl W. Northrop
Christine M. Crowe
Paul, Hastings, Janofsky & Walker
1299 Pennsylvania Avenue, NW
10th Floor
Washington, DC 20004-2400

Mary McDermott
USTA
1401 H Street, NW
Suite 600
Washington, DC 20005

David N. Porter
MFS Communications Company
3000 K Street, NW
Suite 300
Washington, DC 20007

Andrew D. Lipman
Swidler & Berlin
3000 K Street, NW
Suite 300
Washington, DC 20007
Counsel for MFS Communications Co.

David A. Gross
AirTouch Communications, Inc.
1818 N Street, NW
Suite 800
Washington, DC 20036

Pamela Riley
AirTouch Communications, Inc.
One California Street
San Francisco, CA 94111

Albert Halprin
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, NW
Suite 650E
Washington, DC 20005
Counsel for Yellow Pages Publishers

Michael E. Adams
Law offices of Thomas K Crowe
2300 M Street, NW
Suite 800
Washington, DC 20037
Counsel for Excel Telecommunications

James E. Taylor
Jack B. Harrison
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Counsel for Cincinnati Bell

James D. Ellis
SBC Communications, Inc.
175 E. Houston, Room 1254
San Antonio, TX 78205

Durward Dupre
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101

Cindy Schorhaut
IntelCom Group, Inc.
9605 East Maroon Circle
Englewood, CO 80112

Albert H. Kramer
Dickstein, Shapiro & Morin
2101 L Street, NW
Washington, DC 20554
Counsel for IntelCom Group; American
Public Communications Council

Frank W. Krogh
Donald J. Elardo
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, NW
Washington, DC 20006

William B. Barfield
BellSouth Corporation
1155 Peachtree Street, NE
Suite 1700
Atlanta, GA 30309-3610

Lawrence W. Katz
The Bell Atlantic Telephone Companies
1320 North Court House Road
8th Floor
Arlington, VA 22201

Alan N. Baker
Ameritech
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196

Lucille M. Mates
Pacific Telesis
140 New Montgomery Street
Room 1522A
San Francisco, CA 94105

Margaret E. Garber
Pacific Telesis
1275 Pennsylvania Avenue, NW
Washington, DC 20004

Richard McKenna
GTE Service Corp.
600 Hidden Ridge
Irving, TX 75015

David J. Gudino
GTE Service Corp.
1850 M Street, NW
Suite 1200
Washington, DC 20036

Mark C. Rosenblum
AT&T
295 North Maple Avenue
Room 3244J1
Basking Ridge, NJ 07920

Genevieve Morelli
The Competitive Telecommunications Assoc.
1140 Connecticut Avenue, NW
Suite 220
Washington, DC 20036

Danny E. Adams
Kelley Drye & Warren
1200 19th Street, NW, Suite 500
Washington, DC 20036
Counsel for CompTel; Alarm Industry
Communications Committee

Joseph P. Markoski
Marc Berejka
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, NW
PO Box 407
Washington, DC 20044

J. Christopher Dance
Excel Telecommunications, Inc.
933- LBJ Freeway
Suite 1230
Dallas, TX 75243

Michael J. Shorley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Teresa Marrero
Teleport Communications Group, Inc.
One Teleport Drive, Suite 300
Staten Island, NY 10310

Ann P. Morton
Cable & Wireless, Inc.
8219 Leesburg Pike
Vienna, VA 22182

Mark J. Golden
Personal Communications Industry Assoc.
500 Montgomery Street
Suite 700
Alexandria, VA 22314-1561

Jonathan E. Canis
Reed Smith Shaw & McClay
1301 K Street, NW
Suite 1100 - East Tower
Washington, DC 20005
Counsel for Virgin Islands Telephone Corp.

Phillip McClelland
PA Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Anthony J. Genovesi
NY State Assembly
Legislative Office Bldg.
Room 456
Albany, NY 12248-0001

Paul Rodgers
NARUC
1201 Constitution Avenue, Suite 1102
PO Box 684
Washington, DC 20044

Charles H. Helein
Helein & Associates
8180 Greensboro Drive, Suite 700
McLean, VA 22102
Counsel for America's Carrier's Telecom Assoc.

Bradley Stillman
Consumer Federation of America
1424 16th Street, NW, Suite 604
Washington, DC 20036

Catherine R. Sloan
Worldcom, Inc. d/b/a LDDS WorldCom
1120 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Charles C. Hunter
Hunter & Mow
1620 I Street, NW
Suite 701
Washington, DC 20006
Counsel for Telecommunications Resellers

Peter Arth
California PUC
505 Van Ness Avenue
San Francisco, CA 94102

Kathryn Marie Krause
US West, Inc.
1020 19th Street, NW
Suite 700
Washington, DC 20036

Saul Fisher
NYNEX
1095 Avenue of the Americas
New York, NY 10036

Theodore Case Whitehouse
Willkie Farr & Gallagher
3 Lafayette Centre
1155 21st Street, NW
Washington, DC 20036
Counsel for Assoc. of Directory Publishers

Jackie Follis
Texas PUC
7800 Shoal Creek Blvd.
Austin, TX 78757

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