

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the) CC Docket No. 96-115
Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)

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REPLY COMMENTS OF AMERITECH

Ameritech submits these reply comments in response to the Commission's Notice of Proposed Rulemaking in this docket (FCC 96-221, released May 17, 1996) ("Notice"). The Notice has raised many questions concerning the provisions of new § 222 of the Communications Act of 1934 (added by the Telecommunications Act of 1996 ("TA 96")) relating to the use and protection of customer proprietary network information ("CPNI") and other information. In answering those questions, it is important that the Commission acknowledge Congress's intentional application of § 222 to all telecommunications carriers.¹

I. THE COMMISSION'S RULES MUST NOT DISTINGUISH BETWEEN CLASSES OR TYPES OF TELECOMMUNICATIONS CARRIERS.

Section 222 is what it purports to be -- a comprehensive set of restrictions on the use of CPNI by all telecommunications carriers.

¹ As noted in Ameritech's comments, there is no need for a separate proceeding to determine whether commercial mobile radio services should be subdivided under § 222(c)(1). The Commission should conclude in this docket that that is not required.

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A. Section 222 Does Not Contemplate Different Standards for Different Telecommunications Carriers.

Several parties have encouraged the Commission to fashion different CPNI rules for different classes of carriers -- especially arguing for stricter standards and procedures to be applicable to incumbent local exchange carriers ("ILECs"), local exchange carriers ("LECs") generally, carriers with greater than 5% of the nation's access line, etc.² However, the statute applies its restrictions equally to all "telecommunications carriers"³ and does not impose separate, more stringent obligations on ILECs, dominant carriers, or any other subcategory of telecommunications carrier.

Nor can it reasonably be argued that Congress intended that more restrictive CPNI rules be applied to any particular class of telecommunications carrier. In TA 96, Congress was very clear in articulating those instances in which it intended specific, more stringent rules to apply to a particular class of carrier. For example, § 251(c) imposes on ILECs obligations that are in addition to those imposed on all LECs under 251(b). Similarly, § 260 imposes specific obligations on ILECs with respect to the provision of telemessaging service, and §§ 271-276 impose special restrictions on the BOCs with respect to the provision of interLATA services, manufacturing, electronic publishing, alarm monitoring services, and payphone services.

In the case of § 222, however, no such distinctions were made with respect to the general restrictions on the use of CPNI. However, the fact that Congress did create

² *E.g.*, CompTel at 8, Air Touch at 10, MFS at 10.

³ Except of course § 222(c)(3)'s application to local exchange carriers and §222(c)'s application to "a telecommunications carrier that provides telephone exchange service."

separate obligations in subsection (e) for LECs with respect to the disclosure of aggregate customer information and in subsection (c) with respect to list information for telecommunications carriers that provide telephone exchange service is a clear indication that no other distinctions were intended.

In addition, there is nothing in the Conference Report that would indicate that any such additional distinction among carriers should be inferred. In fact, just the opposite is true. The Senate bill imposed substantial CPNI requirements on the BOCs only while the House version allowed the Commission to exempt carriers with fewer than 500,000 access lines. In the bill's final form, however, Congress determined that the CPNI requirements should apply to all telecommunications carriers without exception.

Nor should the Commission conclude that it has a mandate to create distinctions on its own in enacting rules under § 222. Unlike it did in other sections of TA 96,⁴ Congress did not direct the Commission to promulgate regulations to implement §222. In those other provisions of TA 96, there exists some implied Congressional intent that the FCC exercise a certain amount of discretion in enacting rules. There is no such implication in this case. Instead, the Commission's rules must necessarily be limited to interpreting and clarifying the requirements of the § 222.

Ameritech does not oppose the Commission's issuance of interpretive or clarifying rules. Certainly, to the extent that there is any ambiguity in § 222, such rules

⁴ See, e.g., § 251(d)(1) regarding interconnection, § 254 *passim* regarding universal service, § 258(a) regarding PIC verification procedures, § 259(a) regarding infrastructure sharing.

would be appropriate and helpful. However, there is no reasonable interpretation of § 222 that would justify different application of its requirements to different types of telecommunications carriers. Therefore, the Commission should refuse to do so in its rules.

B. The FCC's Current CPNI Rules Should Be Eliminated.

In response to the Commission's inquiry, several parties urged the Commission to maintain its old CPNI restrictions on the BOCs and GTE.⁵ However, the legislative history of § 222 indicates that Congress intended otherwise. First, the Conference Report clearly states that § 222 addresses both privacy and competitive concerns with respect to CPNI; so there is no basis for concluding that the FCC's rules should remain in place because they address a concern -- competition -- not dealt with by Congress. Second, as noted above, provisions in prior versions of the legislation that would have applied the restrictions only to BOCs or large LECs were eliminated, indicating Congress's distaste for CPNI rules applicable only to certain carriers. In fact, Congress used the Commission's own term -- "customer proprietary network information" -- and took the trouble to articulate its own definition -- a clear indication that it intended to supplant the Commission's old, narrow CPNI rules with a more comprehensive set of requirements applicable to all carriers.

Moreover, as noted in Ameritech's comments, there is no longer any reason for special CPNI rules to be applicable to the BOCs and GTE alone. While CPNI might be somewhat helpful in marketing CPE, in an environment in which all customers are knowledgeable about the multitude of sources of CPE, that information might be less

⁵ E.g., Sprint at 7, AT&T at 4, Arch at 12.

useful than other information that can be purchased in the marketplace. The same is true of enhanced services such as voice mail and "on-line" Internet access services.

In addition, the Commission's comparably efficient interconnection ("CEI") rules and its regulations prohibiting discriminatory network access still apply to protect against any alleged "bottleneck" leverage.⁶ Further, the Court of Appeals, in affirming the elimination of the MFJ's ban on information services, specifically found that, even assuming that the BOCs have monopolies over local exchange service in their respective service areas, there is little likelihood that they could use that power to unfairly disadvantage competitive providers of information services.⁷ Moreover, in that analysis, the Court did not even consider CPNI as an issue that needed to be addressed.

Thus, any Commission rules interpreting and clarifying § 222 should completely replace the existing CPNI rules that apply only to the BOCs and GTE.

II. CPNI SHOULD BE PERMITTED TO BE USED IN CONNECTION WITH NATURAL "ADJUNCTS" TO TELECOMMUNICATIONS SERVICES.

In response to the Commission's apparent assumption that CPNI may not be used in connection with information services and CPE,⁸ several parties have correctly

⁶ While the Commission's cost allocation rules also apply, Ameritech suggests that the Commission eliminate those rules for carriers under pure price cap regulation since there is no incentive in that case to cross-subsidize nonregulated services.

⁷ U.S. v. Western Electric Co., 993 F.2d 1572 (D.C. Cir. 1993). As noted in CC Docket 95-20, the furious growth of enhanced services and the involvement of large players in that market belies any notion that the CPNI restrictions are necessary.

⁸ NPRM at ¶ 26.

noted that such an assumption is neither compelled by the Act nor consistent with customer expectations.⁹

Certainly, § 222(c)(1)(B) specifically permits the use of CPNI in connection with activities which, although not “telecommunications services” themselves, are reasonably associated with the provision of those services. Moreover, a liberal reading of this provision would more closely comport with customer expectations. As noted by several commenters, while customers might reasonably expect a distinction between telecommunications-related services and other services that a company might offer, they would be surprised if restrictions were placed on their supplier’s ability to use telecommunications-related information to provide telecommunications-related services.

As noted in the comments of Ameritech and others,¹⁰ customers are interested in “one-stop shopping”. While purchasers are certainly accustomed to look to a multitude of sources for both CPE and enhanced services, in fact, their expectations are that no unreasonable restrictions be placed on their chosen telecommunications carrier’s ability to efficiently provide them with those products and services. In the new fully-competitive telecommunications world envisioned by TA 96, it would be anomalous and a disservice to customers if artificial limitations were placed on a local exchange carrier’s ability to provide its customers with inside wire services, a paging company’s ability to provide its customers with the pagers themselves, a cellular provider’s ability to provide voice mail services, or a provider of caller ID service to also provide the

⁹ *E.g.*, NYNEX at 12, Cincinnati Bell at 6, U S West at 15.

¹⁰ *E.g.*, Cincinnati Bell at 6, USTA at 4, SBC at 8.

necessary caller ID display unit. The Commission should decline to adopt such restrictions that are not compelled by the Act, and, instead, should interpret § 222(c)(1)(B) as permitting the use of CPNI in connection with products and services reasonably related to the provision of telecommunications services.

III. THE COMMISSION'S RULES SHOULD NOT UNDULY COMPLICATE THE OBTAINING OF CUSTOMER "APPROVAL" FOR USE OF CPNI.

Use of CPNI for other than relevant telecommunications services and related products and services requires customer "approval" under the Act. As noted by several parties, the fact that the Act, via § 222(c)(2), provides for an affirmative writing in the case of a customer request for disclosure of CPNI to a third party, reasonably implies that the approval of CPNI required for use by a carrier or its affiliate need be neither in writing nor "affirmative."¹¹

As several parties have noted in their comments, such approval might reasonably be implied under certain circumstances.¹² If the customer is notified of his or her right to preclude the use of CPNI for non-related purposes and does not exercise that right, the customer can be said to have approved of the use of the CPNI. Moreover, such implied consent is logical in general terms. Most customers reasonably expect that a business will use information about customer purchases to provide customers with information about other products and services that the business may offer. There is no reason why the telecommunications business should be any different in the customer's mind.

¹¹ E.g., AT&T at 13, Cincinnati Bell at 15, GTE at 7.

¹² E.g., AT&T at 13, USTA at 5, GTE at 5-6.

Moreover, as pointed out by AT&T,¹³ the Commission's existing CPNI rules adopt an implied consent approach. Unless they affirmatively indicate otherwise, customers are presumed to consent to the use of their CPNI for both CPE and enhanced services purposes.¹⁴ Moreover, the Commission's rules require only that multiline business customers be notified of their rights. And, as AT&T pointed out,¹⁵ the Commission specifically rejected a prior authorization rule as being against customer's interest. Specifically, the Commission found that such a rule would deny mass market consumers the benefit of one-stop shopping and integrated marketing because "a large majority of mass market customers are likely to have their CPNI restricted through inaction."

The rule advocated by the Consumer Federation of America ("CFA"), in this light, is consumer-unfriendly. CFA would have the Commission require affirmative consent for any use of CPNI and rule that an oral authorization is good for only a single transaction, and specify that a written authorization is also valid for only a single transaction if no time period is articulated. Such a severe rule would significantly limit all carriers' ability to notify their customers of new products and services in ways that are convenient and helpful to those customers. As noted above, the Commission has already found that it would not be appropriate that such restrictions result from customer inaction.

¹³ AT&T at 12.

¹⁴ With the exception of business customers with more than 20 lines -- for enhanced services purposes.

¹⁵ AT&T at 15.

Rather, the proposals of AT&T and GTE have substantial merit -- that is, approval should be regarded as having been provided by the customer to the carrier for all uses of CPNI based "on the customer's informed participation in the customer-carrier relationship." Following notification of CPNI rights and absent customer direction to the contrary, a customer's CPNI should be permitted to be used for the marketing of any products and services offered by affiliated operations.¹⁶ In this way, customers who feel strongly about restricting the use of their CPNI can easily do so.¹⁷

With respect to how often such notification should take place, Ameritech suggests that it be one time only. For those customers who care about restricting the use of their CPNI, such notice will be sufficient. An annual notification requirement will only serve to annoy and confuse customers -- especially those customers having multiple carriers -- local, long distance, cellular, paging, etc. For existing customers, the notification can be made fairly quickly after the Commission adopts its rules. New

¹⁶ However, Ameritech questions whether "implied consent" would be appropriate in any case involving the transfer of CPNI to unaffiliated third parties. Specifically, AT&T has requested that the Commission interpret § 222 as not prohibiting the transfer of CPNI from an incumbent LEC to a competing local exchange carrier that wins a customer without written authorization. Ameritech believes that, in such a situation, it would not be inappropriate for the incumbent LEC to require some form of customer approval for the transfer of historical CPNI, beyond the simple fact that that customer has changed service to another carrier. The fact that a customer has switched service to another carrier does not necessarily mean that the customer wants all of his or her prior CPNI batch-dumped to the new carrier. Ameritech would not object to a Commission rule specifying that an incumbent LEC may, if requested by a C-LEC, turn over to the C-LEC CPNI of a customer changing from the ILEC to the C-LEC if the C-LEC obtains customer approval before requesting the transfer of the CPNI and provides the ILEC with assurances that such approval has been obtained.

¹⁷ If the Commission nonetheless requires some form of "affirmative" approval, it should not specify the manner in which the customer be notified of his or her rights or the form in which approval must be obtained. Notification would be inherent in any valid affirmative customer approval process. Unnecessarily detailed rules should not require carriers to go back and re-obtain approvals from customers who have already given their consent in connection with a reasonable process. That would be unnecessarily irritating to customers and wasteful of the time and resources of the carriers and their customers.

customers could be notified with the confirming material they receive from their carriers. Periodic notifications are unnecessary and should not be required.

IV. THE COMMISSION NEED NOT PROMULGATE ELABORATE RULES ON AGGREGATE CUSTOMER INFORMATION.

The Act makes it clear that any carrier can use aggregate customer information for any purpose. The statute also provides that LECs¹⁸ that use aggregate customer information for purposes other than those for which individual CPNI could be used must provide that aggregate information to others upon reasonable request. The rule is clear on its face and, there is no reason for the Commission to elaborate beyond the specific wording of the statute.

There is no duty to disclose aggregate customer information if that information is used for a purpose for which individual CPNI could be used. Thus, the American Public Communications Council ("APCC") is off the mark when it argues that LEC payphone traffic information must be made available to other parties -- including independent public payphone providers ("IPPs"). Without conceding that the information is aggregate customer information, Ameritech would note that there is certainly no obligation to disclose this data to others if it is only used in connection with the provision of payphone service.

Nor should the Commission require LECs to notify others when aggregate CPNI is used for another purpose. There is no requirement in the Act that such notification be given. Moreover, notification would give LEC competitors notice of LEC marketing plans. Clearly, the statute requires only that, if any unaffiliated party thinks that certain

¹⁸ All LECs, not just I-LECs.

specific aggregate CPNI might be useful and requests the data, then that information must be available if the LEC has chosen to use the information other than for purposes described in § 222(c)(1).

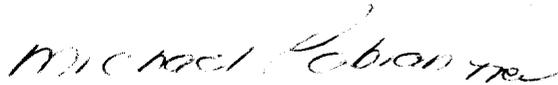
V. CONCLUSION.

The language of § 222 dictates that the Commission should not make any distinction between different types of carriers in adopting rules interpreting the statute. It also evidences a Congressional intent that the Commission's old, narrowly-focused CPNI rules be eliminated.

The Commission should recognize customer expectation and facilitate customer convenience by clarifying that CPNI may be used in connection with products and services that are naturally related to telecommunications services. In that regard, the Commission should also find that customer approval required for use of CPNI can reasonably be implied from a customer's failure, after reasonable notification, to exercise his or her right to restrict the use of that information.

Finally, the Commission should not require carrier notification of use of aggregate customer information. Rather, the statute only requires that a carrier supply the information to others on reasonable request if the carrier has ever chosen to use the information for purposes other than those specified in § 222(c)(1).

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I, Deborah L. Simmons, do hereby certify that a copy of the foregoing, Reply Comments of Ameritech, has been served on the parties listed on the attached service list, via first class mail, postage prepaid, on this 26th day of June 1996.

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