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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 AND OTHER CUSTOMER
INFORMATION

CC Docket No. 96-115

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REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

In the Telecommunications Resellers Association's view, the recommendations proffered by AT&T, the Regional Bell Operating Companies and other incumbent local exchange carriers, if adopted, would undermine, indeed negate, the clearly-expressed will of the Congress, as embodied in Section 702 of the Telecommunications Act of 1996, that the confidentiality of customer information be protected from unauthorized use or disclosure. In assessing these recommendations, TRA urges the Commission to bear several critical points in mind.

First, the text of Section 702 is remarkably clear in its intent to preserve to customers near absolute control over their CPNI. Second, the legislative history of Section 702 confirms the intent reflected in the text of the provision. Third, the issue here is not "one-stop shopping" or the right of a carrier, incumbent or otherwise, to offer integrated telecommunications solutions to prospective or existing customers. The issue here is whether a select group of carriers should be afforded preferred access to the confidential and proprietary data of users of telecommunications service.

With these principals in mind, the Commission should summarily dismiss the self-serving recommendations proffered by AT&T, the RBOCs and the incumbent LECs. With respect to these commenters' contention that CPNI derived from the provision of any telecommunications service should be usable in marketing all basic and selected enhanced services, the Notice correctly recognized that such an approach would effectively negate the consumer privacy and competitive safeguards embodied in Section 702. The Notice is also correct in its analysis of the Congressional intent revealed by the text of Section 702, as well as other portions of the 1996 Act. Given that the 1996 Act clearly contemplates that telecommunications carriers will provide multiple "telecommunications services," it is readily

apparent that the Congress intended to prohibit the use of CPNI associated with one "telecommunications service" to market any other "telecommunication service" without customer authorization.

Again with respect to customer notification of CPNI safeguards and the form of customer authorizations providing access to CPNI, the Notice is correct in its assessment that a customer cannot be deemed to have given its informed consent for a carrier to access its CPNI if it is unaware that the carrier may not use or disclose that information without customer authorization. The Notice was no less on point in concluding that an actual customer authorization was required before a carrier could use or disclose individually-identifiable customer CPNI. If the Congress had desired to carve out an additional exception for use and disclosure by a carrier with whom a customer has an existing relationship, it easily could have included such an exception in the Section 222(d) exception list. Likewise, if the Congress had intended to shift the burden of restricting access to CPNI to the customer, it would have done so expressly. The Congress did not take either action because to do so would have been to render the adoption of a significant portion of Section 702 a meaningless act. Finally, allowing a customer authorization, once given, to exist in perpetuity would have the same impact over time. Failure to impose an expiration date on customer approved access to CPNI would once again shift to the customer the burden of safeguarding the confidentiality of its own CPNI.

The implementing policies and regulations proposed in the Notice reflect the will of the Congress embodied in Sections 222(c) - 222(f) of the 1996 Act, striking an appropriate balance between competitive and consumer privacy interests. The Commission should not be swayed from this reasonable approach by the transparent efforts of AT&T, the RBOCS and other incumbent LECs to secure for themselves one more competitive advantage.

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TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby responds to the comments submitted by AT&T Corp. ("AT&T"), the Regional Bell Operating Companies ("RBOCs") and other incumbent local exchange carriers ("LECs") in response to the Notice of Proposed Rulemaking, FCC 96-221, released by the Commission in the captioned docket on May 17, 1996 (the "Notice"). In TRA's view, the recommendations proffered by AT&T, the RBOCs and other incumbent LECs, if adopted, would undermine, indeed negate, the clearly-expressed will of the Congress, as embodied in Section 702 of the Telecommunications Act of 1996 ("1996 Act"), that the confidentiality of customer information be protected from unauthorized use or disclosure.¹

¹ Pub. L. No. 104-104, 110 Stat. 56, § 702 (1996); 47 U.S.C. § 222.

I

INTRODUCTION

In its comments submitted in response to the Notice, TRA, while applauding the Commission's proposal to "interpret and specify in more detail a telecommunications carrier's obligations under subsections 222(c)-(f) of the 1996 Act,"² strongly urged the Commission to address as well the obligations imposed on telecommunications carriers by Sections 222(a) and 222(b),³ and to promulgate such regulations as are necessary to ensure that the safeguards embodied therein are effective. As TRA explained, Sections 222(a) and 222(b) contain the prohibition long sought by resale carriers against abuse by network providers of the competitively-sensitive data resale carriers are compelled to disclose in order to obtain network services.

Recognizing that a statutory prohibition is meaningless unless it is enforceable and enforced, TRA further urged the Commission to put "teeth" into the Sections 222(a) and 222(b) mandates, by adopting the following five recommendations:

- Issue a strong, unequivocal and unambiguous policy statement declaring that it is unlawful for network providers to use information disclosed to them by their resale carrier customers for any purpose other than to provide the telecommunications and other (*e.g.*, billing) services for which the resale carrier customers have contracted.
- Impose on network providers the duty to safeguard against unauthorized disclosure and abuse by their marketing personnel of the competitively-sensitive data of their resale carrier customers. Certain threshold requirements are appropriate in this respect. First, network providers should be required to deny all marketing personnel access to the confidential data of their resale carrier customers. Second,

² Notice, FCC 96-221 at ¶ 2.

³ 47 U.S.C. §§ 222(a) and 222(b).

a corporate officer of each network provider should be required to formally certify on a periodic basis that the proprietary data of resale carriers cannot be accessed by marketing personnel. Third, network providers should be required to detail in publicly available filings with the Commission the steps they have taken to render the confidential information of resale carriers inaccessible by marketing personnel.

- Impose upon network providers a "strict liability" standard for breaches of their obligations under Sections 222(a) and 222(b). It is the network providers that will be making the determinations as to the adequacy of their database safeguards and realizing the benefits of any cost or administrative savings from use of lesser measures. It is also the network providers that will realize the benefits from illicit marketing successes by their marketing personnel. It is, therefore, the network providers that should bear the liability burden for any failure of their systems.
- Make clear that network providers are not permitted to do indirectly that which Sections 222(a) and 222(b) prohibit them from doing directly. Specifically, the Commission should declare unlawful the "laundering" of the confidential data of resale carrier customers through other carriers, particularly LECs.
- Rigorously enforce the Section 202(a) and 202(b) mandates by imposing heavy monetary sanctions on network providers for all violations of those requirements.

TRA also generally endorsed the Commission's interpretation and proposed implementation of the obligations imposed by Sections 222(c), (d), (e), and (f) on telecommunications carriers with respect to their handling and use of customer proprietary network information ("CPNI") as well as the manner in which the Commission proposed to balance consumer privacy and competitive considerations in establishing a regulatory regime under these sections.⁴ Specifically, TRA agreed with the Commission that the Congress did not intend for the reference in Section 222(c)(1) to "the telecommunications service from which such information was derived" to encompass all basic services, thereby granting carriers carte blanche to use the CPNI of a customer derived from one basic service to market all other basic services, and endorsed the Commission's tentative conclusion that Congress intended to distinguish among

⁴ 47 U.S.C. §§ 222(c), 222(d), 222(e) and 222(f).

telecommunications services "based on traditional distinctions," generally agreeing with the Commission that local, interexchange and commercial mobile radio services ("CMRS") are appropriate categories of telecommunications services for purposes of limiting unauthorized use or disclosure of a customer's CPNI.⁵

TRA also agreed with the Commission that "customers must know that they can restrict access to the CPNI obtained from their use of a telecommunications service before they waive that right, in order to be considered to have given approval,"⁶ and supported the Commission's views that telecommunications carriers seeking approval to use a customer's CPNI should be required to notify the customer of its rights to restrict access to that CPNI and to obtain the customer's express authorization.⁷ Finally, TRA agreed with the Commission that current CPNI safeguards, to the extent that they are more stringent than those mandated by Section 222, should continue to apply to AT&T, the RBOCs and GTE Corporation ("GTE"),⁸ but expressed the view that the States should be permitted to impose more stringent CPNI protections on carriers operating within their borders, to the extent that such additional safeguards are not inconsistent with federally-mandated requirements.⁹

⁵ Notice, FCC 96-221 at ¶¶ 20-26.

⁶ Id. at ¶ 28.

⁷ Id.

⁸ Id. at ¶¶ 38 - 42.

⁹ Id. at ¶ 17.

TRA's views with respect to the Commission's proposed implementation of Sections 222(c), (d), (e), and (f) are generally in accord with those of consumer advocates,¹⁰ State regulatory authorities,¹¹ smaller interexchange carriers ("IXCs")¹² and enhanced service providers ("ESPs").¹³ These commenters generally view Section 702 as a Congressional mandate to safeguard consumer privacy and to prevent incumbent service providers from securing an unfair competitive advantage. AT&T, the RBOCs¹⁴ and other incumbent LEC¹⁵ commenters offer a very different perspective of Section 702, characterizing it as an impediment to their ability to fully serve their customers. TRA urges the Commission not to be swayed by the painfully transparent efforts of this latter group of commenters to secure an unfair competitive advantage through exploitation of CPNI.

¹⁰ See, e.g., Comments of Consumer Federation of America ("CFA"), Pennsylvania Office of Consumer Advocate ("PaOCA")

¹¹ See, e.g., Comments of the People of the State of California and the Public Utilities Commission of the State of California ("CPUC"), New York State Assemblyman Anthony J. Genovesi, Public Utility Commission of Texas ("PUCT"), Washington Utilities and Transportation Commission ("WUTC"), National Association of Regulatory Utility Commissioners ("NARUC").

¹² See, e.g., Comments of The Alarm Industry Communications Committee ("Alarm Industry"), CompuServe Incorporated ("CompuServe"), and Information Technology Association of America ("ITAA").

¹³ See, e.g., Comments of Worldcom, Inc. d/b/a LDDS WorldCom ("LDDS"), Frontier Corporation ("Frontier"), Sprint Corporation ("Sprint"), Cable & Wireless, Inc. ("C&W"), Excel Telecommunications, Inc. ("Excel").

¹⁴ See, e.g., Comments of Ameritech, the Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Corporation ("BellSouth"), NYNEX Telephone Companies ("NYNEX"), Pacific Telesis Group ("PacTel"), SBC Communications Inc. and Southwestern Bell Telephone Company ("SBC"), U S West, Inc. ("U S West").

¹⁵ See, e.g., Comments of GTE Service Corporation ("GTE"), Cincinnati Bell Telephone Company (Cincinnati Bell), ALLTEL Telephone Services Corporation ("ALLTEL"), United States Telephone Association ("USTA").

II

ARGUMENT

A. **The Commission Should Not Permit Large Incumbent Providers To Thwart The Will Of The Congress As Reflected in Section 702 of the 1996 Act**

In their respective comments, AT&T, the RBOCs and other incumbent LECs proffer a number of recommendations, each of which is specifically designed to diminish the effectiveness of the Section 702 CPNI safeguards as they apply both to consumer privacy and full and fair competition. Specifically, these large incumbent carrier commenters generally propose an unduly broad interpretation of Section 222(c)(1)'s reference to "a telecommunications service," reading the term to encompass, and to thereby sanction unauthorized use and/or disclosure of customers' CPNI for purposes of marketing, all basic, and often selected enhanced, services. These commenters also propose to significantly "water down" the CPNI notification and authorization procedures proposed in the Notice. No specific notification requirements would be imposed by these commenters, thereby leaving the form and content of any notice of a customer's right to control access to its CPNI to the unfettered discretion of its carrier. Authorization to use or disclose a customer's CPNI, according to these commenters, should either be implied from existing business relationships or based on an end user's failure to affirmatively restrict access to its CPNI. Moreover, authorizations, once given, would exist in perpetuity if these commenters have their way. Generally, these commenters claim that they are arguing not out of venal self-interest, but for the benefit of consumers desirous of having all their telecommunications needs served by a single carrier.

In assessing these contentions, several critical points should be borne in mind. First, the text of Section 702 is remarkably clear in its intent to preserve to customers near absolute control over their CPNI. Section 222(a) imposes on every telecommunications carrier an unequivocal and unambiguous "duty to protect the confidentiality of proprietary information of . . . customers." In furtherance of this obligation, Section 222(c)(1) prohibits "a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of telecommunications service" from "us[ing], disclos[ing] or permit[ting] access to individually identifiable customer proprietary network information" other than in its provision of "the telecommunications service from which such information is derived or . . . services necessary to, or used in, the provision of such telecommunications service" without "the approval of the customer." For its part, Section 222(c)(2) imposes on these same telecommunications carriers the further obligation to disclose, at the customer's direction, the customer's CPNI to any person designated by the customer. In short, the customer, not the carrier, controls access to and disclosure of the customer's CPNI under Section 702.

The only exceptions to this general principal are set forth in Sections 222(c)(3) and 222(d). Section 222(c)(3) permits disclosure of multiple customers' CPNI in aggregated form. Section 222(d) allows a carrier to disclose/use a customer's CPNI (i) for purposes of billing and collection, (ii) to safeguard its network and services against fraud and abuse, and (iii) to provide inbound telemarketing, referral and administrative services on a call initiated by the customer, if so directed by the customer. Notably absent from the itemized Section 702 exceptions are exceptions predicated on existent business relationships or a customer's failure to affirmatively restrict usage of its CPNI.

Second, the legislative history of Section 702 confirms the intent reflected in the text of the provision. Thus, the Conference Report notes that Section 702 "strives to balance both competitive and consumer privacy interests with respect to CPNI."¹⁶ Consumer privacy interests are furthered by limiting unauthorized access to or use of CPNI. Competitive interests are served by facilitating full and fair competition. Neither of these two categories of interest encompasses preservation of a competitive advantage for incumbent providers. Obviously, competition is not furthered by tilting the proverbial playing field to favor one competitor over another, and consumer privacy is not safeguarded by affording only selected entities unrestricted access to customers' CPNI.

The Conference Report makes clear that use of CPNI by carriers under Section 702 "is limited."¹⁷ The Conference Report makes specific reference to the duty of telecommunications carriers to protect the confidentiality of a customer's proprietary information and emphasizes that carriers are permitted to use, disclose or permit access to identifiable CPNI only for very specific, and limited, purposes.¹⁸ And when discussing the exceptions to the general principle that customer's control access to their own CPNI, the Conference Report characterizes such authority as the right "to use CPNI in limited fashion."¹⁹

Third, it should be borne in mind that the issue here is not "one-stop shopping" or the right of a carrier, incumbent or otherwise, to offer integrated telecommunications solutions

¹⁶ Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 205 (1996) ("Joint Explanatory Statement").

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

to prospective or existing customers. The issue here is whether a select group of carriers should be afforded preferred access to the confidential and proprietary data of users of telecommunications service. Any carrier that desires to develop an integrated service proposal for a prospective or existing customer may obtain access to that entity's CPNI under Section 702 simply by obtaining the entity's approval. Obviously, a new market entrant will have to secure a prospective customer's approval to access that entity's CPNI. Why should an incumbent LEC that desires to market long distance or enhanced services to a customer that it happens to serve solely by virtue of its once-monopoly franchise be afforded easier access to that customer's CPNI? Whose benefit would be served by such a painfully discriminatory approach? The customer's? No, the customer will have access to whatever services it desires irrespective of the incumbent LEC's ease of access to its CPNI. Only the incumbent LEC would benefit and the public interest price paid for that unfair competitive advantage would be a diminution of competition. It is almost embarrassing to witness entities possessed of so many competitive advantages attempting to justify the need for still one more.

With these principals in mind, the Commission should summarily dismiss the self-serving recommendations proffered by AT&T, the RBOCs and the incumbent LECs. With respect to these commenters' contention that CPNI derived from the provision of any telecommunications service should be usable in marketing all basic and selected enhanced services, the Notice correctly recognized that such an approach would effectively negate the consumer privacy and competitive safeguards embodied in Section 702. Certainly, a customer cannot be said to retain control over access to its CPNI if it is deemed to have authorized use and/or disclosure of such information simply by taking local telephone service. And the goal of full and fair competition would not be served by conferring on incumbent LECs a substantial

competitive advantage over IXCs and ESPs simply by virtue of their monopoly-generated customer bases. As succinctly stated in the Notice, "the 1996 Act prohibits carriers that are established providers of certain telecommunications services from gaining an advantage by using CPNI to facilitate their entry into new telecommunications services without obtaining prior authorization."²⁰

The Notice is also correct in its analysis of the Congressional intent revealed by the text of Section 222(c)(1). As the Notice points out, Section 222(c)(1) makes consistent use of the singular form of "telecommunications service," referencing the plural "services" only when referring to "services necessary to, or used in, the provision of such telecommunications service."²¹ Given that the 1996 Act clearly contemplates that telecommunications carriers will provide multiple "telecommunications services" -- *see* definition of "Telecommunications Carrier" at Section 3 of the 1996 Act²² and Section 222(a) -- it is readily apparent that the Congress intended to prohibit the use of CPNI associated with one "telecommunications service" to market any other "telecommunication service" without customer authorization.

While TRA disagrees with one element of the Commission's assessment of the scope of the permissible use/disclosure of CPNI,²³ it acknowledges that the over all approach set forth in the Notice is reasonable. Interpreting Section 702 as "distinguishing among

²⁰ Notice, FCC 96-221 at ¶ 24.

²¹ Id. at ¶ 21.

²² 47 U.S.C. § 153(r)(49).

²³ While TRA agreed with the Commission that local, interexchange and commercial mobile radio services ("CMRS") were appropriate categories within which to permit use of CPNI, it disagreed that intraLATA or "short-haul toll" should be treated as both a local and an interexchange telecommunications service. TRA expressed the view that such an approach would simply perpetuate a vestige of the monopoly local exchange structure that the 1996 Act had struck down.

telecommunications services based on traditional service distinctions"²⁴ reasonably balances competitive and customer privacy interests while achieving the intent of the Congress to safeguard the confidentiality of customer CPNI.

Again with respect to customer notification of CPNI safeguards and the form of customer authorizations providing access to CPNI, the Notice is correct in its assessment that "customers must know that they can restrict access to the CPNI obtained from their use of a telecommunications service before they waive that right, in order to be considered to have given approval."²⁵ Certainly, a customer cannot be deemed to have given its informed consent for a carrier to access its CPNI if it is unaware that the carrier may not use or disclose that information without customer authorization. A nonexistent notice requirement, or a notice requirement which leaves the form and content of the notice to the carrier's discretion, is an open invitation to abuse. Customers with no reason to suspect that they are being manipulated will be easy marks for unscrupulous marketing personnel who desire access to CPNI in order to gain an edge over their competitors.

The Notice was no less on point in concluding that an actual customer authorization was required before a carrier could use or disclose individually-identifiable customer CPNI.²⁶ Section 222(c)(1) expressly requires "approval of the customer" for access to CPNI. Sections 222(c)(3) and 222(d)(3) confirm that it is the customer that controls access to its CPNI. The suggestions that customer approval can be gleaned from the mere existence of a

²⁴ Notice, FCC 96-221 at ¶ 22.

²⁵ Id. at ¶ 28.

²⁶ Id. at ¶¶ 29 - 33.

carrier/customer relationship or that approval really means negative consent, requiring a customer to take an affirmative action in order to avoid being deemed to have given approval, are borderline nonsensical.²⁷ If a customer relinquishes control over its CPNI simply by using telecommunications services, it never really had any control. Similarly, if a customer will be deemed to have given approval if it fails to take an action that the vast majority of customers will never be aware of or understand, it never really had any control. These recommendations of AT&T, the RBOCs and other incumbent LECs elevate form over substance, creating regulatory fictions.

It is hornbook law that statutes should not be construed so as to be rendered meaningless.²⁸ If the Congress had desired to carve out an additional exception for use and disclosure by a carrier with whom a customer has an existing relationship, it easily could have included such an exception in the Section 222(d) list. Likewise, if the Congress had intended to shift the burden of restricting access to CPNI to the customer, it would have done so expressly. The Congress did not take either action because to do so would have been to render the adoption of a significant portion of Section 702 a meaningless act. The only entities that

²⁷ The Commission has declined to adopt such negative consent arrangements in the past as unfair to consumers. Thus, in condemning "negative option" letters of agency ("LOA") for preferred interexchange carrier ("PIC") changes, the Commission noted that "this type of LOA . . . impose an unreasonable burden on consumers who do not wish to change their PICs" because they "require[] a consumer to take some action to avoid a PIC change." The Commission, accordingly, banned negative option LOAs altogether. Policies and Rules Concerning Changing Long Distance Carriers, 10 FCC Rcd. 9560, ¶ 11 (1995), *recon. pending (emphasis in original)*.

²⁸ Rosado v. Wyman, 397 U.S. 397, 415 (1970) ("the courts should construe all legislative enactments to give them some meaning"); U.S. v. Jersey Shore State Bank, 781 F.2d 974, 977 (3d Cir. 1986) ("any construction of a particular statutory scheme a 'dead letter' is disfavored and to be avoided"); Marsano v. Laird, 412 F.2d 65, 70 (2d Cir.) ("an interpretation which emasculates [a statute] should be avoided if possible"); Wilshire Oil Co. of Cal. v. Costello, 384 F.2d 241 (9th Cir. 1965) (statute should not be construed so as to be rendered meaningless).

have potential access to a customer's CPNI are those with whom the customer has a customer/carrier relationship. Hence, if these carriers can use the customer's CPNI solely by virtue of that relationship, or unless the customer affirmatively directs otherwise, no meaningful safeguards would have been imposed on use or disclosure of a customer's CPNI by Section 702 and the Congress would have made a meaningless gesture in enacting Section 202(c)(1).

Allowing a customer authorization, once given, to exist in perpetuity would have the same impact over time. Failure to impose an expiration date on customer approved access to CPNI would once again shift to the customer the burden of safeguarding the confidentiality of its own CPNI. The customer would have to not only remember, but also take an affirmative action, to revoke a prior authorization. Such a shifting of the burden is entirely inconsistent with the spirit of Section 702. As TRA has repeatedly stressed, Section 702 is clearly intended to preserve to the customer's control over its own CPNI. Carriers should, therefore, shoulder the burden of obtaining access to a customer's CPNI; customers should not have to do anything to protect the confidentiality of their proprietary information.

The implementing policies and regulations proposed in the Notice reflect the will of the Congress embodied in Sections 222(c) - 222(f) of the 1996 Act, striking an appropriate balance between competitive and consumer privacy interests. The Commission should not be swayed from this reasonable approach by the transparent efforts of AT&T, the RBOCS and other incumbent LECs to secure for themselves one more competitive advantage.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with these reply comments and its earlier-filed comments.

Respectfully submitted,

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