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December 2, 1996

Mr. William A. Kehoe, III
Federal Communications Commission
Common Carrier Bureau
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Ms. Karen Brinkmann
Federal Communications Commission
Wireless Telecommunications Bureau
Room 5002
2025 M Street, N.W.
Washington, DC 20554

Re: CC Docket No. 96-115, Customer Proprietary Network Information ("CPNI") and WT Docket No. 96-162, Commercial Mobile Radio Services ("CMRS")

Dear Mr. Kehoe and Ms. Brinkmann:

On November 19, 1996, U S WEST Communications, Inc. ("U S WEST") made an *ex parte* contact with the Wireless Telecommunications Bureau. Much of the content of that contact focused on the particulars of the potential arrangements between telephone carriers and their wireless operations. However, some of the discussion focused on CPNI, particularly the types of products and services that could benefit from internal CPNI use and the role and scope of "implied consent" within the context of internal corporate sharing and use of CPNI. Questions were also raised about the scope of the written consent provision of Section 222(c)(2) of the Telecommunications Act of 1996.[1]

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act" or "Act").

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U S WEST wishes to go on record with our response to these issues.

Section 222(c)(2)

With respect to Section 222(c)(2), the observation was made by Staff that the provision did not seem one that prohibited the transfer of CPNI to third parties without written approval, but one that -- rather -- simply imposed an obligation on telecommunications carriers when a certain event occurred to respond with a specific action (i.e., to release information to a person designated by a customer, upon receipt of a written customer request). The Section can certainly be read, as a literal matter, to be circumscribed in the way suggested by the Staff. When read literally, Section 222(c)(2) can be viewed as imposing on all telecommunications carriers an obligation similar to that already imposed on Bell Operating Companies ("BOC") pursuant to the Federal Communications Commission's ("Commission") Open Network Architecture ("ONA") CPNI regime, i.e., the obligation to release commercially valuable customer information when requested to do so in writing by an individual reflected in the records.

However, a broader reading of the Section is possible and generally comports with existing business practices of most local exchange carriers ("LEC"), we believe. Section 222(c)(2) can be read to reflect a Congressional recognition that individuals recognize and appreciate that there is a different relationship between themselves and those businesses with which they have an existing business relationship and those with which they do not. With respect to the former, information access and use should not be encumbered by a "written consent" requirement; with respect to the latter, and the protection of the individual's privacy expectations, a written instrument authorizing the release of information should not be deemed unexpected or unwarranted.[2]

As U S WEST has advised the Commission, focus group research conducted by U S WEST confirmed that individuals did not want information released to third parties without their consent, while they had no concern about U S WEST using the

[2] It is important to note that the written consent requirement is not an absolute requirement, in any event. To the extent that an entity needs CPNI to fulfill a permissible Section 222(d) purpose, the information could be accessed and made available without a customer's written consent. See, e.g., Comments of U S WEST, Inc., WT Docket No. 96-162, GD No. 90-314, filed Oct. 3, 1996 at 25; Reply Comments, WT Docket No. 96-162, filed Oct. 24, 1996 at 10-14. Indeed, it is for this reason that U S WEST is agreeable to accepting carrier representations, short of written instruments, that they are authorized to access information with respect to interconnection, resale and the purchase of unbundled network elements.

same material internally for product design, development and marketing.[3] Survey information submitted by Cincinnati Bell Telephone Company (or "CBT") in CC Docket No. 96-115 makes out a similar case.[4]

U S WEST's internal practices have always been such that an individual's privacy interests are protected when record information about them is released. Indeed, in the White Pages of the telephone directories we advise customers that information about them is "fully protected." Sometimes this protection requires a writing signed by the customer before information is released to a third party. Other times, when requests for information are received orally, the processes involve sending the information only to the address of the customer (regardless of where someone requests the information to be sent), so that the customer knows of the request and the information is calculated to be received by the customer.[5] While Section 222(c)(2) might not mandate a process requiring a writing before information be sent to third parties, internal company practices of many telecommunications carriers -- undoubtedly in place as a matter of institutional practice for years -- have certainly created customer expectations that information about them is not released to third parties, absent some type of customer-initiated transaction and request.[6]

Moving from release of information to third parties to internal use of customer information, questions have arisen about the scope of the products and services that should be permitted to benefit from such use and "implied consent" within an organization and affiliate organizations to make use of CPNI.

Customer Premises Equipment ("CPE") and Enhanced Services

U S WEST reads Section 222(c)(1)(B) as a statutory provision expressly authorizing the realization of overall corporate benefits associated with CPNI access and usage across the corporate family with respect to complementary telecommunications services and non-telecommunications services, including CPE

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[3] See U S WEST's Comments, CC Docket Nos. 90-623 and 92-256, filed Apr. 11, 1994 at 10-12 ("U S WEST April 11, 1994 Comments").

[4] See Comments of Cincinnati Bell Telephone Company, CC Docket No. 96-115, filed June 11, 1996 at 7-8 and Appendix A.

[5] See U S WEST April 11, 1994 Comments at 19-20, where we described this as our standard practice.

[6] Indeed, this may be why telephone companies, traditionally, have been deemed by individuals as institutions likely to safeguard individually identifiable information. See U S WEST's Comments, CC Docket No. 90-623, filed Mar. 8, 1991 at 65-66.

and enhanced services. The literal language of that provision makes clear that services or products "used in" or "necessary to" the provision of telecommunications services *per se* can benefit from the CPNI in the possession of telecommunications carriers, in both the design and marketing operations. The consumer welfare associated with such use is obvious. Not only is one-stop shopping advanced, but products and services that add value to the basic telecommunications service can be developed and offered to customers in a manner that is efficient and effective. Both statutory authorization, as well as implied consent (discussed further below), support the use of CPNI with respect to such offerings.[7]

CPE is clearly "necessary" with respect to and "used in" the provision of virtually all telecommunications services, whether wireline or wireless. To be sure, many types and styles of CPE are available from other than telecommunications carrier sources, but offering the CPE on the service call offers consumers increased efficiencies and facilitates service transactions (i.e., the faster the customer has the CPE, the faster the service can be operational). Furthermore, some types of CPE, such as those which support Caller ID services/functions and wireless services, may be idiosyncratic to the particular service and more difficult to obtain.[8]

Similarly, enhanced services often have a clear and direct connection with telephony services, both supporting and being supported by such services. For example, voice mail services, except in rare cases, are a complementary service to basic telephone service. Other services such as fax store and forward and Internet access services work in conjunction with telephone lines/services purchased by consumers.

Inside wire, a non-telecommunications service, is also a service that meets the clear statutory requirement of Section 222(c)(1)(B). Indeed, the wire has no purpose above or beyond supporting the telephone exchange and toll services.

Specific rules which attempt to "catalog" every service as either "in" or "out" of the Section 222(c)(1)(B) "box" are neither necessary nor desirable from either a

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[7] Even if the statute were not clear in authorizing such use, the Commission's prior findings of implied consent by the mass market to allow for the use of such information with respect to CPE and enhanced services would support such information sharing.

[8] For example, CPE needed by CMRS customers is necessarily quite specialized. The configuration of a given Personal Communications Service ("PCS") provider's handset will depend on: 1) which air interface, i.e., Code Division Multiple Access ("CDMA") or Time Division Multiple Access ("TDMA") or possibly Group Special Mobile ("GSM") the provider has chosen for its primary network; and 2) whether the handset is to operate on a dual-band basis to make use of both PCS and cellular frequencies. Making CPE available at the point of service sale is not only efficient but, in many instances, necessary for the services to be made available in a timely fashion.

market or a public interest perspective. While there might be some regulatory concern over the inability to impose "bright line" rule restrictions with respect to the statutory language (e.g., what is not included in the phrase "necessary" or "used in"?), the Commission should craft rules utilizing, verbatim, the Congressional language. Furthermore, to maximize the public interest associated with commercial communications,[9] one-stop shopping, and the realization of efficient transactions, the Commission should indicate its support for a broad interpretation of the phrases, similar to the approach it took in the Interconnection Proceeding.[10] Such interpretation would advance the public interest.[11]

Implied Consent

U S WEST has consistently taken the position that internal use of CPNI can be implied from the existing business relationship between U S WEST and its customers. Certainly, our focus group research supports such use. The propriety of using such information beyond U S WEST, i.e., with affiliates, is one that must be based on statistical evidence of consumer opinion and logic, as there has not -- to the best of U S WEST's knowledge -- been a specific survey done with respect to information sharing in a telecommunications environment.

Implied consent "inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights. . . . [I]mplied consent is not constructive consent [but, rather] 'consent in fact' which is

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[9] CPNI access and use facilitates educated and meaningful communication, as well as the "dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." In the Matter of Unsolicited Telephone Calls, Memorandum Opinion and Order, 77 FCC 2d 1023, 1035-36 ¶ 32 (1980).

[10] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325, rel. Aug. 8, 1996 ¶ 579 ("'Necessary' does not mean 'indispensable' but rather 'used' or 'useful.'").

[11] There is surely no reason to broadly interpret the phrase with respect to carrier-to-carrier relationships but narrowly with respect to carrier-to-customer relationships. To the extent the Commission believes the public interest is advanced by a broad interpretation of the word "necessary" with respect to competitive interactions, it has even more compelling reasons to find a broad interpretation supports the public interest in retail consumer transactions, where consumers are simply trying to get their needs met in the most efficient, quickest way possible.

inferred 'from surrounding circumstances.'" "[I]mplied consent -- or the absence of it -- may be deduced from the 'circumstances prevailing' in a given situation."[12]

U S WEST believes we, as well as other commenting parties, have provided the Commission with ample evidence that individuals expect a business having information about them to use that information in ways that are calculated to produce potential benefits to the individuals about whom the information relates. Furthermore, we believe that common sense and logic support a finding that implied consent to use CPNI exists not only within a specific corporate organization (organizational structures are not matters that many consumers manifest an interest in) but to affiliates, as well. We believe such use is supported by prior findings of the Commission (i.e., the Common Carrier Bureau found that it was not improper for AT&T Corp. ("AT&T") to share CPNI with its credit card operation;[13] and within the context of the Telephone Consumer Protection Act of 1991 interpretations,[14] the Commission found that minimal privacy issues were raised when an individual was contacted by a business with whom the individual had an existing business relationship or one of its affiliates), as well as research (the Louis Harris Survey demonstrating a high level of consumer support for affiliate and information sharing)[15] and, more recently, by Congressional action.[16]

The scope (as opposed to the fact) of such sharing should be guided by common and market sense as opposed to regulatory mandate. Beginning with the proposition that -- particularly in an information market and an information

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[12] Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990) (addressing whether implied consent to monitor telephone calls existed).

[13] In the Matter of BankAmerica Corporation, The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. v. American Telephone & Telegraph Co., AT&T Universal Card Services Corp., and Universal Bank, Memorandum Opinion and Order, 8 FCC Rcd. 8782, 8787 ¶¶ 26-27 (1993).

[14] 47 USC § 227.

[15] Consumers, Credit Reporting, and Fair Credit Reporting Act Issues, 1994, A National Opinion Survey conducted by Louis Harris & Associates and Dr. Alan F. Westin for MasterCard International, Inc., and VISA, U.S.A., Inc. ("Louis Harris Survey").

[16] 142 Cong. Rcd. H. 11746 § 2402(e)(4)(i) excluding from the term "credit report" "information solely as to the transactions or experiences between the consumer and the person making the report" (a past exception), as well as the "communication of that information among persons related by common ownership or affiliated by corporate control." Affiliate sharing with respect to "non-experience" information can occur only after a notice and opt-out process has been put in place. Furthermore, states are preempted from interfering with this authorized affiliate sharing until at least January 1, 2004. See id. § 2419(2) amending Section 624 of the Fair Credit Reporting Act.

economy[17] -- affiliate sharing produces market and consumer benefits,[18] the Commission should allow the market to define the extent and the scope of that sharing, absent an individual's request to not participate. It is impossible for the Commission to articulate, in advance, all the beneficial uses of affiliate sharing. Yet, the Commission can depress market and consumer benefits by trying to do so.[19]

Section 222(c)(1) of the statute should be construed to permit the sharing of CPNI across corporate affiliates with respect to (c)(1)(A) and (B) purposes, without any additional consent requirement beyond the imputation of "implied consent." This is consistent with general customer expectations and business practices. Thus, it is clearly the "least burdensome" consent requirement and it benefits from allowing LECs that are not highly diversified from seeking further "approvals" from their existing customers.

And, while U S WEST believes that an existing customer relationship could support an implied consent to use CPNI beyond (c)(1) purposes,[20] depending on the facts of any particular case, we can also see the reasonableness in notifying consumers of the various activities in which corporate affiliates might be involved, beyond telephony, and the way in which CPNI might be used by them to better serve the individuals about whom the information relates. The combination of the existing business relationship and the open and honest disclosure certainly would

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[17] The 1996 Act clearly acknowledged the convergence of both technology and industries. One aspect of that convergence that might not be immediately apparent, however, is the rebirth of all businesses as "information companies." Certainly, the attachments submitted to U S WEST's Opening Comments in CC Docket No. 96-115 demonstrate that companies are well aware of the value of information in the design, development and marketing of their products, whether they be telecommunications or cable companies. See U S WEST, Inc.'s Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at Appendices A and B. Similar reincarnations are being realized in other market segments, such as banking.

[18] The Louis Harris Survey, for example, indicated clearly that as particular benefits associated with affiliate sharing are articulated, consumer "approval" of the sharing increased.

[19] For example, a conservative approach to affiliate sharing would have, at least potentially, deprived AT&T of its ability to use its CPNI with respect to its credit card venture, and perhaps its wireless operations, as well.

[20] For example, non-telecommunications businesses use their individually identifiable information across their integrated corporate operations. Individuals are sometimes aware of the relationships between various affiliates and sometimes are not. The level of awareness often has to do with the public manifestations of the corporate enterprise. It may be either implicit (similar offerings from a market perspective) or explicit (i.e., dissimilar, but branded offerings). See U S WEST April 11, 1994 Comments at 18 and note 34 (noting that corporate affiliate sharing might be outside an individual's expectations if the relationship between or among the affiliated companies was not well known or understood). Such activity, at least in the past, has not generally been deemed "invasive" of the individual's privacy.

be sufficient to support a finding of "implied consent" or "customer approval." But in no event should general affiliate CPNI sharing, even beyond telecommunications services offerings, be deemed *per se* inappropriate.

To the extent that a business openly and honestly disclosed to its customers the type of affiliates with which information might be disclosed, permission to use information across the panoply of affiliates should be permitted, absent a customer-imposed restriction.[21] Customer "approval" should be deemed once the notification is completed. Absent an individual's request not to have CPNI shared, or a later complaint about a particular use (which could be addressed by not sharing that individual's information in the future), the market benefits potentially associated with affiliate information sharing and use should be permitted to flow through the economy, regardless of whether there are close connections between the affiliated operations.[22]

The market is well poised to address the scope of information sharing and use. Increasingly, the marketing of "privacy" is being realized. For example, the benefits of "privacy" associated with digital wireless communications are being touted in full-page advertisements in newspapers; credit card companies are advising that the privacy of their cardholders is important to them; similar messages are being conveyed by telecommunications companies. Thus, within the context of an existing business relationship, the Commission should first and foremost rely on the relationship to define the scope of use and customer "approval." Businesses which over-assume will pay a market price for their mistakes; but the individual will not suffer material prejudice from the assumption.

Finally, to the extent that the Commission receives a complaint from a consumer on the matter of information sharing and deems the information sharing associated with the complaint as being "unreasonable" under the Communications

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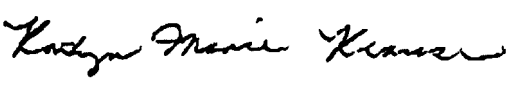
[21] U S WEST currently provides disclosures regarding our CPNI use to all business customers (not just to those with more than 20 lines). With respect to those customers with fewer than 20 lines, the disclosure is framed as a "notice and opt out." Approximately 5% of these customers have restricted their CPNI be used only for basic telecommunications purposes.

[22] For example, a telecommunications company that also owns an appliance store or a pizza operation might deem it appropriate to share information with the affiliate operation (assuming any value could be gained from such sharing). To the extent the potential sharing was clearly disclosed and no objection to the sharing arrangements was received, customers should be deemed to have "approved" the sharing. See U S WEST April 11, 1994 Comments at 18 and note 34 (noting that Sears is generally considered a retail outlet of consumer goods, but that it also engages in car rentals and banking operations (through its then-affiliate Dean Witter) and that customers might not be opposed to this type of sharing if what was occurring was that the customer was being afforded a benefit as a result of the information sharing).

Act based on the facts and circumstances associated with the specific situation, it has ample authority to address the matter within a particular factual context. Particularly in light of the fact that the 1996 Act does not even require a Commission rulemaking regarding Section 222, the Commission should seriously consider a conservative approach to rulemaking in this area, especially where there is an existing business relationship between a company and an individual, relying on market conduct in the first instance to ensure the proper level of privacy protection.

Sincerely,



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