

EX PARTE OR LATE FILED

February 3, 1997

**EX PARTE**

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: CC Docket No. 96-115, CPNI

Dear Mr. Caton:

On behalf of Pacific Telesis Group, I am enclosing a memorandum that responds to questions raised by the staff on January 16. Please associate this with the above-referenced docket. We are submitting two copies of this notice, in accordance with Section 1.206(a)(1) of the Commission's rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions.

Sincerely,

*Gina Harrison / AFE*

Attachment

cc: Laurence Atlas  
Dorothy Atwood  
Karen Brinkmann  
Barbara Esbin  
Paul Gallant  
Regina Keeney  
William A. Kehoe III  
Richard Metzger  
Gayle Radley Teicher

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1776 K STREET, N.W.  
WASHINGTON, D.C. 20006  
(202) 429-7000

AUTHORIZED GATEWAY CUSTOMER  
(202) 429-7028  
myourshaw@wrf.com

FACSIMILE  
(202) 429-7049  
TELEX 248349 WYRN UR

Re: CPNI: CC Docket No. 96-115

This memorandum responds to questions raised by the Common Carrier Bureau staff in a meeting on January 16 regarding the interpretation of section 222 of the Telecommunications Act of 1996 and the relationship of that section to section 272.

## Introduction

In interpreting sections 222 and 272, the Commission should be careful to distinguish the privacy and competition goals of the Act and not to misconstrue provisions that were intended solely to protect customer privacy in order to advance the agenda of certain competitors.

- In general, §222, relating to privacy of customer information, allows a Bell operating company to solicit customer approval to use and disclose CPNI in connection with marketing that company's services and those of its affiliates. Section 222 does not impose a requirement that the BOC solicit approvals on behalf of other carriers. Indeed, such a requirement would violate the First Amendment's freedom of speech protection. Nor does §222 require a BOC to disclose the CPNI to other carriers, absent the customer's written approval obtained by the other carrier.
- When a BOC, as part of the BOC's joint marketing arrangement with its interLATA affiliate, solicits its customers for approval to use or disclose CPNI and (with approval) uses or discloses the CPNI, the nondiscrimination provisions of §272 do not require the BOC to provide such solicitation services to other carriers nor to disclose the CPNI to them.

## Interests balanced in §222

Section 222 recognizes several important interests: the privacy of customer information; the proprietary interests of carriers in information obtained from customers and developed by their own efforts; the needs of carriers to use information in the provision of service and to develop and market new services; the rights of carriers to

protect themselves from fraud or unlawful use of services; and the public policy of promoting competition for telecommunications services.

Congress carefully balanced these sometimes conflicting interests in section 222. For example, where the customer privacy interest is relatively low—as it is for aggregate customer information and subscriber list information—Congress tipped the balance in favor of nondiscriminatory provision of such information to competitors. *See* §§222(c)(3) & (e). Where customer privacy interests or carrier proprietary interests are high—regarding individually identifiable customer proprietary information or carriers’ proprietary information—Congress established protections against unauthorized use or disclosure. *See* §§222(b) & (c)(1).

### **Nondiscrimination and joint marketing provisions of §272**

The 1996 Act also provided for enhanced competition in interLATA services by authorizing Bell operating company entry, subject to certain safeguards. To provide certain interLATA services, a BOC must receive FCC approval and provide those services through a separate interLATA affiliate. *See* §§271 & 272.

The Act contains several provisions that prohibit the BOC from discriminating in favor of its interLATA affiliate in the provision of information and services. *See, e.g.,* §§272(c)(1) & (e)(2). Congress specifically allowed the BOC and the interLATA affiliate to jointly market and sell each other’s services and exempted these activities from the nondiscrimination provisions that otherwise might apply. *See* §272(g).

### **Use and disclosure of CPNI**

#### ***Approval for carrier use of CPNI under §222(c)(1)***

Section 222(c)(1) prohibits a carrier from disclosing or using individually identifiable CPNI “except ... with the approval of the customer” (and except for specific operational uses). This section does not specify how a carrier may obtain such approval. Congress could have created a mandatory means for obtaining approval, as it did in §222(c)(2), where it required an “affirmative written request” for disclosure of CPNI to third parties. Instead, Congress gave carriers wide discretion to obtain approval by any reasonable means. Approval could, for example, be obtained in writing, orally, or by a notice and opt out procedure.

#### ***Disclosure of CPNI under §222(c)(1)***

Nothing in §222(c)(1) requires a carrier to disclose CPNI to third parties. The provision is directed solely to protecting customer privacy and has nothing to do with disclosure or competition. The competitive goals of §222 are addressed in other sections, as discussed below, such as §222(c)(2), which provides a means for mandatory disclosure of CPNI.

### ***Solicitation of approval and disclosure to third parties***

A carrier is not obliged by §222(c)(1) to seek approval to disclose CPNI to third parties, even if it does seek such approvals for its own use and that of its affiliates. Nor does §222(c)(1) oblige a carrier to agree to disclose CPNI to third parties who seek approval for such disclosure in the same way as the carrier uses for its own internal use. For example, a carrier may use a notice and opt out procedure to obtain approval for its own use of CPNI, but require written approval for disclosure to third parties. Congress could have included third-party rights in §222(c)(1) if it wanted to inject competitive goals into that section, but it did not do so. Instead it struck a balance in favor of customer privacy and carrier's rights to communicate with their customers and build on that relationship in the marketing of new services.

### ***Mandatory disclosure of CPNI under §222(c)(2)***

Section 222(c)(2) represents Congress' answer to competitive concerns that competing carriers should have a means of obtaining CPNI. Section 222(c)(2) requires a carrier to disclose CPNI to any person designated by the customer, including a competitor, "upon affirmative written request of the customer." At the same time, this section addresses customer expectations that CPNI will not be disclosed to third parties without their written authorization. This provision imposes a mandatory obligation on carriers, provided the customer has given the proper form of approval. However, a carrier should be able to establish reasonable conditions to assure itself that an approval is genuine and not fraudulently obtained and to require indemnification in case it, in good faith, discloses information pursuant to a purported approval that is not genuine.

A limited exception to the requirement of written authorization is appropriate to allow release of a subset of CPNI to a competitor who has won away the carrier's customer. The release should only take place after the placing of an actual order to change service from the old to the new carrier. If necessary, the Commission could use its authority under section 10 of the Act to permit a carrier to disclose necessary provisioning information in the course of receiving an order to change a service to another carrier who has won a customer based on the customer's oral approval and the winning carrier's representation that it has such approval. On the other hand, a carrier could refuse to turn over CPNI to another carrier based on a claim of oral approval, if the latter carrier were still in the process of trying to market to that customer, unless the customer submitted an affirmative written request.

### **Nondiscrimination regarding use of CPNI**

#### ***Sections 272(c)(1) and 272(g)(3)***

Section 272(c)(1) obliges a BOC, in its dealings with its interLATA affiliate, not to discriminate between the affiliate and any other entity in the provision of information

or services. The FCC held, in the First Report and Order in Docket 96-149 ¶222, that the information subject to §272(c)(1) includes CPNI.<sup>1</sup>

Section 272(g)(3) creates an exception to this nondiscrimination requirement for the joint marketing and sale of services permitted under §272(g), namely, a BOC's interLATA affiliate's marketing and selling the BOC's telephone exchange services under §272(g)(1) and a BOC's marketing and selling the interLATA services of its affiliate under §272(g)(2). The Commission held that activities such as customer inquiries, sales functions, and ordering fall clearly within the scope of §272(g)(3) and hence are excluded from the §272(c) nondiscrimination requirements. In addition, the Commission decided that the coverage of other activities by §272(g)(3) would need to be made on a case-by-case basis. First Report and Order in Docket 96-149 ¶296. CPNI can be used—with appropriate customer approval under §222(c)(1)—in responding to customer inquiries, selling services, and processing orders, all functions already identified in Docket 96-149 as falling within the joint marketing exception, without being subject to §272(c)(1). Furthermore, using CPNI to target customers for sales campaigns is undoubtedly a joint marketing function that is also excluded from the applicability of §272(c)(1).

#### *Specific examples of use of CPNI*

Under the requirements of §222(c)(1) for customer approval to use CPNI, the BOC may solicit customer approvals to use or disclose CPNI, for example by mailing a notice to customers or through telemarketing. Such a solicitation could seek customer approval for a variety of different purposes: (1) for the BOC to use CPNI in its own marketing of its own services, (2) for the BOC to use CPNI in connection with the BOC's joint marketing of its services and the interLATA affiliate's services, (3) for the BOC to disclose the CPNI to the interLATA affiliate so that the affiliate can use the CPNI for the joint marketing of its services and the BOC's services, (4) for the BOC to disclose the CPNI to the interLATA affiliate so that the affiliate can use the CPNI for purposes unrelated to joint marketing, (5) for the BOC to use the information to market the products and services of affiliates other than those of the interLATA affiliate (e.g., affiliates providing CMRS or video), or (6) for the BOC to disclose the CPNI to affiliates other than the interLATA affiliate so that those affiliates can use the CPNI to market their products.

#### *CPNI not used for interLATA affiliate*

The §272(c)(1) nondiscrimination requirement clearly does not apply to purposes (1), (5), and (6) because in each of those cases there is no provision of information or services to, or use of CPNI in any way on behalf of, the interLATA affiliate. The

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<sup>1</sup> Although Congress fully addressed CPNI issues in §222 and the "information" referred to in §272(c)(1) does not include CPNI, *see* Comments of Pacific Telesis Group, Docket 96-149, at 33-34, the analysis in this section assumes *arguendo* that §272(c)(1) does include CPNI, as the Commission determined in Docket 96-149.

solicitation of approvals is on behalf of the BOC or another, non-interLATA affiliate, and the information is disclosed to or used by BOC personnel or a non-interLATA affiliate.

***CPNI used by BOC for joint marketing***

Purpose (2), where the BOC solicits approval to use CPNI for its own joint marketing efforts, is also not subject to the nondiscrimination provision of §272(c)(1) because the BOC is not providing any information to the interLATA affiliate. To the extent that the BOC is deemed to be providing a “joint marketing service” to the interLATA affiliate, or if this activity otherwise falls within the meaning of §272(c)(1), the solicitation of approval and the use of the information is part of the joint marketing and sale of the affiliate’s interLATA services, and is exempt from §272(c)(1) under §272(g)(3).

***CPNI used by interLATA affiliate***

Purposes (3) and (4) both involve disclosure by the BOC of CPNI to its interLATA affiliate—for joint marketing (purpose (3)) or non joint marketing (purpose (4)).<sup>2</sup> To the extent that the joint marketing exception does not apply, the nondiscrimination requirement of §272(c)(1) must distinguish among: disclosure to the interLATA affiliate; the type of customer approval that may be required; and solicitation for the interLATA affiliate.

*Disclosure.* Outside of the context of joint marketing, if the BOC discloses CPNI, with appropriate approval, to its interLATA affiliate, §272(c)(1) requires that the BOC not discriminate between its interLATA affiliate and any other entity. However the BOC’s nondiscrimination obligation relating to disclosure of CPNI must be interpreted in light of customer privacy rights. In order to respect the customer’s privacy rights, the BOC cannot be obliged to disclose CPNI to another entity just because the BOC disclosed the CPNI to its interLATA affiliate with appropriate customer approval. The other entity would have to have appropriate customer approval, as well.

*Type of approval.* Section 2891 of the California Public Utilities Code requires a residential subscriber’s consent, in writing, before a telephone company may disclose CPNI to another person. Because Pacific Bell would require this written approval before it would disclose CPNI to an unaffiliated carrier in order to comply with California law, Pacific Bell would also require the same written consent before it would disclose CPNI to its interLATA affiliate.

*Solicitation.* A BOC’s solicitation of approval to disclose CPNI to its interLATA affiliate is distinguishable from the *disclosure* of the CPNI. Any obligation to make such solicitations for others would be an unconstitutional abridgment of the BOC’s First

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<sup>2</sup> While the Commission has not yet resolved the full scope of joint marketing under §272(g)(3), but will do so on a case-by-case basis, it may find that the BOC’s solicitation of approval to disclose CPNI to the interLATA affiliate for the affiliate’s joint marketing falls within the scope of §272(g)(3).

Amendment rights. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986). Although nothing in the Act specifically requires a BOC to solicit CPNI disclosure approvals for unaffiliated entities, if the Commission were to find that §272(c)(1) creates an ambiguity, it should resolve any doubts in favor of a constitutional reading of the Act—one that would not compel the BOC to disseminate the speech of others. *United States v. X-Citement Video*, 115 S.Ct. 464, 467, 469 (1994). Because a legal obligation that the BOC must disseminate the CPNI approval solicitations of another entity would be unconstitutional, the nondiscrimination provision cannot constitutionally be interpreted to require that the BOC offer an “approval solicitation service” to unrelated entities, even if it does so on behalf of the interLATA affiliate.

***Section 272(e)(2)***

Section 272(e)(2) obliges a BOC not to provide any information concerning its provision of exchange access to its interLATA affiliate unless such information is made available to other providers of interLATA services in that market on the same terms and conditions. Section 3(16) defines “exchange access” as the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. Because exchange access is a service that BOCs provide to toll carriers, §272(e)(2) relates to technical information about this provision of exchange access, not to the CPNI of subscribers.