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SUMMARY

In this filing, U S WEST¹ responds to the Questions posed by the Bureau regarding the relationship between Section 222 of the 1996 Act and certain specific provisions of Sections 272 and 274. While Section 272 has been held by the Commission to contain a broad, absolute, nondiscriminatory obligation regarding the BOC's provision of "information" and "services" (Section 272(c)(1)) to a Section 272 affiliate (whether a BOC subsidiary or a sister affiliate corporation), Section 274 contains no such broad discriminatory obligation.

As described more fully in the text, Section 272 requires nondiscrimination with respect to the "provisioning" of certain things, such as "information" and "services." Section 274 contains no such similar broad nondiscrimination obligation, focusing instead on the nondiscriminatory provisioning of "joint marketing and referral services" vis-à-vis a BOC-affiliated electronic publishing operation and third-party operations (Section 274(c)(2)(A)), as well as the nondiscriminatory behavior of a BOC in a "teaming or business arrangement," where the BOC is always one of the partners to the arrangement (Section 274(c)(2)(B)).

Below, U S WEST argues that Section 272(c)(1) should be read to exclude CPNI from the "information" referenced in the Section. Alternatively, that Section should be read to require only the nondiscriminatory provisioning of CPNI to any entity authorized to receive it. The actual process of securing authorizations (*i.e.*, customer approvals) should be controlled by Section 222. Reflecting customer privacy and market expectations, the approval process vis-à-vis a carrier (including a BOC) with an existing business relationship and an entity without such a relationship will be different. Such differences do not violate Section 272(c)(1). Nor do they implicate Section 274(c)(2). The former does not require the predicate approval process to access and use CPNI to be identical; the latter but marginally

¹ All abbreviations and acronyms used in this Summary are fully identified in the text.

addresses CPNI use at all (specifically mentioning a form of CPNI only with respect to teaming and business arrangements).

In support of U S WEST's position, U S WEST notes that critical importance of a BOC's commercial property, CPNI, to the success of its -- and its affiliates -- business operations. CPNI is commercial business information, regardless of its specific relevance to a particular or individual customer. As such, rules and/or regulations seeking to impede the use of that property, or seeking to impede the predictable commercial speech that stems from the business information, should be narrowly drawn. This is particularly true since Congress chose to deal with CPNI -- a specific "type" of information -- in a separate provision of the Act (i.e., Section 222), making that Section equally applicable (on a nondiscriminatory basis) to all telecommunications carriers.

The application of a ubiquitous, similar approval process for all carriers with an existing business relationship with customers and one for those without is consistent with Section 222, the professed purpose of which is to deal with the "privacy of customer information." Customer privacy expectations are compromised by the release and use of CPNI by stranger-third parties, in the absence of affirmative customer approval. On the other hand, such expectations are not compromised by the use of the information by companies who have an existing relationship with the customer.

The use of commercial business information by a business having a relationship to the customers from which the information stems, while not compromising privacy expectations, advances and promotes customers' market expectations regarding existing commercial practices and one-stop shopping. Indeed, as previously found by the Commission, within an existing business relationship, a process reflecting the realities of existing business relationships and refusing to impose "affirmative" actions from customers -- particularly mass market customers -- avoids penalizing customers from predictable inaction, while allowing the efficiencies of scope and scale associated with corporate enterprises to function. And, while the

Commission has never specifically held, such process advances First Amendment values both with respect to the speaker (who has a First Amendment right to communicate -- intelligently -- to its customers) and the audience (who has a right to hear lawful commercial speech).

Nor does such an application harm competition. Those in competition with the BOCs have substantial CPNI in their possession, reflecting customers' purchasing and usage patterns nationwide. The fact that BOCs would not have access to their CPNI, in the absence of some type of customer affirmation, assures that their customer privacy expectations would also be protected.

It also assures that such competitors will not be able to game the regulatory process. Customer privacy expectations do not produce asymmetrical results. Customers have one set of expectations with respect to companies (and their affiliates) with whom they regularly do business and another set for companies with whom they have no existing business relationship. While CPNI must, according to both legislative and regulatory precedent, be provided to any business designated by the customer, customers do not expect such "designation" to be provided for them in the name of nondiscrimination or equality of access.

As the Commission has consistently done, it should accord the final decision on CPNI access and use to the customer. The CPNI approval process should reflect customers' privacy expectations as well as their predictable conduct. The process should not fall victim to the undemonstrated claims of advocates that customers fear their existing suppliers and trust those they don't know. Such claims are incredible as a matter of human experience. Nor should the process be skewed by claims of "lack of access" to critical information. Those that are predictably the most formidable competitors to the BOCs have no lack of access to significant, valuable customer information -- information they would fight to the death to protect against release absent an affirmative customer approval.

Neither claim should be permitted to form the foundation for a regulatory regime required to protect consumer interests or to advance competition. Both claims would render customers of the BOCs victims to undemonstrated rhetoric and would be totally at odds with the pro-competitive mandate of the 1996 Act.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF U S WEST, INC.

I. **INTRODUCTION**

U S WEST, Inc. ("U S WEST") herein responds to the Public Notice issued by the Common Carrier Bureau ("Bureau") in the above-referenced proceeding.¹ That Notice is very focused on specific statutory language and the potential interplay of various provisions of the Telecommunications Act of 1996 ("1996 Act" or "Act"). Yet, it addresses a matter of significant importance above and beyond the literal statutory provisions themselves.

Because of the number of assumptions included in the questions,² assumptions with which U S WEST often disagrees, responding to the questions produces much repetition, *caveats* and clarifications. Thus, in this Introduction, U S WEST discusses certain overall themes and positions that the later answers reflect. This method allows for more streamlined answers than might otherwise be possible.

¹ Public Notice, DA 97-385, rel. Feb. 20, 1997 ("Public Notice" or "Notice").

² The Bureau acknowledges that there are assumptions, cautioning readers against reading too much into those assumptions. Id. ¶ 5.

A. Customer Proprietary Network Information (“CPNI”) Is Valuable Commercial Property Which Facilitates Constitutionally Protected Speech. Statutes Which Impede Either U S WEST’s Use Of That Property Or The Communication Of That Speech Should Be Narrowly Construed.

The Public Notice primarily addresses how a business – one particular business at that: a Bell Operating Company (“BOC”) and its affiliated business operations – will be permitted to make use of the commercial business information in the possession of one of the corporate affiliates. That business information, to be sure, relates to individual customers. However, that relation does not deprive the information of its property or commercial status.

CPNI is one of the most critical property interests of a telecommunications business. And, its importance is not confined solely to the business that collects the information. CPNI allows for educated product development and design, targeted marketing, and meaningful communications not just between the collecting business and all its customers but across the corporate enterprise.

CPNI is the foundation on which virtually all commercial speech between the enterprise and its customers is conducted. Such speech is both constitutionally protected and important to the operation of a free-enterprise economy. Requiring a customer of an existing business to “opt in” to such commercial communications is unprecedented in the United States,³ with but one exception: the Federal Communications Commission’s (“Commission” or “FCC”) Computer III/Open Network Architecture CPNI rules dealing with customers with more than 20 lines. But for that requirement, there does not exist an “affirmative consent” requirement for a business to use its own information. Indeed, just the opposite statutory model is in place for other companies,⁴ and Congress has recently endorsed affiliate sharing in

³ This fact strongly suggests that had Congress meant to impose an affirmative consent obligation on the BOCs with respect to CPNI, it would have done so directly rather than by the circuitous route the Commission is suggesting, *i.e.*, the use of the word “information” in Section 272(c)(1)’s nondiscrimination provision or the even less express language in Section 274(c).

⁴ 47 USC § 551(c)(1); “disclosure” requires written or electronic consent; affiliate sharing is generally not considered a “disclosure.”

other contexts.⁵ Furthermore, an opt-in requirement impedes not only the free speech rights of the speaker but of the listener, as well.⁶

As the Commission has acknowledged, "even assuming" a certain regulatory act were permissible in the area of speech control, regulators should "be reluctant to act in an area as sensitive as free speech absent the strongest kind of public interest showing."⁷ This is particularly true since there is value in 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 . . . be intelligent and well informed. To this end, the free flow of commercial information is indispensable.⁸

It is through the vehicle of CPNI that products get designed and developed and later marketing information disseminated. In light of the importance of CPNI, and the fact that all existing

⁵ Consumer Credit Reporting Reform Act, Sections 2402(e) and 2419(2), allowing for sharing of "experience" information in a credit environment across affiliated companies and preempting states from ruling to the contrary for at least five years.

⁶ See Lamont v. Postmaster General, 381 U.S. 301 (1965). Alliance for Community Media, et al. v. FCC, 56 F.3d 105 (1995) aff'd sub nom. Denver Area Educational Telecommunications Consortium, Inc., et al. v. FCC., 116 S.Ct. 2374, 2390-94 (1996); Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986).

Also note the Commission's implicit recognition of the depressive influence of an affirmative authorization requirement on commercial speech. See, e.g., Computer II Remand Order, 6 FCC Rcd. 7571, 7610 n. 155 (1991) (noting that, under a prior authorization regime, a large majority of mass market customers are likely to have their CPNI restricted as a result of inaction. Of course, such a restriction would mean that otherwise lawful speech could not occur, particularly on a targeted basis); Changing Long Distance Carriers, 7 FCC Rcd. 1038, 1045 ¶ 44 (1992) (noting that carriers have had little success in having customers return written documents (in that context, the written documents being referenced were Letters of Authorizations or Letters of Agency ("LOA")); Divestiture Related Tariffs, 101 FCC 2d 935, 942 ¶ 21 (1985) (noting that end users who are committed to doing business with an enterprise often do not return signed authorizations).

⁷ Memorandum Opinion and Order, CC Docket No. 78-100, 77 FCC 2d 1023, 1035-36 ¶ 32 (1980) citing Virginia Pharmacy Board v. Virginia Consumer Council.

⁸ Id. ¶ 34.

telecommunications providers have and hold CPNI (often reflecting various products, often shared with various affiliates), the Commission must not ignore the context of its current inquiry.⁹

Section 222 focuses on CPNI from an industry perspective, applying equally to all telecommunications carriers. Yet, when the Commission focuses on the nondiscrimination provisions of Sections 272 and 274, it focuses on but one telecommunications provider. Furthermore, in the latter situation, the Commission is construing temporary statutory provisions. It does not make sense to establish a CPNI sharing regime potentially at odds with customer expectations and the detailed provisions of Section 222, when such rules would be in place for only a short period of time. The better solution is to reconcile the nondiscrimination provisions of Sections 272 and 274 with Section 222 so that both sound business practice and customer privacy expectations are realized.

B. Any Nondiscrimination Obligation Associated With CPNI Should Apply To The Provisioning Of The CPNI, Not The Predicate Approval Processes

Particularly given the scope of the other telecommunications carriers in the market, who frequently have in their possession CPNI relating to customers nationwide (unlike BOC CPNI which is more regional in character), the Commission should narrowly construe the nondiscrimination requirements in Sections 272 and 274.¹⁰ To the extent that sections of those statutory provisions implicate CPNI or basic telephone service information, any nondiscrimination obligation associated with that information should be confined to

⁹ As the Commission noted in its Non-Accounting Safeguards Order, CC Docket No. 96-149, rel Dec. 24, 1996 ¶ 19, the goal of the Commission's proceedings in implementing the 1996 Act "is to establish a regulatory framework that enables service providers to enter each other's markets and compete on an equal footing by not allowing one service provider to game regulatory requirements in such a way as to hinder competition."

¹⁰ Section 272(c)(1) contains broad nondiscrimination language. However, as U S WEST discusses below with respect to Section 274 issues, that latter Section imposes minimum nondiscriminatory obligations with respect to the provisioning of basic telephone service information (or CPNI). With respect to the nondiscriminatory provisioning of "joint marketing and referral services," the matter of CPNI access is at most incidental and can be accomplished without the application of a broad nondiscrimination obligation. With respect to the nondiscriminatory treatment of teaming and business arrangement partners, U S WEST proposes herein that they be treated the same with respect to CPNI approvals.

a provisioning obligation. That is, to the extent a BOC is willing to provide CPNI to any entity authorized to receive it (affiliates as well as third parties), the nondiscrimination obligations of the statutes should be deemed met.

The approval process, i.e., a predicate process to the “provisioning” of CPNI should be governed by Section 222 and should incorporate customer privacy expectations into its formulation. Those customer expectations require that an approval process cannot always be equal as between BOC companies and those with whom they share an affiliation and third parties who can lay claim to no such affiliation.

Non-BOC carriers with existing customer relationships are certainly not harmed by such an interpretation. Indeed, they will continue to have access to the richness of the CPNI in their possession and will be able to use such CPNI to craft market-responsive service packages. A statutory interpretation that remains consistent with the Commission’s existing CPNI rules, according choice to customers over the use and disclosure of CPNI, is the model most in the public interest.¹¹ Such model not only accords with customer expectations but allows third parties to access CPNI in the possession of the BOCs, upon securing appropriate customer approval (just as the BOC affiliate). Similarly, the BOC will be entitled to use its CPNI through an approval processes crafted with a view toward accommodating First Amendment values, as well as customer privacy and market expectations.

¹¹ In rejecting prior authorizations for use of CPNI within an existing business relationship, the Commission has previously found such authorizations as being “unnecessary to protect customer interests and promote competition.” Phase II Order, 2 FCC Rcd. 3072, 3094 ¶ 152 (1987). The Commission has held that the configuration of its CPNI rules actually has advantages over a prior authorization rule because it encourages efficient, integrated combinations of offerings for the specific needs of customers; it allows the BOCs to target customers for service offerings/packages that might otherwise not be being served effectively; BOC sales would generally increase overall industry sales; and the absence of the BOCs from the market they were then entering (enhanced services) meant that many other providers currently had more/better CPNI than the BOCs did. Phase II Recon. Order, 3 FCC Rcd. at 1162-63 ¶ 97. A similar analysis should apply to the regulatory implementation of the statutory provision addressing CPNI.

C. Affiliate Versus Non-Affiliate Approval Processes

The approval process required to use CPNI beyond a Section 222(c)(1)(A) or (B) purpose should be the same for all telecommunications carriers similarly situated, as envisioned by the plain language of Section 222. That process should reflect the material differences between securing approval from a customer with whom an existing business relationship exists and from an individual where no such relationship exists. The relationship is critical, something long acknowledged by the Commission. An existing relationship allows for a range of “tacit” and “implied” consents (based either on the relationship itself or the relationship plus a notification of intended uses);¹² while the lack of a relationship strongly suggests that something more affirmative by way of customer “approval” should be necessary to access and use CPNI,¹³ whether the additional affirmation is oral¹⁴ or written.¹⁵

¹² Indeed, the CPNI rules have – with but a single exception – always been supported by consent implied from the existing business relationship and Commission “expectations” about that relationship. See, e.g., Phase II Recon. Order, 3 FCC Rcd. 1150, 1163 ¶ 98 (1988) (the Commission “anticipate[d] that most of the BOCs’ . . . customers . . . would not object to having their CPNI made available to the BOCs to increase the competitive offerings made to such customers.” Furthermore, the Commission’s TCPA [Telephone Consumer and Protection Act] Orders also acknowledge that there is a certain set of expectations that exist within a business relationship that simply are absent outside of it. Privacy “concerns” are generally absent in the context of an existing business relationship. TCPA Order, 7 FCC Rcd. 8752, 8770 ¶ 34 (1992); TCPA NPRM, 7 FCC Rcd. 2736, 2738 ¶ 14 (1992).

¹³ For example, when AT&T engaged in its CPNI debates it repeatedly took the position that “customers would not reasonably expect that access to CPNI would be limited within the company, but would expect that their proprietary information would not be disclosed to third parties without permission.” AT&T CPE Relief Recon. Order, citing AT&T’s Comments, 104 FCC 2d 739, 765-66 ¶ 49 (1986). This observation has been confirmed by others. See, e.g., U S WEST Comments, CC Docket No. 90-623, filed Mar. 8, 1991 at 65-66 (citing to Cambridge Report, sponsored by Bellcore, where 94% of the respondents said that their permission should be secured before their name and address was provided to an outside entity); U S WEST Comments, CC Docket Nos. 90-623 and 92-256, filed Apr. 11, 1994 at 20-21 (describing its 1989 and 1993 Focus Groups and the differing expectations of nonpublished and nonlisted customers with respect to internal use of customer information and external third-party release); Cincinnati Bell Comments, CC Docket No. 96-115, filed June 11, 1996, at 9 and Appendix A; and see Ex Parte letter to William F. Caton, FCC, from Gina Harrison, Pacific Telesis, dated Dec. 11, 1996 at Attachment A, at 8 Question 8 (Public Attitudes Toward Local Telephone Company Use Of CPNI, Report of a National Opinion Survey, Conducted November 14-17, 1996 by Opinion Research Corporation and Prof. Alan F. Westin) (“Pacific Telesis Survey”).

Carriers communicating with customers with whom they have an existing business relations should be permitted to describe potential beneficial uses of the CPNI across the carrier enterprise itself, as well as across companies who share an affiliation with the carrier. Use of that CPNI will, over time, form the foundation for the product packages and the one-stop shopping that the 1996 Act seeks to promote and which clearly advance both the public interest and competition itself.¹⁶

With respect carriers who have no existing relationship with an individual, customer approvals to access and use CPNI might be secured through various means, including written approvals or oral

¹⁴ For example, U S WEST is not requiring that carriers have affirmative written consent before advising U S WEST that they should have access to CPNI in order to accomplish a change in local carrier. Like with the presubscription process, and primary interexchange carrier ("PIC") changes, U S WEST is relying on the carrier's representation of authority. That authority might well have been provided orally.

¹⁵ The fact that Congress references a customer "written" designation in Section 222(c)(2), while it made no such reference to a "written" approval in Section 222(c)(1) (dealing with carriers' own use of their CPNI), strongly suggests that Section 222(c)(1) contains no Congressional mandate that carriers secure written approvals from their customers before they, or their affiliates, use CPNI within the corporate enterprise or in affiliated ventures or arrangements. The existence of the word "written" in the one provision and its absence in the other invokes the "rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." Field v. Mans, 116 S.Ct. 437, 442 (1995). See also Gozlon-Peretz v. U.S., 498 U.S. 395, 404 (1991); American Civil Liberties Union v. Reno, 929 F.Supp 824, 850 (E.D.Pa. 1996). Compare the Commission's statement of a similar, but converse, rule of statutory construction in the Non-Accounting Safeguards Order ¶ 86 (citing to MCI and relevant case law to the effect that an express Congressional exclusion in one portion of a statute and a failure to repeat the exclusion in another portion strongly suggests the exclusion was only meant to apply in the instance it was made express).

¹⁶ See, e.g., Non-Accounting Safeguards Order ¶ 18 (noting that a Section 272 company could provide integrated offerings, similar to their competitors, and that such was consistent with the Act which meant to "give service providers the freedom to develop a wide array of service packages and allow consumers to select what best suits their needs"); ¶ 7 (noting that "Both the BOCs and other firms, most notably existing interexchange carriers, will be able to offer a widely recognized brand name that is associated with telecommunications services. As firms expand the scope of their existing operations to new product lines, they will increasingly offer consumers the ability to purchase local, intraLATA, and interLATA telecommunications services, as well as wireless, information, and other services, from a single provider (i.e., 'one stop shopping'), and other advantages of vertical integration."), n. 717 (citing to the Senate Commerce Committee observation that "the ability to bundle [a variety of telecommunications services] into a single package to create "one-stop-shopping" will be a significant competitive marketing tool.").

approvals. The only approval method that should not be permitted to businesses that have no existing customer relationship is an notice and opt out method.

While it is certainly appropriate for a BOC, or any other carrier, with an existing relationship with a customer to secure “approval” through an opt-out mechanism, on its own behalf as well as on behalf of its affiliates, the use of such mechanism as an approval method for a business that has no relationship to the customer is inappropriate. Opt-out communications are not traditionally used to grant authority where there is no relational context, *i.e.*, no underlying business relationship. Nor is it appropriate where the material being communicated is novel or unexpected by the recipient of the correspondence.

Since third parties will generally not have pre-existing customer relationships with the customers of the BOC, there is no foundation for an implied consent or implied authority for them to access or use the CPNI. Furthermore, because third parties have not had access to BOCs’ (or other carriers’) CPNI in the past, barring affirmative customer consent, such a change in circumstances and *status quo* compel the conclusion that a communication different from an opt-out approval would be necessary.

Finally, the nature of an opt-out process is that inertia or inaction is allowed to operate in such a way that commercial information continues to be used and commercial speech is not unnecessarily precluded. When there is an existing business relationship, this accordance of the “benefit of the doubt” is appropriate. Where there is no existing business relationship, the inaction associated with the process can result in unwanted communications from companies that are strangers to the consumer. As the Commission itself has recognized, such communications from strangers are often considered a nuisance and an invasion of consumers’ privacy.¹⁷ For these reasons, an “opt-out” communication from an entity with whom the customer has no relationship would be an abusive method of securing customer approval.

¹⁷ BNA [Billing Name and Address] Third Recon. Order, 11 FCC Rcd. 6835, 6849 ¶ 24 (1996).

Non-BOC service providers -- formidable providers at that, both with respect to product offerings, marketing savvy and access to substantial CPNI -- will undoubtedly seek approval models that are flexible and which enable them to utilize all of the CPNI in their possession (whatever it may be and from whatever affiliate it derives). They will combine their CPNI to create the best product mixes and packages they can in order to provide quality services to those customers that range across their varied affiliate enterprises.

If a BOC could not share its CPNI with its affiliates absent some kind of affirmative approval (i.e., the approval standard for non-affiliated, third party access/use), it would obviously be severely hamstrung in engaging in business,¹⁸ all because predictable customer inertia would result in affirmative approvals not being forthcoming. The deprivation of CPNI to the BOC affiliates¹⁹ would make educated product design and development,²⁰ as well as the rendering of quality customer service, an impossibility.

The customers of the BOC and its affiliates would be the ultimate market "victims" of an affirmative approval process being imposed within the context of their existing business relationships, as much as the

¹⁸ Compare the Commission's statement in the Phase I Order ("Marketing plays an important role, and represents a significant cost, in bringing new services to the public. We see no reason to handicap AT&T and the BOCs competitively in this regard, particularly when significant competitors in the markets . . . are not so limited."). Phase I Order, 104 FCC 2d 958, 1012 ¶ 99 (1986).

¹⁹ U S WEST here uses the word "deprivation" because any type of "affirmative approval" model for securing consents, particularly from mass market customers, would likely produce statistically few responses. The consequence would be that the BOC and/or the affiliate would -- for all practical purposes -- be cut off from the CPNI. See notes 6 supra, 26 infra; p. 28, infra.

²⁰ With respect to Section 272(g)(3) joint marketing, the Commission was somewhat reserved with respect to the activities it held fell within the phrase. See Non-Accounting Safeguards Order ¶ 296 (declining to find that product design and development were necessary components of such marketing). Whether the Commission was correct or not with respect to its observations in a Section 272(g)(3) context, it is certainly incorrect to hold that, as a general matter, product design and development are not related to marketing. Current products are often modified and refined based on information received from the market with respect to existing products. New products are often designed based on information about products and services customers are purchasing, and not purchasing. CPNI plays a significant role in the process from the product concept through the final sale and delivery. Thus, outside a "joint marketing" context, the importance of CPNI to BOC-affiliated companies engaging in product development and marketing for their own independent business purposes should not be underestimated.

overall corporate enterprise itself. This diminishment in quality service could well act as an arbitrary catalyst for customer shifts, skewing the state of the competitive marketplace.

From both a statutory and policy perspective, then, it is not reasonable to require absolute equality of CPNI access/use through the “approval” process. There is nothing in Sections 272 or 274 that require the “approval” process referenced in Section 222 for accessing and sharing CPNI to be identical. That process should be different depending on whether there is or is not an existing relationship. This difference is one educated by economic and market sense, relationships, judicial precedent,²¹ and First Amendment values associated with commercial speech.

II. ANSWERS TO QUESTIONS

I. *INTERPLAY BETWEEN SECTION 222 AND SECTION 272*

A. *Using, Disclosing, and Permitting Access to CPNI*

1. **[1a.]** *Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 ‘affiliate and any other entity in the provision or procurement of . . . services . . . and information . . .’ mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? [1b.] If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?*

1a, b. If Section 272(c)(1) applies to CPNI at all, the Section has no application to the use of CPNI with respect to approved joint marketing (per Section 272(g)(3)). Furthermore, the Section requires at most that a BOC who provides CPNI to a Section 272 affiliate, with appropriate customer approval, must provide the information to other entities authorized to receive it. The predicate authorization process, however, need not be the same for the BOC affiliate and the other entity.

There are two possible readings of Section 272(c)(1) with respect to CPNI, at least with respect to the term “information” and the obligation that it be provisioned on a nondiscriminatory basis as between the

BOC Section 272 affiliate and other parties. The first, and U S WEST believes the best, statutory interpretation is that Section 272(c)(1)'s reference to "information" has no application to CPNI, at all -- a particular type of information dealt with in detail in another statutory provision. This position is not only one supported by general principles of statutory construction,²² but is buttressed by the detail of Section 222 and the fact that that Section "address[es] both privacy and competitive concerns" with respect to all telecommunications carriers.²³

However, we are aware that the Commission has held otherwise.²⁴ If CPNI is included in the term "information" in Section 272(c)(1), then the nondiscrimination provisions have no application to the access and use of CPNI within the context of Section 272(g)(3) joint marketing.²⁵

²¹ Indeed, in reviewing the Commission's Order permitting CPNI sharing between AT&T and McCaw, the D.C. Circuit found such sharing permissible and stated it should lower prices and improve service offerings, both of which were in the public interest. SBC Communs. Inc. v. FCC, 56 F.3rd 1484, 1494-95 (1995).

²² "Where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision. . . . Similarly, with respect to a conflict arising between a statute dealing generally with a subject, and another dealing specifically with a certain phase of it, the specific legislation controls in a proper case." 73 Am Jur 2d, Statutes, Section 257. See also, United States v. Chase, 135 U.S. 255, 260 (1890) (reciting the above-mentioned rule in terms almost identical to the Am Jur quotation); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932); Fourco Glass Co. v. Transmirra Products Corp. et al., 353 U.S. 222, 228 (1957); Bulova Watch Co., Inc. v. United States, 365 U.S. 753, 758 n. 7 (1961). Compare HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) (stating the basic general rule within the context of two subsections of a single statutory provision).

²³ CPNI NPRM, CC Docket No. 96-115, 11 FCC Rcd. 12513, 12521 ¶ 15 (1996).

²⁴ Non-Accounting Safeguards Order, ¶ 222.

²⁵ Since 1985, the Commission has repeatedly articulated the nexus between access and use of CPNI and successful joint marketing, acknowledging that a "single point of contact" marketing approach by design and necessity requires joint access to CPNI. AT&T CPE Relief Order, 102 FCC 2d 655, 692-93 ¶ 64; AT&T CPE Relief Reconsideration Order, 104 FCC 2d 739, 766 ¶ 50 (1986). See also AT&T/McCaw Order, 9 FCC Rcd. 5836, 5885-86 ¶ 83 (1994); AT&T/McCaw Recon. Order, 10 FCC Rcd. 11786, 11790-91 ¶ 7 (1995). Furthermore, the Commission has found that a prior authorization requirement within the context of an existing business relationship could thwart both business efficiencies and economies as well as quality customer service by reducing access to the commercial information because of inertia. Computer II Remand Order, 6 FCC Rcd. 7571, 7610 n. 155 (1991).

CPNI access and use of the "information" would be permitted within the joint marketing context, provided the prescriptions of Section 222(c)(1) were complied with. Were the Commission to determine a broad reading of Section 222(c)(1)(A) and (B), such that a single telecommunications service was contemplated by the statutory language, then no separate customer "approval" would be necessary to access or use the information in a joint marketing context. Should the Commission remain of the position that local exchange and interexchange services are two different services (in two different "buckets"), then customer approval would be necessary to share the information between the BOC and the Section 272 affiliate.

As demonstrated in the Introduction, the appropriate approval mechanism to approve CPNI use by the BOCs and its affiliates (or other carriers and their affiliates, where there is an existing business relationship) could run the gamut from oral to written consent, but could lawfully include a customer notification with the opportunity to opt out. While this conclusion would be correct based on the general affiliation between two companies, it is even more compelling in light of the critical nexus between joint marketing and CPNI and Congress' express grant of authority to the BOC and its Section 272 affiliate to engage in joint marketing. In no event should an "affirmative approval" or "prior authorization" requirement be imposed.²⁶

Beyond the "exempted" activity in Section 272(g)(3), Section 272(c)(1) would require that a BOC not discriminate in its "provision" of CPNI as between its Section 272 affiliate (who might want to access

²⁶ A prior authorization requirement would eviscerate the joint marketing authority granted by Section 272(g)(3), as well as materially burden other integrated product and service offerings. See, e.g., BOC CPE Relief Order, 2 FCC Rcd. 143, 148 n. 86 (1987) (depriving carriers of access to CPNI would not "permit the [carriers] to engage in the type of integrated activities, including joint planning and responses to customer needs, that many customers apparently desire and that [carriers] could . . . [otherwise] efficiently provide." 1994 Public Notice, 9 FCC Rcd. 1685 (1994) ("the Commission concluded that a prior authorization rule would as a practical matter deny to all but the largest business customers the one-stop-shopping benefits of integrated marketing of basic and enhanced services by BOCs."); Computer II Remand Order, 6 FCC

and/or use the CPNI for purposes beyond Section 272(g)(3) joint marketing activities) and other entities. If the BOC is willing to provision the CPNI to all entities who are duly authorized to receive it, Section 272(c)(1) is not violated if the "authorization" process predicate to the provisioning is not identical. The differences in the approval process are not differences in the "provisioning" of the CPNI, since in all instances a BOC would be willing to provide the CPNI -- to either its Section 272 affiliate or other entities.

Section 272(c)(1) and Section 222 can be reconciled by construing Section 222 as controlling with respect to the "approval" process for the provisioning of the CPNI.²⁷ The approval process must reflect customer privacy expectations which will vary between businesses (and affiliates) with whom the customer has an existing business relationship and those without such a relationship.²⁸ Particularly since a notice and opt-out approval process should be permitted with respect to Section 272(g)(3) joint marketing activity, the BOC should be able to use the same "approval process" for more general CPNI sharing with the Section 272 affiliate (i.e., for uses that would support products offerings beyond those contemplated by Section 272(g)), so as not to create significant market confusion. Finally, under this reconciling approach to the two statutory provisions, the approval process itself would be nondiscriminatory: i.e., all telecommunications carriers and their affiliates would be permitted to access and use CPNI supported by a

Rcd. 7571, 7610 n. 155 (1991) ("Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction").

²⁷ This reconciliation actually results in an interpretation entirely supported by Section 222(c), where a customer's approval to use CPNI could be implied either from the existing business relationship or from a notice and opt-out communication; whereas something more affirmative would be required to share the information with third parties.

²⁸ From a privacy perspective, Section 222 basically resolves the "privacy/competitive balance" issue similarly to the way in which the Commission has repeatedly resolved it: Pursuant to Section 222(c)(1), telecommunications carriers can access/use CPNI internally to provide telecommunications and ancillary services to customers and consent is assumed or implied. Pursuant to Section 222(c)(2), information should be made available to third parties in those instances where a customer requests that such be done. In almost all of its particulars, Section 222 is a codification of the Commission's existing CPNI rules. 47 USC § 222(c)(1), (2).

number of various approval mechanisms, including a notice and opt out model;²⁹ non-affiliated entities would be required to show something affirmative to support customer approval to access/use BOC CPNI and a BOC would have to show similar facts to access/use the CPNI of a competitor.

The actual provisioning of CPNI, to either a BOC Section 272 affiliate or a non-affiliated company, might constitute a "service," comparable to the licensing of listings.³⁰ Thus, to the extent that a BOC were willing to license the CPNI to any or all authorized entities, the requirements of Section 272(c)(1) would be satisfied.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's 'affirmative written request' under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

Section 222(c)(2) creates a mandatory obligation for telecommunications carriers receiving written customer requests to release CPNI to third parties. In this respect, the Section amounts to a type of industry-wide codification of the FCC's existing CPNI requirements, i.e., that BOCs provide CPNI to third parties upon the receipt of a demonstrable customer request.

²⁹ This interpretation would also be consistent with the statutory construction principle that statutes are generally subject to a strict construction where they interfere with private property rights or are in derogation of rights of individual ownership. See 73 Am Jur 2d, Statutes, Sections 285, 287. The "affiliate/opt-out" approach would operate to the benefit of all telecommunications carriers and their affiliates; while the "non-affiliate/affirmative approval" approach would operate with respect to all those without such a relationship. In this regard, the "property rights" of all telecommunications carriers would be equally protected with the least burden.

³⁰ As discussed more fully below in response to Questions 6 and 10 and in note 42, a BOC does not engage in a "service" when it exercises its commercial free speech rights to communicate with its customers about its collection, use and distribution of CPNI (including potential sharing across a broad range of affiliate activities -- of which Section 272 activities would be but one).

The Section is not a prescription as to the only circumstances under which CPNI can be provided to third parties.³¹ However, its "written designation" reference does comport with general notions of customer privacy and customer choice with respect to the release of information to third parties.

In no event does Section 222(c)(2) or Section 272(c)(1) require a BOC Section 272 affiliate to be treated as a "third party," when in fact and in law it is not. The discussion in the Introduction demonstrates that general customer approval to access and use CPNI should be different depending on the relationship of the party seeking the approval.

Other data suggests that the approval can support both BOC and non-BOC uses and can well incorporate affiliate uses. For example, survey data from our customers demonstrates that they want to be able to purchase packages of services from U S WEST, which include cable services³² -- services that may be provided by U S WEST's communications carrier operations or cable affiliates. Pacific Telesis' recent survey contributions suggest that the same is true of wireless and long distance services.³³ In no event should a BOC affiliate be treated as a "third party."

3. [3a.] If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's 'affirmative written request' under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? [3b.] Must the answer to this question be the same as the answer to question 2?

3a. As stated above, U S WEST does not read Section 222(c)(2) as imposing an absolute affirmative written request requirement before CPNI can be shared with third parties. However, even if the

³¹ Section 222(d), for example, outlines specific instances in which CPNI can be provided to third parties regardless of customer approval (e.g., to initiate, render, bill and collect; to protect the rights or property of a carrier; to protect users of those services or others from fraud, abuse or unlawful acts).

³² See U S WEST's Opening Comments, filed herein June 11, 1996 at 6-7.

³³ Pacific Telesis Survey, Attachment A, at 7-8 Question 7.

Section were construed in this manner, there would be no obligation or reason to treat a carrier with an existing customer relationship or its affiliates as "third parties" to the customer. They are not.

3b. With respect to the general concepts of affiliate relationships versus third party relationships, the answer is the same as 2 and as discussed at greater length in the Introduction.

B. Customer Approval

4. **[4a.]** *If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate?³⁴* **[4b.]** *If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?*

4a. The standard for customer approval should be the same for all carriers with an existing business relationship with the customer (including their affiliates); a different standard for those with no such relationship should be expected and required. BOCs and companies with whom they have an affiliation should have the same standard for customer approval as other businesses with existing CPNI and existing business relationships. With respect to customers with whom no business relationship exists, BOCs and other carriers should expect to have to secure some type of affirmative customer approval.

All telecommunications carriers should have a range of options with respect to securing customer approval for access to and use of CPNI. With one exception (that being the use of a notice and opt-out communication), U S WEST believes that non-affiliated entities should be free to seek customer approval for CPNI access in any manner that is lawful, consistent with customer privacy expectations and which

³⁴ In this and other similar questions, the Bureau poses the Question as if Section 222(c)(1) generally or always requires customer approval before a BOC can use CPNI. See also Questions 4, 5, 20, 23. This is, of course, incorrect. A BOC, like other telecommunications carriers, is free to use CPNI without customer approval with respect to authorized Section 222(c)(1)(A) and (B) purposes. Those Sections can be read very broadly to allow for extensive CPNI use across a wide variety of products and services and varied affiliates. Even if the Commission determines that a "narrow" reading of these statutory sections is

does not place undue burdens on the carriers in possession of the CPNI. We would, however, expect to be indemnified against false information or consents.³⁵

4b. If a BOC allows disclosure to its Section 272 affiliate based on "oral" customer consents, it is not unreasonable for a BOC to allow disclosure to an unaffiliated entity based either on a customer's oral approval or an entity's oral representation that they have approval (through either an oral or written process). However, absent a business decision to the contrary, a BOC should not be compelled to process on-line third-party "oral approvals." Nor should it be required to accept such approval representations in the absence of indemnifications.

So long as no telecommunications carrier acts unlawfully in establishing those "approvals" it will accept, the Commission should not become unduly involved in this matter. Should a carrier inappropriately refuse to accept the "approval" process of another carrier, the Commission is sufficiently equipped to deal with the matter through its complaint authority, under Section 208.

5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

As U S WEST indicated above, we do not believe that in all instances affirmative written consent is required before CPNI can be released to a third party. However, that does not mean that the "same

appropriate, customer "approval" still will only be necessary for CPNI uses beyond those already authorized.

³⁵ Like the Commission, we have had our share of "slamming" complaints in the context of LOAs and do not relish being further caught in the middle of carrier representations that end users claim are false. For this reason, some carriers might require a representation that written customer approval to access and use the BOC CPNI has been secured. This would not be an unreasonable requirement. And, it would be in synchrony with the Section 222(c)(2) obligation for the BOC to release CPNI in accordance with a customer's written designation.

standard for customer approval" must be used as between carriers with an existing business relationship with customers (including their affiliates) and those without. They should not.

Furthermore, as made clear above, a carrier's affiliates are not appropriately characterized or treated as "third parties" to customers where some portion of the corporate enterprise has an existing business relationship.

6. [6a.] *Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? [6b.]* *If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities? [6c.]* *If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?*

6a, b. The very fact that the Bureau puts the phrase "approval solicitation service" in quotations suggests how far afield of traditional language and logic the assumption in this question goes.

A BOC's communication to its customers about the use of its commercial property is not a "service" being performed for any of its companies or affiliates. Rather, for the BOC, it is a legally-compelled predicate action to be able to broadly use its commercial information across product offerings and services (which may be found to be discrete) and across various affiliates that may be providing service offerings that might benefit from the use of the information. In this regard, it is an exercise in First Amendment protected commercial speech being undertaken to assure continued access to commercial property. It is also a necessary communication to determine whether or not the BOC's customers "approve" of the uses communicated in the correspondence, not just with reference to the BOC but across the general corporate family.

Without the requisite customer approval, the BOC may not provide the information to various integrated operations of its business or to companies with whom it has an affiliation. There is nothing in

law or logic that suggests that when a company speaks to its customers, even on behalf of one of its affiliates -- and, in particular, an affiliate regarding which it has express Congressional authority to jointly act (i.e., joint marketing) -- that the company is engaged in a "service."

A BOC should not have to solicit "third party" consents of any kind. At most, under the theory of "legal notice,"³⁶ the Commission might require a BOC to disclose the general competitive nature of the current environment and the fact that customers have (or will soon have) competitive choices; and perhaps the fact that customers can authorize third parties to access or receive CPNI. Beyond that, however, a BOC's communication with its subscribers should be off limits to regulatory prescriptions.

Mandating that a business that speaks with its customers affirmatively solicit customer approvals for CPNI distribution on behalf of its competitors goes beyond appropriate First Amendment and antitrust jurisprudence. First Amendment principles assure businesses the right to speak. When a business speaks to its own customers, either on its own behalf or those of its larger corporate enterprise (even a competitive enterprise), it should not have to carry a message that it disagrees with or opposes.³⁷ Furthermore, sound antitrust principles do not require a contrary conclusion.³⁸

Competitive speech should be conducted pursuant to traditional channels -- such as advertising, outbound direct mail and telemarketing, etc. Indeed, the very success of LOAs in the IXC field demonstrate that competitors are quite capable of speaking, and having their speech heard, without requiring one competitor to speak against its commercial interests and in favor of another.

³⁶ See BNA Third Recon. Order, 11 FCC Rcd. 6840-41 ¶ 9; BNA Second Recon. Order, 8 FCC Rcd. 8798, 8811 ¶ 77 (1993). Compare 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1505 n.7, 1506 (cited with approval by the Commission in its Non-Accounting Safeguards Order, nn. 725, 729).

³⁷ Pacific Gas & Elec. V. P.U.C. of California, 106 S.Ct. 903 (1986).

³⁸ See, e.g., Catlin v. Washington Energy Co., 791 F.2d 1343, 1345-46, 1348-49 (9th Cir. 1986) (gas company's use of its mailing list to advertise vent dampers in its gas billings was not unlawful, but rather an advantage available to the utility as an integrated business).