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March 17, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William Caton
Office of the Secretary
1919 M Street, N.W.
Room 232
Washington, D.C. 20554

Re: CC Docket No. 96-115 - Telecommunications Carriers' Use of CPNI and Other Customer information

Dear Mr. Caton:

Please find enclosed the original and four paper copies of Comments filed by AirTouch Communications, Inc. in the above referenced proceeding. Along with these copies, two paper copies and a copy on disk have been sent to Janice M. Myles and one paper copy and a copy on disk have been sent to I.T.S. If you have any questions please feel free to contact me.

Sincerely,

Kathleen Q. Abernathy

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MAR 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the Federal Communications Commission
Washington, D.C. 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 AirTouch Communications, Inc.

INTRODUCTION

AirTouch Communications, Inc. ("AirTouch")[1] herein comments on certain additional questions raised by the Common Carrier Bureau in a recent Public Notice,[2] released in conjunction with the Notice of Proposed Rulemaking in the above-captioned proceeding.[3]

In its initial Comments on the Notice, AirTouch noted that because of their traditional monopoly franchise and extensive service areas, BOCs possess very

[1] AirTouch is one of the largest providers of cellular and paging services in the United States, and has interests in PCS, satellite, and international wireless service providers.

[2] Public Notice, CC Docket 96-115, DA 97-385 (released February 20, 1997).

[3] Notice of Proposed Rulemaking, CC Docket 96-115, 11 FCC Rcd 12513 (released May 17, 1996)("Notice").

competitively sensitive information that is relevant to the provision of both interexchange and CMRS services. Accordingly, when BOCs use such monopoly-derived information in the marketing and provision of CMRS, interexchange, or other services, there must be demonstrably effective mechanisms for obtaining informed customer approval and ensuring that competitors have equal access to such unique information. See, e.g., Comments of AirTouch, June 11, 1996, at 4-7.

The Public Notice now raises several additional questions, primarily concerning the relationship between the CPNI rules and BOC separate affiliate and electronic publishing rules. As a general matter, AirTouch believes that these questions should be answered so as to further the express intent of the 1996 Act to provide for a pro-competitive national policy framework and to open all telecommunications markets to competition.[4] As AirTouch explained in its Comments, for the time being this will require careful regulation of BOC use of CPNI. AirTouch provides specific responses to certain additional questions in the sections below.

1) 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? 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?

[4] See, e.g., Telecommunications Act of 1996, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).

Addressing this question based on the structure and text of the statute, the Commission must conclude that the "non-discrimination principle" in Section 272(c)(1) means that a BOC may not permit its affiliates to access CPNI under terms and conditions that are more favorable than those available to other parties. Such an approach would be consistent with the Commission's recognition that, in certain cases, the standard used in Section 272 is not one which prohibits merely "unjust or unreasonable discrimination," but rather prohibits any discrimination at all. Cf. Interconnection Order, 11 FCC Rcd 15499, 15612 (1996), para. 217. Additionally, there is no basis to exclude proprietary customer information from the term "information" in Section 272(c)(1).

Consequently, a BOC may not provide its affiliates with access to customer-specific CPNI and yet not provide access to third parties on the same terms and conditions.[5] This approach best fits the conclusions reached by the Commission in the Non-Accounting Safeguards Order.[6] In fact, where a customer directs a BOC to provide a third party with CPNI, the statute requires such disclosure. 47 U.S.C. § 222(c)(2). This approach recognizes that CPNI is, by

[5] This is also consistent with the Act's treatment of aggregate CPNI, which can be used to market other services as long as it is also provided to other carriers on reasonable and nondiscriminatory terms. 47 U.S.C. § 222(c)(3).

[6] First Report and Order, CC Docket No. 96-149, FCC 96-489 (released December 24, 1996)("Non-Accounting Safeguards Order"). In that Order, the Commission determined that a BOC must treat all other entities in the same manner as its section 272 affiliate. Non-Accounting Safeguards Order, para. 202.

definition, proprietary to the customer, not to the BOC or other carrier. Consequently, where customer approval is obtained through appropriate means, third parties must be granted access to CPNI.

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?

3. Must all carriers, including interexchange carriers and independent LECs, treat their affiliates and other intra-company operating units as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer the same as the answer to question 2?

This question can be resolved by simple logic. If the only permissible way a carrier may disclose a customer's CPNI to a third party is via an "affirmative written request," and a BOC may not discriminate between its section 272 affiliate and other third parties, then a BOC may only provide its section 272 affiliate with a customer's CPNI pursuant to an "affirmative written request." However, other carriers and their affiliates, who are not "Bell Operating Companies," are clearly not subject to Section 272. Consequently, the answer to question 3 need not be identical to question 2. Other carriers, not subject to Section 272, are free to deal with their affiliates on terms not governed by Section 272.

Of course, even where Section 272 does not apply, Section 222 continues in force. In particular, AirTouch notes that BOCs are not required by Section 272 to form a separate affiliate to provide CMRS services, but are subject to other safeguards. The Commission recently undertook to reexamine these regulations and create sensibile safeguards to ensure consistency between BOC cellular service and BOC PCS provision, while also ensuring that anticompetitive abuses of BOC local essential facilities do not occur.[7] These safeguards should reflect that Section 222 is not inconsistent with other rules requiring prior customer approval before a BOC may use local calling CPNI to market CMRS services, and include a non-discrimination approach similar to that in Section 272 (c) (1). See CMRS Safeguards Notice, para. 71.

7. If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

The plain language of the statute does not suggest that section 272(g)(3) "exempts" the joint marketing activities described elsewhere in section 272 from

[7]In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Services, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, WT Docket No. 96-162, FCC 96-319 (August 13, 1996)("CMRS Safeguards Notice").

the non-discrimination obligations of section 272(c)(1). Rather, Section 272(g)(3) only provides that a BOC may engage in joint marketing with respect to its own services and that of an affiliate and that such activity "shall not be considered" to conflict with its other obligations.

To the extent that there is a conflict, such activity would be prohibited by Section 222, and outside the scope of what was authorized by sections 272(g)(1) and 272(g)(2). For example, section 272(g) authorizes "marketing," generally understood to mean the advertising of services, the research associated with developing those advertisements, and sales efforts -- none of which inherently requires unrestricted access to local calling CPNI. Congress expected that such "marketing" would be accomplished consistent with the CPNI restrictions in Section 222, and with the non-discrimination obligations of Section 272(c)(1). This reading of the statute is consistent with the Conference Report,[8] and with the other provisions of Section 272, specifically Section 272(e)[9].

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[8] The Conference Report provides that section 272(g)(3) provides that the authorized joint marketing "does not violate" the non-discrimination safeguards. It does not discuss any "exemption" from the non-discrimination safeguards. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 152 (1996), or authorize any discrimination in the provision of CPNI under the context of "joint marketing."

[9] Section 272(e)(2) provides that a BOC (and any affiliate subject to Section 251(c)) shall not provide any ...information concerning its provision of exchange access to the affiliate described in subsection (a) unless such ... information [is] made available to other providers of interLATA services in that market on the same terms and conditions. It would be impossible for a BOC to comply with Section 272(e) were it to discriminate via joint marketing arrangements in its provision of CPNI information. This is further evidence that Section 272(g)(3), which does not address Section 272(e), was not intended as an "exemption" from the non-discrimination safeguards.

The specific obligations of a BOC engaged in joint marketing with its affiliate should be the same as those ordinarily imposed -- a prior written authorization. By requiring prior written authorization, those carriers that have obtained sensitive, valuable local calling CPNI merely becase their customers had no choice but to use those carriers' services will not be able to unfairly leverage that advantage into competitive markets.[10] As competitive and regulatory pressures on BOC local and access services revenues build, the incentives to utilize this advantage will only grow stronger. Consequently, the Commission should explicitly reaffirm that a BOC engaging in joint marketing pursuant to sections 272(g)(1) and (g)(2) should be required to obtain affirmative customer approval before local calling CPNI is disclosed to a BOC affiliate.[11]

[10] Of course, it would be appropriate for the Commission to revisit whether prior written authorization is necessary at such time as wireline local services become subject to real competition.

[11] Section 222 and the Commission's relevant rules should also govern BOC use of local calling CPNI when a BOC is joint marketing landline services and CMRS pursuant to Section 601(d) of the 1996 Telecommunications Act.

CONCLUSION

The Commission should adopt rules which recognize that BOCs and their affiliates may engage in joint marketing, and provide competitive services, while also honoring both the non-discrimination safeguards of Section 272(c), and the customer information protection rules of Section 222.

Respectfully submitted,

By: _____

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