

Gina Harrison
Director
Federal Regulatory Relations

1275 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004
(202) 383-6423

EX PARTE OR LATE FILED

PACIFIC TELESIS
Group-Washington

March 20, 1997

DOCKET FILED 03/20/97

RECEIVED

MAR 20 1997

Federal Communications Commission
Office of Secretary

EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

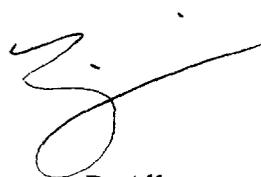
Dear Mr. Caton:

Re: WT Docket No. 96-162, CMRS Safeguards; CC Docket No. 96-115, CPNI; CC
Docket No. 94-54, CMRS Interconnection and Resale

Yesterday, Betsy Granger, Senior Counsel, Pacific Telesis Legal Group and I met with Roz Allen, Deputy Chief and Karen Gulick, Assistant Chief, Wireless Telecommunications Bureau, David Furth, Chief, Jane Halprin, Legal Advisor, Mika Savir, Commercial Wireless Division, to discuss issues summarized in Attachment A. In addition, we are furnishing the above-listed staff with a copy of a previous filing, Attachment B herein. We are submitting two copies of this notice and attached materials, 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 yours,



cc: R. Allen
D. Furth
K. Gulick
J. Halprin
M. Savir

No. of Copies rec'd
List ABCDE

021

Competitive Safeguards for the LEC Provision of PCS

WT Docket No. 96-162

CC Docket No. 96-115

CC Docket No. 94-54

Presentation by Pacific Bell Mobile Services

March 19, 1997

Structural Separation Should Not Be Extended to BOC Provision of PCS

- “We continue to believe that it serves the public interest to permit the LECs, including the BOCs, flexibility in the provision of PCS through nonstructural safeguards as part of our efforts to introduce greater competition to the CMRS market.” NPRM, August 13, 1996.
- There are no changed circumstances that support a change in this conclusion.
- The Commission's proposal should be the upper limit of regulation.

The Accounting Rules Provide Adequate Protection Against Cross-Subsidy

- The Commission should make it clear that PCS is a nonregulated service for federal accounting purposes.
- There is no need to make any changes in the accounting rules in Part 64 and 32, if there is a separate corporate affiliate that provides PCS because under the existing rules all PCS costs are off the LEC's books, and all transactions between the LEC and the separate affiliate are governed by the affiliate transaction rules.

There Is No Evidence of Discriminatory Interconnection Practices

- The record contains no evidence that LECs have favored their wireless affiliates with respect to interconnection.
- GTE has provided integrated LEC and wireless services for a decade and has no claims filed against it.
- Interconnection obligations, network disclosure obligations and CPNI obligations are now set forth in the Communications Act.
- The filing of a compliance plan with respect to accounting, interconnection, network disclosure and CPNI is an unnecessary regulatory burden.

The Wireless Package of Service, Features and CPE Is Familiar to Consumers

- Wireless services come with features such as voice mail, but there has never been a category of “enhanced” wireless services from a regulatory perspective, and there is no justification for creating one now. Likewise, there is no justification for treating wireless long distance as a distinct telecommunications service for the purposes of Section 222. The handset is also an integral part of the wireless package.
- It would be counterproductive to impose CPNI rules that create distinctions in wireless services that have never existed.

The CPNI Provisions Do Not Require Any Subdivision Within Wireless Service

- Neither privacy nor competitive issues arise from treating wireless service as a whole. All wireless competitors benefit equally.
- Treating the wireless family of services and products as a whole does not change the relationship with services in the other “buckets.” Consent would still be required to obtain CPNI from the local and long distance buckets.
- The Commission should officially recognize that the enhanced/information services distinction has no relevance in the wireless context.

Conclusion

- The pro-competitive, deregulatory goals of recent legislation are best served by not imposing full structural separation on LEC provision of PCS and by not dividing the traditional wireless package into different components for CPNI purposes.
- The Commission should clarify that there is no need for PBMS to amend its safeguards plan.
- Consistent with the sunset provisions of the Telecommunications Act of 1996, the Commission should include a sunset provision for its proposed separate affiliate requirement.

Gina Harrison
Director
Federal Regulatory Relations

1275 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004
(202) 383-6423

PACIFIC  **TELESIS**
Group-Washington

January 10, 1997

EX PARTE

FILE COPY

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: CPNI, CC Docket No. 96-115

Please include the enclosed memo on "Use of CPNI Obtained from Provision of CMRS to Market Enhanced Services and CPE" by Wiley, Rein & Fielding in 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 yours,



cc: D. Atwood
K. Brinkmann
B. Kehoe
G. Teicher

Attachment

January 10, 1996

Use of CPNI Obtained from Provision of CMRS To Market Enhanced Services and CPE

by
Wiley, Rein & Fielding

This memorandum addresses the question whether CMRS providers may utilize customer proprietary network information ("CPNI") for marketing "enhanced services" and customer premises equipment ("CPE").¹ Based upon our analysis of prior Commission rulings and the Telecommunications Act of 1996, we conclude that CMRS providers may permissibly use CPNI for marketing both "enhanced services" (if this term is relevant for CMRS at all) and customer premises equipment ("CPE"):

- *First*, CMRS providers were permitted to use CPNI for their own marketing purposes prior to passage of the Telecommunications Act of 1996. In other words, *Computer III*'s limitations on CPNI use do not apply to CPNI obtained in the provision of CMRS. Those restrictions applied only to CPNI obtained by AT&T and certain local exchange carriers (the BOCs, and in part, GTE) in provision of local exchange telephone service. The *Computer III* CPNI restrictions are not, and never have been, applicable to CMRS providers' use of CPNI obtained in the provision of CMRS.
- *Second*, the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93") also makes absolutely clear that CMRS licensees may use CPNI obtained from provision of CMRS in marketing "enhanced services," because OBRA '93 eliminated any lingering distinction between "basic" CMRS and "enhanced" services. In the absence of any such separate category for CMRS, CMRS providers could not be prohibited from using CPNI obtained from CMRS for marketing "enhanced services."
- *Third*, the 1996 Act permits CMRS licensees to use CPNI obtained from providing CMRS for marketing "enhanced services" (to the extent that such a category is relevant to CMRS at all) and CPE. Although Section 222 of the Act

¹ This memorandum is limited to an analysis of the use of CPNI obtained from the provision of CMRS; it does not address the use of CPNI obtained from non-CMRS offerings.

imposes some restrictions on CPNI use, it permits CMRS providers to continue using CPNI for marketing “enhanced services” and CPE. Section 222(c)(1) authorizes unrestricted use of CPNI in provision of “(A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service.” Because “enhanced services” and CPE plainly meet these criteria in the context of mobile services, they fall within the scope of 222(c)(1).² Accordingly, Section 222(c)(1) explicitly permits unrestricted use of CPNI obtained by CMRS licensees through provision of CMRS for marketing “enhanced services” and CPE.

Each of these rationales is discussed in further detail below.

I. Prior to the 1996 Act, CMRS Providers Were Permitted to Use CPNI to Market Enhanced Services and CPE

Prior to passage of the 1996 Act, CMRS providers were permitted to use their CPNI for marketing “enhanced services” and CPE. CMRS providers were not covered by “*Computer III*’s CPNI restrictions, which prohibited BOCs and GTE from using CPNI obtained as providers of local exchange telephone services to market enhanced services and CPE. The authority of CMRS providers to use CPNI for marketing “enhanced services” is particularly clear in light of the definition of mobile service in the Omnibus Budget Reconciliation Act of 1993 (“OBRA ‘93”), which makes no distinction between “enhanced services” and the underlying mobile service itself.

A. Under Computer III, CMRS Providers Were Permitted to Use CPNI for Marketing “Enhanced Services” and CPE

In *Computer III*, the Commission imposed certain restrictions on certain wireline carrier use of CPNI obtained in the provision of local exchange services, and in doing so,

² It should be noted that enhanced services and CPE could also meet the section 222(c)(1) criteria for non-CMRS.

carefully set forth the scope of applicable restrictions. These limitations on CPNI use did not apply to CPNI obtained by CMRS licensees as providers of CMRS services. Indeed, the purpose of the CPNI restrictions, as set forth by the Commission in *Computer III*, is entirely irrelevant in the context of CMRS.

Prior to *Computer III*, local exchange carriers (LECs) were not subject to restrictions on use of their CPNI to market other services. Instead, the Commission relied upon even more stringent "structural separation" rules to ensure that LECs could not use information, resources, or capital acquired through providing regulated services to aid or subsidize their participation in competitive telecommunications markets. Under structural separation, LECs who wanted to provide mobile services, enhanced services, or CPE could do so only through a separate corporate subsidiary with its own books, officers, operating personnel, and computing and switching facilities.³

³ See *Amendment of Section 64,702 of the Commission's Rules and Regulations (Computer II)*, 77 F.C.C. 2d 384, *modified on recon.*, 84 F.C.C. 2d 50 (1980), *modified on further recon.*, 88 F.C.C. 2d 512 (1981), *modified on further recon.*, 56 Rad. Reg. 2d (P&F) 301 (1984), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C. 2d 1117 (1983); *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C. 2d 469 (1981) [hereinafter "*Cellular Communications*"], *recon.*, 89 F.C.C. 2d 58 (1982), *further recon.*, 90 F.C.C. 2d 571 (1982); see also 47 C.F.R. § 22.903 (BOC cellular structural separation requirements).

In pending proceedings to implement provisions regarding LEC provision of CMRS, the Commission has sought comment on whether to retain current structural separation requirements imposed on BOC cellular providers, or to develop less restrictive regulations which may entail some requirements regarding corporate structure, as well as non-structural safeguards designed to promote interconnection and prevent price discrimination and cross-subsidization. The Commission is also considering whether to establish uniform non-structural safeguards which would be applicable to all Tier I LECs providing PCS. *Amendment of the Commission's Rules to Establish Competitive Service*

These orders in no way restrict a separate subsidiary's use of its CMRS CPNI for marketing enhanced services or CPE. As to cellular subsidiaries, the Commission imposes no restrictions on use of CMRS CPNI for marketing enhanced services or CPE. Indeed, the thrust of the Commission's rulings on cellular communications is that these affiliates are intended to operate in a competitive environment.⁴

It is similarly clear that issuance of the *Computer III* regulations did not alter the ability of CMRS providers to use CPNI, since *Computer III's* CPNI restrictions do not apply to mobile services. The *Computer III* proceedings began in the mid-1980s, when AT&T and the BOCs petitioned for relief from structural separation requirements imposed on enhanced services and CPE -- but not from the separation rules for cellular providers. The Commission eventually repealed the structural separation requirements applicable to certain wireline carriers' with respect to both enhanced services and CPE, in two parallel proceedings. In the place of these structural protections, the Commission imposed several non-structural safeguards on AT&T, the BOCs and GTE regarding their participation in the enhanced services and CPE markets.⁵ Specifically, those carriers were required to (1)

Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, FCC 96-319 (Aug. 13, 1996).

⁴ See *Cellular Communications*, recon., further recon.

⁵ *Furnishing of Customer Premises Equipment and Enhanced Services by AT&T*, 102 F.C.C. 2d 655 (1985), recon., 104 F.C.C. 2d 739 (1986); *Furnishing of Customer Premises Equipment by the BOC's and ITC's*, 2 FCC Rcd 143 (1987), recon., 3 FCC Rcd 22 (1987); *Amendment of Section 64,702 of the Commission's Rules and Regulations (Computer III)*, Phase I, 104 F.C.C. 2d 958 (1986), recon., 2 FCC Rcd 3035 (1987), further recon., 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989), vacated sub nom. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987), recon., 3 FCC Rcd 1150 (1988), further recon., 4 FCC Rcd 5927 (1989), vacated sub nom. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

disclose in advance any new or modified network services that might affect CPE interconnection; (2) give competitors non-discriminatory access to their network; (3) file detailed accounting reports; and (4) comply with CPNI restrictions which required those wireline carriers to make CPNI available to competitors upon customer request and give customers an opportunity to prohibit the use of their CPNI for marketing enhanced services or CPE.⁶

The FCC proceedings deregulating provision of "enhanced services" do not extend *Computer III's* non-structural safeguards to CPNI obtained by carrier's mobile service affiliates.⁷ Nor do the Commission's proceedings deregulating CPE extend *Computer III's* non-structural restrictions to use of CPNI by mobile service affiliates for the purpose of marketing CPE.⁸ Indeed, the rationale for imposing these restrictions on AT&T, the BOCs, and GTE is utterly irrelevant in the mobile services context. CPNI use restrictions, like the other non-structural safeguards imposed on carriers' provision of CPE and enhanced services, were designed to *substitute* for the protections of structural separation. In addition to other reasons for treating wireless CPNI used by cellular entities differently than BOC and GTE CPNI, there was no possible need for imposing additional non-

⁶ On remand from the Ninth Circuit, the Commission retained these non-structural safeguards, including the CPNI restrictions. *In re Computer III Remand Proceedings*, 6 FCC Rcd 7571 (1991), *sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1427 (1995).

⁷ Phase I, 104 F.C.C. 2d 958 (1986), *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989); Phase II, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989).

⁸ *Furnishing of Customer Premises Equipment and Enhanced Services by AT&T*, 102 F.C.C. 2d 655 (1985), *recon.*, 104 F.C.C. 2d 739 (1986); *Furnishing of Customer Premises Equipment by the BOC's and ITC's*, 2 FCC Rcd 143 (1987), *recon.*, 3 FCC Rcd 22 (1987).

structural safeguards on cellular affiliates, since the Commission left intact the structural separation rules. Such restrictions would be inappropriate in the competitive environment of mobile services. Thus, *Computer III* did not affect the ability of CMRS providers to use their CPNI for marketing “enhanced services” and CPE.

B. In Light of OBRA ‘93, It Is Especially Clear that *Computer III*’s CPNI Restrictions Do Not Apply to Marketing of “Enhanced Services” by CMRS Providers

If there was any doubt that CMRS providers could use their CPNI for marketing purposes prior to the 1996 Act, the treatment of CMRS in OBRA ‘93 makes unmistakably clear that mobile service providers have the authority to use their CPNI in this manner.

OBRA ‘93, which includes several provisions relating to CMRS providers, defines commercial mobile service as:

any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.⁹

This definition does not differentiate between mobile service and an “enhanced service.” Accordingly, it collapses what previously might have been termed two distinct categories of services (commercial mobile service and “enhanced services”) into one service (commercial mobile service). Given this definition, it is meaningless to suggest that CMRS providers cannot use their CPNI to market “enhanced services,” since such a category no longer exists.

⁹ OBRA ‘93, § 601(d), Pub. L. No. 103-66, Title VI, § 6002(d), 107 Stat. 312, 395-96 (1993).

Moreover, OBRA '93's treatment of mobile services makes the framework of *Computer III* completely untenable in the context of mobile services. The *Computer III* distinction between wireline services and enhanced services was based on perceptions of different competitive conditions in those markets at the time *Computer III* was adopted but was never applied to mobile services. Absent this distinction, the *Computer III* restrictions cannot be applied to use of CMRS providers' CPNI for marketing enhanced services.

II. The 1996 Act Does Not Impose Any New CPNI Restrictions on CMRS Providers

The language of the Act authorizes CMRS providers to utilize their CPNI for marketing these services. While Section 222 of the 1996 Act imposes a general duty on telecommunications carriers to protect their customers' CPNI, *see* § 222(a), it also identifies several permissible unrestricted uses of CPNI. The unrestricted uses relevant to CMRS providers are set forth in Section 222(c)(1). This section allows a carrier to use CPNI without customer approval in providing:

- (A) the telecommunications service from which such information is derived,
or
- (B) services necessary to, or used in, the provision of such telecommunications service. . . .

Section 222(c)(1).

In the context of mobile services, "enhanced services" do not constitute separate "services." As OBRA '93's treatment of mobile services makes clear, "enhanced services" can only be characterized as part of the mobile service itself. CMRS providers thus have unrestricted use of their CPNI to market this service under Section 222(c)(1)(A). Since, as previously discussed, "enhanced service" is not separable from mobile service, it is

appropriately described as “the telecommunications service from which [the CPNI] is derived.” Thus, in the context of CMRS,¹⁰ “enhanced services” fall within the scope of Section 222(c)(1)(A), and are exempt from any CPNI restrictions. Section 222(c)(1) accordingly permits unrestricted use of CMRS providers’ CPNI for marketing “enhanced services.”

Even if “enhanced services” were somehow distinct from mobile service, Section 222(c)(1)(B) would exempt CMRS providers from any CPNI restrictions in marketing “enhanced services.” This provision allows unrestricted CPNI use for provision of services “necessary to, or used in, the provision of [CMRS].” In light of the treatment of CMRS in OBRA ‘93, “enhanced services” qualify, at a minimum, as services “necessary to, or used in, the provision of [mobile services],” and accordingly are not subject to any CPNI restrictions. Not only is this interpretation of Section 222(c)(1)(A) and 222(c)(1)(B) squarely in line with the statutory language, but the legislative history regarding Section 222 in no way contradicts this construction of the Act.

Nor are CMRS providers subject to CPNI restrictions in marketing CPE. CPE is appropriately characterized as a service “necessary to, or used in,” provision of mobile services. In the mobile service realm, not only is CPE “necessary to” delivery of mobile services, CPE has no function outside the context of providing mobile services. Moreover, as a practical matter, CPE is almost always sold as part of a package with the mobile service itself, not as a separate product. It is clear that wireless CPE is “necessary to, or used in” provision of CMRS. CMRS providers are thus permitted to use their CPNI for

¹⁰ Again, it should be noted that this analysis does not address non-CMRS offerings.

marketing CPE under Section 222(c)(1)(B) of the Act.¹¹ Again, the legislative history of Section 222, while not directly addressing this issue, does not suggest to the contrary.

This position is also consistent with the Commission's earlier rulings that permitted cellular carriers to "bundle" CPE and cellular services, subject only to the condition that the equipment and service be made available separately at nondiscriminatory rates.¹² At that time, bundling of local exchange services and CPE was explicitly prohibited. The Commission recognized the integral relationship between cellular CPE and mobile services. The Commission found that there were significant public interest benefits associated with bundling of cellular CPE and service, including "reduc[ing] barriers to new customers," "provid[ing] new customers with CPE and cellular service more economically," "achieving economies of scale and lowering the cost of providing service to each subscriber," and assisting the transition to digital networks.¹³

Furthermore, interpreting the 1996 Act as imposing new restrictions on CMRS CPNI would thwart the goals of the statute. The overarching purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework."¹⁴ The Act is intended to "accelerate rapidly private sector deployment of advanced telecommunications

¹¹ Of course, this interpretation of Section 222(c)(1)(B) does not in any way imply that CPE is subject to regulation under Title II of the Act. Nothing in Section 222 suggests that a service "necessary to, or used in, the provision of [a] telecommunications service" must itself be a "telecommunications service" within the scope of Title II. CPE qualifies as a service "necessary to, or used in, the provision of" a telecommunications service even though it does not fall within the Commission's regulatory powers under Title II of the Act.

¹² *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992).

¹³ *Id.* at 4030-31.

and information technologies and services to all Americans by opening all telecommunications markets to competition.”¹⁵ Mobile service is already far along this path. Imposing new restrictions on CMRS providers -- even though these providers have never been subject to such regulation in the past -- would fly in the face of the basic deregulatory aims of the Act. Thus, the 1996 Act does not impose any new prohibitions on use of CMRS CPNI.¹⁶ CMRS providers thus remain free to use their CPNI in marketing “enhanced services” and CPE.

III. CONCLUSION

Section 222(c)(1)(B) permits all CMRS providers to use their CPNI in marketing “enhanced services” and CPE. Prior to passage of the 1996 Act, CMRS providers were free to use CPNI for this purpose. Both the statutory language of the Act’s CPNI provisions and the Act’s legislative history establish that CMRS providers are able to use their CPNI for marketing both “enhanced services” and CPE.

¹⁴ Telecommunications Act of 1996, H.R. Conf. Rep. No. 104-458, 113.

¹⁵ *Id.*

¹⁶ The Commission is currently considering the extent to which § 601(d) of the Act, which permits BOCs to jointly market and sell CMRS together with landline services, affects existing CPNI regulations prohibiting BOCs from providing CPNI to cellular affiliates, *see* 47 C.F.R. § 22.903. In so doing, the Commission has sought comment on whether these existing restrictions are rendered superfluous by Section 222’s comprehensive scheme for regulating CPNI use. *LEC Provision of CMRS*, FCC 96-319, ¶¶ 69-73, 121. However, neither the existing regulations nor any new regulations addressing joint marketing provisions in the Act would affect the ability of a cellular subsidiary to use its *own* CPNI in marketing “enhanced services” or CPE.