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PACIFIC  **TELESIS**
Group-Washington

March 18, 1997

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Federal Communications Commission
Office of Secretary

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: *CC Docket No. 96-115 - Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*

On behalf of Pacific Telesis Group, we are re-filing this proceeding in order to include a diskette of our "Further Comments" which were filed yesterday.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,



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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Implementation of the Telecommunications
Act of 1996:

Telecommunications Carriers' Use of
Customer Proprietary Network Information
and Other Customer Information

CC Docket No. 96-115

FURTHER COMMENTS OF PACIFIC TELESIS GROUP

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Date: March 17, 1997

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SUMMARY

Any CPNI rules adopted by the Commission must remain true to the purpose and design of §222. We have proposed four principles that will help guide the development of the rules and the resolution of questions as they arise. Those principles are:

- Customers must be given the opportunity to determine whether CPNI related to their services may be used by existing carriers and their affiliates and disclosed to third parties.
- Section 222 was written by Congress to apply to all carriers equally, and any CPNI rules adopted by the Commission must also apply in the same way to all carriers.
- The legal standard for customer approval for internal use vs. external disclosure, need not, and should not, be the same.
- The nondiscrimination provisions of other sections of the Act cannot be used to override the right of customers to determine who may use and have access to CPNI related to the customers services, and cannot be used to impose crippling restrictions on only some carriers.

Based on these principles¹, the Commission should adopt rules that:

- permit a carrier with an existing relationship with a customer, and that carrier's affiliates, to use that customer's CPNI with any form of customer approval, including oral, written, and notice and opt-out;
- recognize that notice and opt-out is neither a practical nor a sufficient standard for customer approval for disclosure of or permission of access to CPNI for third parties;
- recognize that written customer approval provides the greatest protection for customers and other carriers;
- do not require disclosure of CPNI to any third party unless the customer has approved disclosure to that third party;
- recognize that the nondiscrimination requirements do not control who has access to CPNI, but only how that access is obtained.

¹ Based on the Commission's encouragement to the parties to further examine the questions raised in the Public Notice, we have developed these principles, which reflect a shift in some areas from our prior statements.

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March 17, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the Telecommunications
Act of 1996:

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Customer Proprietary Network Information
and Other Customer Information

CC Docket No. 96-115

FURTHER COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("Pacific") hereby submits further comments in the above-captioned proceeding, as requested in the Public Notice issued on February 20, 1997.

I. **INTRODUCTION**

Pacific urges the Commission to adopt rules interpreting §222 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), that do not over-complicate the relationship between §222 and other provisions of the Act, and that permit all telecommunications carriers to serve their customers as authorized by the Act. The rules should protect customer privacy while permitting carriers to use customer information as anticipated by

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Congress and customers. The rules should not be used as a way to restrict activities that Congress has expressly permitted.

The Commission should focus on the fundamental purpose of the CPNI provision - to protect customer privacy and give customers the ability to control the use and disclosure of their CPNI - and not allow that focus to be deflected by peripherally related provisions in other sections of the Act or by attempts by some to gain an advantage through inconsistent application of the CPNI rules. This means creating simple, straightforward CPNI rules that address that fundamental purpose, and that apply to all telecommunications carriers in the same way. Nor should the Commission be distracted by claims that competition requires different rules for different companies. It is not possible to create a set of competitive rules that will be practicable to implement, and, more importantly, such rules are not required by the Act. The rules that are necessary address customers' needs and expectations, and make it possible for all telecommunications carriers to interact with their customers on a reasonable basis.

In addressing the very detailed questions of this Public Notice, it became apparent that the process of responding to them would benefit from the identification of some key CPNI principles, determining which of them apply in each case or question, and how they apply. Following are the principles as we see them. We urge the Commission to consider them and strive to find the simplest path through the maze of CPNI issues, and create only those rules that are reasonable and necessary to protect customer privacy while making it as simple as possible for carriers to enter new markets.

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The first principle is that customers must be given the opportunity to determine whether their CPNI can be used by their existing service provider and its affiliates, and whether third parties may also obtain access to the customer's CPNI. That opportunity cannot be eliminated for BOC customers by operation of nondiscrimination requirements only indirectly related to CPNI.

The second principle must be that, since Section 222 was written by Congress so that it applies to all telecommunications carriers, the rules adopted by the FCC pursuant to §222 must remain consistent with that Congressional design. Where Congress intended special provisions to apply to the BOCs, it put specific language in the Act. It did not require any special CPNI provisions relating to the BOCs, and the Commission should not attempt to create them. Suggestions that competition requires a different set of rules for the BOCs are simply inconsistent with the Act and are based on outdated thinking. The fact is, BOCs do not have a monopoly on CPNI, and should not be disadvantaged in their ability to compete - in either intraLATA or, through their §272 affiliates, interLATA services. All telecommunications carriers have CPNI about their own customers. Each wants to use its CPNI to market its own and its affiliates' services to its customers, and each would like access to the CPNI of others for that same purpose. The same rules should apply to all in using their own CPNI and in gaining access to the CPNI of other carriers.

The situation today is not the same as it was when the Commission first implemented CPNI rules. At that time, the BOCs were seeking to compete with relatively small enhanced services and CPE providers that did not have access

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to information about telecommunications services customers. Those original CPNI restrictions were called competitive safeguards and were deemed appropriate at that time because of the differences between the BOCs and their competitors. The situation today is vastly different. Congress recognized that difference when it entitled §222 "Privacy of Customer Information". The BOCs will be and are competing with other telecommunications carriers, some of which are larger than the BOCs (*e.g.*, in California today AT&T has more customers than Pacific Bell), and all of which have their own CPNI. Furthermore, the CPNI of IECs may well be more valuable in a competitive sense than that of the BOCs. The BOCs' competitors will certainly seek approval from their customers to use information about existing services (*e.g.*, long distance) to market new services (*e.g.*, local and intraLATA toll). Yet these same companies argue that it is unfair for a BOC to do the same thing by seeking customer approval to use information about their existing services (*e.g.* local and intraLATA toll) to market new services (*e.g.*, long distance services of the BOC's §272 affiliate). The level playing field is to let all competitors compete in the same way, not to severely restrict only some competitors. This is consistent with the Commission's ruling in CC Docket No. 96-149 that once §271 authorization is received, a BOC may, under §272(g)(2), engage in the same type of marketing activities as other service providers.¹

¹ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking. 5 Com. Reg. (P&F), 696 (1996) ("Non-Accounting Safeguards Order"), ¶292.

The third principle is that the legal standards for approval and rules to implement them will be different for internal use vs. external disclosure. Different standards, when fairly and reasonably developed and implemented, do not translate into discrimination in favor of either party. There is no requirement that the standards be the same for internal use vs. external disclosure. Customers have an expectation that a company that has information about the customer, and the affiliates of that company, will use that information to market new or different services to the customer.¹

Consequently, any form of customer approval, including oral, written or notice and opt-out, would be consistent with customer expectations and appropriate to authorize a carrier and its affiliates to use CPNI. However, customers are also concerned generally about businesses' use of information, suggesting that they have an expectation that a company that has information about the customer will not disclose that information to third parties without affirmative approval of the customer.² Consequently, notice and opt-out approval would not be appropriate for disclosure of CPNI to third parties. Nor would it be practicable to implement or explain to customers. Written approval is most appropriate for disclosure of CPNI to third parties, since it protects both customers and other carriers from misrepresentations about whether customer approval has been obtained.

¹ Ex parte letter of Gina Harrison, Pacific Telesis Group, dated December 11, 1996, to William F. Caton, Acting Secretary, FCC, Attachment A, at pp. 4-5, 8-10.

² Id. at pp. 3-4.

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Furthermore, if the Commission finds that both oral and written approval are lawful forms of approval for use by third parties, the Commission must determine what discretion a carrier has in deciding what form of customer approval it will accept from third parties. For example, does a carrier have discretion to decide that it will accept only written approval?⁴ If the Commission permits both oral or written approval, we believe carriers should have such discretion, so long as it is exercised reasonably. In addition, a carrier should be permitted to require evidence of a customer's approval before disclosing CPNI. This provides the greatest protection for customers and carriers, and is consistent with laws like that in California which requires written customer approval before a telecommunications carrier may disclose information about a residence customer.⁵

Finally, the fourth principle relates to the meaning of nondiscrimination, in the context of § 272(c)(1), 274(c)(2)(A) and (B), and how it relates to CPNI.⁶ In keeping with the purpose of § 222, which cannot be overridden by the nondiscrimination requirements, those requirements mean that a BOC will disclose CPNI on the same rates, terms, and conditions to anyone that presents lawful customer approval. What constitutes lawful approval in each instance will depend upon § 222 and how the FCC interprets it. Lawful approval need not be the same in all circumstances. The Commission should determine that

⁴ There can be no decision to accept only oral approval, since § 222(c)(2) requires disclosure upon affirmative written request from the customer.

⁵ Section 2891 of the California Public Utilities Code.

⁶ It is questionable whether Congress intended that the "information" that is the subject of § 272(c)(1) includes CPNI, but for the sake of answering the questions in this Public Notice, we will assume *arguendo* that it did so intend.

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notice and opt-out as well as written and oral approval are lawful forms of approval for use of CPNI by a company and its affiliates, while written approval is the appropriate form of lawful approval for disclosure of CPNI to third parties.

II. RESPONSES TO PUBLIC NOTICE QUESTIONS

1. Interplay Between Section 222 and Section 272

A. Using, Disclosing, and Permitting Access to CPNI

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?

Answer 1

No. Section 272(c)(1) does not, and cannot, impose a requirement that BOCs make CPNI available to other entities. This question ignores two important factors: the need for customer approval before CPNI can be disclosed, and the §272(g)(3) joint marketing exemption from §272(c)(1)'s requirements.

Section 222 authorizes a BOC to disclose or permit access to CPNI to other entities only with customer approval. The nondiscrimination requirement of §272(c)(1) cannot be used as a means of circumventing that customer approval requirement. Nor can approval by a customer for disclosure or access to one entity be expanded by interpretation of §272(c)(1) to provide approval for disclosure or access to another entity. If a customer approves access to or disclosure of CPNI to a BOC's §272 affiliate, the customer expects the CPNI to be disclosed to that affiliate, not to other entities, and the customer's wishes must be respected. That

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is the purpose of §222. Similarly, if a customer approves a BOC's use of CPNI, for or on behalf of its §272 affiliate, that approval cannot trigger a requirement that the BOC disclose or give a third party access to that CPNI. If a customer approves that BOC use, the customer does not expect and §222 does not permit the CPNI to be disclosed to anyone else.

Section 272(g)(3) exempts joint marketing by a BOC or a BOC §272 affiliate pursuant to §§272(g)(1) and (2) from the §272(c)(1) nondiscrimination requirements. Thus, if CPNI is being used by a BOC or its §272 affiliate as part of §272(g) joint marketing, the BOC is not required to comply with §272(c)(1) with respect to that use of CPNI.

In those cases where §272(g)(3) does not apply, the nondiscrimination requirement of §272(c)(1) requires that upon receipt of lawful customer approval, the BOC must disclose or permit access to CPNI to the BOC's §272 affiliate on the same terms and conditions as apply to disclosure or permission of access of CPNI to any other entity when that entity provides the same form of lawful customer approval. It also means that, to the extent a BOC may exercise discretion in the form of customer approval it will accept, and the requirements imposed on that approval, the BOC may not discriminate between its §272 affiliate and other entities in the exercise of its discretion.

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?

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Answer 2

In those cases where §272(c)(1) applies (i.e., not with respect to joint marketing), §272(c)(1) requires that CPNI be disclosed to §272 affiliates and other entities on the same terms and conditions when they provide the same form of lawful customer approval (*i.e.* CPNI will be disclosed to the §272 affiliate upon receipt of lawful customer approval to disclose to the affiliate, and will be disclosed to other entities upon receipt of lawful customer approval to disclose to the other entity). The form of lawful approval may be different, depending on how the Commission interprets §222, but the terms and conditions applicable to each form of approval will be the same. If, as the question assumes, an unaffiliated party must have an "affirmative written request," but under the Act an affiliate may have some other form of approval (*e.g.*, oral or notice and opt-out), the Act, not the BOC, would be making a discrimination. The BOC would be nondiscriminatory so long as it merely requires both affiliates and nonaffiliates to obtain whatever lawful form of approval they need under the Act.

3. 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? Must the answer to this question be the same as the answer to question 2?

Answer 3

Carriers are not required to treat their affiliates and other intra-company operating units as third parties for which customers' affirmative written

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request must be secured. Under §222(c)(1) a telecommunications carrier may use, disclose, or permit access to CPNI within its corporate family with "the approval of the customer," which may be written, oral, or opt-out. This is consistent with customer expectations of how CPNI will be used. This answer is not the same as the answer to question 2. Section 272(c)(1) only applies to transactions between BOCs and their §272 affiliates. It does not apply to transactions between BOCs and their other affiliates or between IECs and their local service affiliates or between other non-BOC carriers and their affiliates. Therefore, no nondiscrimination obligation exists to create a similar "written request" obligation.

B. Customer Approval

4. 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? 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?

Answer 4

The answer to this question depends on how the Commission answers the questions discussed in Section I of these comments, i.e., what forms of customer approval are lawful for disclosure of CPNI to third parties and for use by a carrier and its affiliates, and what does §272(c)(1) mean in the context of CPNI. The form of approval that is appropriate, and lawful, should be different for disclosure of CPNI to third parties than it is for use by a carrier and its affiliates, because customers' expectations are different. Consequently, a form of customer

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approval (*e.g.*, notice and opt-out) may be lawful for disclosure of CPNI to a BOC's §272 affiliate, but not for disclosure of CPNI to an unaffiliated entity, so that the BOC could not necessarily disclose CPNI to an unaffiliated entity based on a form of approval that is lawful for the §272 affiliate but not for unaffiliated entities. To the extent the forms of lawful approval for disclosure to §272 affiliates and unaffiliated entities are the same, the BOC would be required to follow the same terms and conditions in accepting the same form of approval. For example, if oral approval is lawful, and the BOC requires a written statement from the requesting carrier that it has obtained oral approval, the same condition would apply whether it is the §272 affiliate or the third party seeking disclosure through oral customer approval.

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?

Answer 5

No. There is no nondiscrimination requirement applicable to non-BOC carriers or to BOC use, disclosure or permission of access for affiliates and other intra-company operating units other than the §272 affiliate.

6. 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? 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? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the

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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?

Answer 6

No. To the extent that a BOC solicits customer approval for joint marketing and sales activities under §272(g), such activity is exempt from the §272(c)(1) nondiscrimination requirement pursuant to §272(g)(3). In that instance, the BOC should insure that the use, disclosure, or permission of access to CPNI is limited to such joint marketing and sales activities. If the customer approves disclosure to the BOC's section 272 affiliate for non-joint marketing purposes and to unaffiliated entities (this would most likely occur as two separate grants of approval by the customer), a BOC must provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions applicable to the form of approval used as it provides the CPNI to its section 272 affiliate.

Moreover, any requirement that a BOC solicit approval on behalf of unaffiliated entities would present grave questions under the First Amendment. The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988).

The First Amendment protection against compelled speech applies to commercial speech of corporations as well as to the speech of individuals. "For corporations as for individuals," the Supreme Court stated in *Pacific Gas and*

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Electric v. Public Util. Comm'n, 475 U.S. 1 (1986), "the choice to speak includes within it the choice of what not to say." *Id.* At 16 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). Because

"[t]he essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. ... There is necessarily ... a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."

Pacific Gas, 475 U.S. at 11 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemmingway v. Random House*, 23 N.Y.2d 341, 348 (1968))).

The Supreme Court's decision in *Pacific Gas* is controlling. In *Pacific Gas*, the Court held unconstitutional a state regulation requiring a privately owned utility company to include in its monthly billing envelopes messages of another organization. The Court held that the order impermissibly required the company to "assist in disseminating the speaker's message." *Id.* At 15. "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id.* At 9. The constitutional deficiency in any attempt to compel a BOC to disseminate approval solicitations for others is in no way mitigated because the BOC might not be compelled to distribute opinions. The First Amendment protects companies from the compelled dissemination of any speech. *See, e.g., Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994) (state cannot require a Certified Financial Planner ("CFP") to include in

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advertisements the (truthful) statement that CFP designation was granted by a non-governmental organization); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (state requirement that professional fundraisers disclose the percentage of funds they paid to charities is unconstitutional); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 115 S. Ct. 2338, 2347 (1995) (“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say’ ... [T]his general rule ... applies not only to expressions of value, opinion, or endorsement, but equally to statement of fact the speaker would rather avoid”).

C. Other Issues

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)?

Answer 7

Section 272(g)(3) means that use, disclosure, or permission of access to CPNI that is part of or related to joint marketing activities pursuant to §272(g)(1) and (2) are not activities that are subject to the §272(c)(1) nondiscrimination requirements. A BOC may use its own CPNI, with customer approval, to market and sell (*i.e.*, to jointly market) the services of its §272 affiliate pursuant to §272(g)(2) without triggering the nondiscrimination provisions of §272(c)(1). A BOC §272 affiliate also may obtain from the BOC and use CPNI to

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market or sell, pursuant to §272(g)(1), the services of the BOC without triggering the nondiscrimination requirements of §272(c)(1). Sections 222(c)(1) and (2) do not impose any special or different obligations on a BOC because it is engaged in the activities permitted by §§272(g)(1) and (2).

8. To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.

Answer 8

The Act does not require that the use, disclosure, or access to CPNI be "essential" to the joint marketing activity to be covered by §272(g)(3). If it is part of or related to joint marketing under §§272(g)(1) or (2), it is exempted by §272(g)(3) from the §272(c)(1) nondiscrimination requirements. Soliciting customer approval to use, disclose, or permit access to CPNI when a BOC markets and sells the services of the §272 affiliate and when a §272 affiliate markets and sells the services of the BOC is an activity described in §272(g). Marketing and selling are activities for which access to information about a customer's existing services is very helpful. It makes the interaction with the customer smoother, and helps assure the customer is offered the services he/she might find most useful. Other carriers will undoubtedly seek approval of their customers to use their CPNI about that carrier's services to sell the carrier's other services. BOCs and the §272 affiliates must be accorded the same opportunity. Since CPNI may be used,

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disclosed or accessed for joint marketing only with customer approval, seeking that approval is part of the joint marketing activity.

Furthermore, since CPNI begins to be created as soon as information is shared by the customer about the desired configuration of the service, the BOC joint marketing authorized in the Act would be effectively eliminated if BOC representatives were in any way precluded from using or accessing the customer's account information, if they had customer approval to do so.

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services . . . concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any . . . services . . . or information concerning its provision of exchange access to [its affiliate] unless such . . . services . . . or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

Answer 9

The information addressed by §272(e)(2) does not include CPNI. That section refers to information concerning a BOC's provision of exchange access. Exchange access is the "offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." (§153(6)) Exchange access services are the services provided to interexchange carriers to provide access to end users for origination and termination of interexchange (*i.e.* interLATA) calls. CPNI (*i.e.* information about the services an end user obtains from a BOC) is not information concerning the BOC's provision of exchange access services to other carriers. The Commission viewed the §272(e)(2) requirement correctly as relating to network information when it

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concluded, in the Non-Accounting Safeguards Order, that the requirements of §272(e)(2) can be sufficiently met by the current network disclosure rules. (¶253) Furthermore, it makes no sense to try to shoe-horn CPNI into this provision - CPNI is dealt with by Congress in §222. There is simply no need to extend the meaning of §272(e)(2) to also address CPNI.

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

Answer 10

If a BOC seeks customer approval to use, disclose, or permit access to CPNI for or on behalf of its §272 affiliate, that activity would be a transaction subject to §272(b)(5). To the extent the activity is part of joint marketing, it would be included as part of the joint marketing transaction between the BOC and the §272 affiliate. No special requirements are necessary because a transaction may relate to CPNI. The BOC and its §272 affiliate must comply with the requirements set forth in the Commission's Order in CC Docket No. 96-150,⁷ which are sufficient.

11. Please comment on any other issues relating to the interplay between sections 222 and 272.

Answer 11

Section 272(f)(1) provides for the "sunset" of most of the provisions of §272, including §272(c)(1), three years after the BOC receives authorization to

⁷ Cite 96-150 order.

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provide interLATA telecommunications services through its §272 affiliate, unless that period is extended by the Commission. To the extent the Commission establishes rules relating to CPNI, including any requirements relating to solicitation of customer approval, and use, disclosure, and permission of access to the CPNI, that are based upon the provisions of §272⁸ (especially, but not limited to §272(c)(1)), those rules must include a statement that such rules will also sunset when §272 sunsets.

The Commission did not, in its Public Notice, make reference to the joint marketing of commercial mobile service that is permitted by §601(d) of the Telecommunications Act of 1996. That section permits a BOC, or any other company, to jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services. Such joint marketing is not subject to §272(c)(1).⁹ Any CPNI rules created to interpret §272(c)(1)'s interaction with §222 should clearly state that such rules apply only with respect to use, disclosure, and access to CPNI relating to affiliates under §272, and do not apply to the joint marketing of commercial mobile service, or to any other service.

12. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 272.

⁸ Section 272(e) does not sunset with the rest of §272. However, this is irrelevant with respect to CPNI rules because §272(e) does not address CPNI.

⁹ The reference in §601 of the Telecommunications Act of 1996 to §272 of the Act states that it is in relation to wireline service, so does not effect joint marketing of commercial mobile service.

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Answer 12

In the First Report and Order in Docket 96-149, the Commission did not find it necessary to adopt specific regulations to implement §§272(c)(1) or 272(e)(2).¹⁰ Even assuming, *arguendo*, that CPNI is included within the information covered by one or both of these sections, there is still no need to adopt specific implementing regulations. However, if the Commission wishes to consider such regulations, we propose the following:

§xx.xxx Nondiscrimination safeguards applicable to Bell operating companies.

(a) Provision of CPNI. Except when a part of or related to joint marketing and sale of services under section 272(g) of the Act, a Bell operating company may not discriminate in rates, terms, and conditions between an affiliate described in subsection 272(a) of the Act and any other entity in the disclosure or permission of access to individually identifiable customer proprietary network information; provided, however, that the Bell operating company shall provide individually identifiable customer proprietary network information or access thereto to such affiliate or any other entity only upon receipt of customer approval as allowed by this Part identifying the entity to which the customer has approved such disclosure or permission of access.

(b) Customer approval. Except when a part of or related to joint marketing and sale of services under section 272(g) of the Act, a Bell operating company may not discriminate between an affiliate described in subsection 272(a) of the Act and any other entity in imposing a requirement concerning the method of customer approval to be used by such affiliate or such other entity. To the extent that this Part allows an affiliate of a company to obtain customer approval for disclosure of or access to individually identifiable customer proprietary network information of such company by different methods than those that may be used by an unaffiliated entity, a Bell operating company is not obliged by subsection (a) to require its affiliate to use the same method of obtaining customer approval as must be used by an unaffiliated entity.

¹⁰ See Non-Accounting Safeguards Order ¶¶ 194-236, 246-253, 321; *cf. Id.* "Final Rules."

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(c) *Sunset*. The provisions of this section shall cease to apply when the provisions of section 272 of the Act (other than subsection 272(e)) cease to apply pursuant to section 272(f) of the Act.

2. Interplay Between Section 222 and Section 274

A. Threshold Issues

13. To what extent, if any, does the term "basic telephone service information," as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?

Answer 13

Section 274(i)(3) defines "basic telephone service information" as "network and customer information" of a BOC and "other information" acquired by a BOC as a result of providing basic telephone service. "Customer information" appears to include CPNI to the extent the CPNI relates to the provision of basic telephone service to a specific customer. Customer information may also include other information about a customer, *e.g.*, subscriber list information, that is not part of CPNI. It is important to note that, to the extent basic telephone service information is CPNI, the more specific provisions of §222 would control, under principles of statutory construction, and the protections of that section apply to any use of the CPNI, which may be used for purposes other than the provision of the service from which the CPNI is derived or the provision of services necessary or used in the provision of such service only with customer approval.