

B. Using, Disclosing, and Permitting Access to CPNI

1. Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

14. Does section 274(c)(2)(A) mean that a BOC that is providing "inbound telemarketing or referral services related to the provision of electronic publishing" to a separated affiliate, electronic publishing joint venture, or affiliate may use, disclose, or permit access to CPNI in connection with those services only if the CPNI is made available, on nondiscriminatory terms, to all unaffiliated electronic publishers who have requested such services? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(A) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

Answer 14

No. Section 274(c)(2)(A) does not, and cannot, impose a requirement that BOCs make CPNI available to other entities. Two fundamental points are important here: the need for customer approval before CPNI can be used or disclosed, and the scope of the §274(c)(2)(A) nondiscrimination requirement.

Sections 222(c)(1) and (2) permit use, disclosure, or permission of access to CPNI only with customer approval. If a BOC uses, discloses, or permits access to CPNI as part of the provision of inbound telemarketing or referral services related to electronic publishing pursuant to §274(c)(2)(A), it may do so only with customer approval, and only to the extent of that customer approval. For example, if a customer gives oral approval, pursuant to §222(d)(3), for use of CPNI to refer the customer to an electronic publisher (pursuant to the requirements of ¶149 of the Commission's First Report and Order in Docket 96-152),¹¹ the CPNI may not be

¹¹ Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Services, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, Mimeo, Released Feb. 7, 1997 ("Electronic Publishing Order")

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disclosed by the BOC to the electronic publisher or anyone else. Similarly, if the customer approves disclosure of CPNI to a particular electronic publisher, the BOC cannot disclose the CPNI to any other electronic publisher. The customer's wishes with respect to the use or disclosure of the CPNI must be respected. That is the purpose of §222.

The nondiscrimination requirement of §274(c)(2)(A) requires that a BOC that provides inbound telemarketing or referral service to a separated affiliate, electronic publishing joint venture, or affiliate, must make those services available to all electronic publishers on request, on nondiscriminatory terms. (See Electronic publishing Order, ¶¶149-156.) Unlike §272(c)(1), §274(c)(2)(A) does not impose a nondiscrimination requirement on the provision of information or other services. If the Commission believes the Act imposed a nondiscrimination requirement with respect to CPNI, that requirement could be only that the BOC will disclose the CPNI on the same terms and conditions upon receipt of the same form of lawful customer approval.

2. Section 274(c)(2)(B) -- Teaming or Business Arrangements

15. To the extent that basic telephone service information is also CPNI, should section 274(c)(2)(B) be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher," may use, disclose, or permit access to basic telephone service information that is CPNI in connection with that teaming or business arrangement only if such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(B) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

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Answer 15

See Answer 13 and 14 above.

To the extent that basic telephone service information is CPNI, §274(C)(2)(B) does not, and cannot, impose a requirement that BOCs make CPNI available to other entities. Two fundamental points are important here: the need for customer approval before CPNI can be used or disclosed, and the scope of the §274(c)(2)(B) nondiscrimination requirement.

CPNI may be used, disclosed, or accessed in relation to a §274(c)(2)(B) teaming or business arrangement only as permitted by §222. If a customer approves use, disclosure, or permission of access to CPNI, the BOC may use, disclose, or permit access to the CPNI only as approved by the customer. For example, if the customer approves disclosure to an electronic publisher participant in a teaming arrangement, whether a BOC affiliate or otherwise, disclosure may be made only to that electronic publisher, and not to others who have not obtained customer approval.

The nondiscrimination obligation of §274(c)(2)(B), with respect to CPNI, is that upon receipt of lawful customer approval, the BOC must disclose CPNI to any electronic publisher who provides such lawful customer approval on the same terms and conditions applicable to the form of customer approval provided. It also means that if the BOC uses the CPNI in the provision of the service from which the CPNI is derived as part of the BOC's participation in the teaming or business arrangement, it must do the same thing in other teaming and business arrangements.

16. If section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request," does section 274(c)(2)(B) require that the entities, both affiliated and non-affiliated, engaged in section 274 teaming or business arrangements with the BOC be treated as third parties for which the BOC must have a customer's affirmative written request before disclosing CPNI to such entities?

Answer 16

In those cases where §274(c)(2)(B) applies, that section and the Commission's Electronic Publishing Order, ¶168, require that CPNI be disclosed to all electronic publishing entities that provide lawful customer approval under the same terms and conditions as it is disclosed to entities engaged in §274 teaming or business arrangements with the BOC that provide the same form of lawful customer approval. The form of 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 form of approval they need under the Act.

3. Section 274(c)(2)(C) -- Electronic Publishing Joint Ventures

17. Should section 274(c)(2)(C) be construed to mean that an electronic publishing joint venture be treated as a third party for which the BOC must have a customer's approval, whether oral, written, or opt-out, before disclosing CPNI to that joint venture or to joint venture partners?

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Answer 17

Not necessarily. There is no nondiscrimination requirement in §274(c)(2)(C). The requirements would depend on whether the electronic publishing joint venture is an affiliate of the BOC pursuant to the definition in §274(i)(1), and what forms of approval the Commission determines to be lawful for affiliates and nonaffiliates.

C. Customer Approval

1. Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

18. Must a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher" under section 274(c)(2)(A) obtain customer approval pursuant to section 222(c) before using, disclosing, or permitting access to CPNI on behalf of such entities? If so, what forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation? What impact, if any, does section 222(d)(3) have on the forms of customer approval in connection with section 274(c)(2)(A) activities?

Answer 18

Yes, customer approval is necessary before a BOC may use, disclose, or permit access to CPNI when providing inbound telemarketing or referral services, to the extent the electronic publishing service is in a different CPNI "bucket" than the service from which the CPNI is derived. The form of customer approval will depend on whether the CPNI is to be used by the BOC or an affiliate or disclosed to an unaffiliated entity, and what forms of customer approval the Commission finds to be lawful in each such situation. Any form of customer approval, including oral, written, or notice and opt-out, is appropriate for BOC or affiliate use, because that

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is consistent with customer expectations. Written approval is appropriate for disclosure to unaffiliated entities because that provides the greatest protection for customers and other carriers. Section 222(d)(3) simply defines one permissible form of authorization for use of CPNI by a BOC during inbound telemarketing.

19. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its separated affiliate or electronic publishing joint venture also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers when it provides such a service for its section 274 separated affiliates, electronic publishing joint ventures, or affiliates under section 274(c)(2)(A)? What impact, if any, does section 222(d)(3) have on the BOC's obligations under section 274(c)(2)(A) with regard to the solicitation of a customer's approval during a customer-initiated call? 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 274 separated affiliates or electronic publishing joint ventures or affiliates over unaffiliated entities? If the customer approves disclosure to both the BOC's section 274 separated affiliates or electronic publishing joint ventures or affiliates 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 274 separated affiliates or electronic publishing joint ventures or affiliates?

Answer 19

No. The §274(c)(2)(A) nondiscrimination requirement only applies to "inbound telemarketing or referral service related to the provision of electronic publishing" and does not apply to any such "approval solicitation service" or to the provision of CPNI. Section 222(d)(3) has no impact on a BOC's obligations - it is permissive in nature.

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).

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"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 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

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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 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").

20. To the extent that sections 222(c)(1) and 222(d)(3) 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 electronic publishers under the same standard for customer approval as is permitted in connection with its section 274 separated affiliate, electronic publishing joint venture, or affiliate under section 274(c)(2)(A)? If, for example, a BOC may disclose CPNI to its section 274 separated affiliate pursuant to the customer's oral or opt-out approval, is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

Answer 20

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

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customer approval are lawful for disclosure of CPNI to third parties and for use by a carrier and its affiliates, and what does the §274(c)(2)(A) nondiscrimination requirement 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 approval (*e.g.*, notice and opt-out) may be lawful for disclosure of CPNI to a BOC's §274 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 §274 affiliate but not for unaffiliated entities. To the extent the forms of lawful approval for disclosure to §274 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 §274 affiliate or the third party seeking disclosure through oral customer approval.

2. Section 274(c)(2)(B) -- Teaming or Business Arrangements

21. Must a BOC, that is engaged in a teaming or business arrangement under section 274(c)(2)(B) with "any separated affiliate or with any other electronic publisher" obtain customer approval before using, disclosing, or permitting access to CPNI for such entities? What forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation?

Answer 21

See Answer 15 above. To the extent the CPNI use, disclosure, or permission of access relates to something other than the provision of service from which the CPNI is derived, or the provision of service necessary to or used in the provision of such service, customer approval is necessary. The form of customer approval will depend on whether the CPNI is used by the BOC or an affiliate or disclosed to an unaffiliated entity, and what forms of customer approval the Commission finds to be lawful in each such situation. Any form of customer approval, including oral, written, or notice and opt-out are appropriate for BOC or affiliate use, because that is consistent with customer expectations. Written approval is appropriate for disclosure to unaffiliated entities because that provides the greatest protection for customers and other carriers.

22. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of any of its teaming or business arrangements under section 274(c)(2)(B) also offer to solicit that approval on behalf of other teaming arrangements and unaffiliated electronic publishers? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers and teaming arrangements when it provides such a service for any of its teaming or business arrangements under section 274(c)(2)(B)? 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 electronic publishing teaming or business arrangements over unaffiliated entities? If the customer approves disclosure to both the BOC's electronic publishing teaming or business arrangements 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 electronic publishing teaming or business arrangements?

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Answer 22

No. The §274(c)(2)(B) nondiscrimination requirement applies only to facilities, services, and basic telephone service information provided as authorized by §274, and §274 does not authorize an "approval solicitation service."

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).

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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").

23. To the extent that 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 electronic publishers under the same standard for customer approval as is permitted in connection with its teaming or business arrangements under section 274(c)(2)(B)? If, for example, a BOC may disclose CPNI to a section 274 separated affiliate with which the BOC has a teaming arrangement pursuant the customer's oral or opt-out approval, is the BOC likewise required to disclose CPNI to unaffiliated electronic publishers or teaming arrangements upon obtaining approval from the customer pursuant to the same method?

Answer 23

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 the §274(c)(2)(B) nondiscrimination requirement 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 approval (*e.g.*, notice and opt-out) may be lawful for disclosure of CPNI to a BOC's §274 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 §274 affiliate but not for unaffiliated entities. To the extent the forms of lawful approval for disclosure to §274 affiliates and unaffiliated entities are the same, the BOC would

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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 §274 affiliate or the third party seeking disclosure through oral customer approval.

D. Other Issues

24. Does the seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 274 separated affiliate or electronic publishing joint venture constitute a "transaction" under section 274(b)(3)? If so, what steps, if any, must the BOC and its section 274 separated affiliate or electronic publishing joint venture take to comply with the requirements of section 274(b)(3) for purposes of CPNI?

Answer 24

If the BOC seeks approval for or on behalf of a separated affiliate or electronic publishing joint venture, it would be a transaction subject to §274(b)(3) and the BOC would be required to comply with the requirements of the Commission's order in Docket 96-150. It would not be a §274(b)(3) transaction if the BOC sought approval for its own use of CPNI. No special requirements are necessary because a transaction may relate to CPNI.

25. Please comment on any other issues relating to the interplay between sections 222 and 274.

Answer 25

Section 274(g)(2) provides for the sunset of §274 four years after the date of enactment of the Telecommunications Act of 1996. To the extent the Commission establishes rules relating to CPNI, including requirements relating to solicitation of customer approval, and use, disclosure, or permission of access to

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the CPNI, that are based on the provisions of §274, those rules must include a statement that such rules will also sunset when §274 sunsets.

26. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 274?

Answer 26

In the First Report and Order in Docket 96-152, the Commission did not find it necessary to adopt specific regulations to implement section 274(c)(2).¹² Even assuming, *arguendo*, that CPNI is included within the information covered by this section, there is still no need to adopt specific implementing regulations. However, if the Commission wishes to consider such regulations, Pacific proposes the following:

§yy.yyy Nondiscrimination safeguards applicable to Bell operating companies.

(a) Provision of CPNI. A Bell operating company that provides, with the approval of the customer, disclosure of or access to individually identifiable customer proprietary network information to a teaming or business arrangement pursuant to section 274(c)(2)(B) of the Act must provide disclosure or access, with the approval of the customer, as allowed by this Part, identifying the entity to which the customer has approved such disclosure or permission of access, on a nondiscriminatory basis both to other teaming arrangements and to unaffiliated electronic publishers on the same terms and conditions and prices.

(b) Customer approval. A Bell operating company may not discriminate between a teaming or business arrangement in which it is engaged pursuant to section 274(c)(2)(B) of the Act and other teaming arrangements or unaffiliated electronic publishers in imposing a requirement concerning the method of customer approval to be used by such arrangement or such publisher. 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)

¹² See Electronic Publishing Order ¶¶ 143-207.

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to require its affiliate to use the same method of obtaining customer approval as must be used by an unaffiliated entity.

(c) *Sunset*. The provisions of this section shall cease to apply when the provisions of section 274 of the Act cease to apply pursuant to section 274(g)(2) of the Act.

III. CONCLUSION

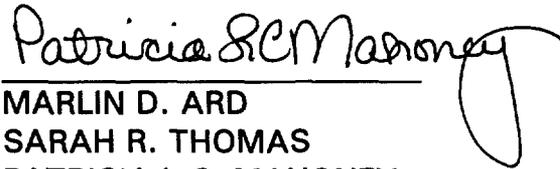
Pacific urges the Commission to adopt rules interpreting §222 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, that reflect the purpose of §222 to protect customer privacy and that do not over-complicate the relationship between §222 and other provisions of the Act. The Commission should not permit itself to be deflected from that purpose by the attempts of some parties to impose anti-competitive restrictions on only some telecommunications carriers. The rules should not be used as a way to restrict activities that Congress has expressly permitted.

[Signature page to follow]

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Respectfully submitted,

PACIFIC TELESIS GROUP


MARLIN D. ARD
SARAH R. THOMAS
PATRICIA L.C. MAHONEY

140 New Montgomery Street, R. 1522A
San Francisco, CA 94105
(415) 542-7649

MARGARET E. GARBER

1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6472

Its Attorneys

Date: March 17, 1997

CERTIFICATE OF SERVICE

I, Chuck Nordstrom, hereby certify that on this 17th day of March, 1997, copies of the foregoing "FURTHER COMMENTS OF PACIFIC TELESIS GROUP" re: CC Docket No. 96-115, were served by hand to the parties listed below.

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