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Group-Washington

March 27, 1997

DOCKET NO. 96-115 ORIGINAL

RECEIVED
MAR 27 1997
Federal Communications Commission
Office of Secretary

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, please find enclosed an original and six copies of its "Reply Comments" in the above proceeding.

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,

Alan Francisco FOR GINA HARRISON

Enclosure

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

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

REPLY COMMENTS OF PACIFIC TELESIS GROUP

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SUMMARY

The Commission should adopt an interpretation of §§222, 272, and 274 that recognizes the purpose underlying each of those provisions, and that gives full effect to each. The primary purpose of §222 is to protect customer privacy. The purpose of the nondiscrimination provisions of §§272 and 274 is to ensure fair competition. The Commission should reject proposed interpretations that seek to create unbalanced, one-sided competition. These proposals elevate the nondiscrimination provisions over §222, harming not only competition but also customer privacy. Congress created §222 to apply to all telecommunications carriers, and to protect equally the customers of all telecommunications carriers. Many of the proposals of commenters would instead apply very different rules to some carriers to the detriment of competition and the customers of those carriers.

The Commission can avoid that inappropriate result by adopting rules that apply §222 in a like manner to all carriers, and overlay those rules with a nondiscrimination requirement that protects competitors and customers. The Commission should adopt customer approval requirements that permit each carrier to seek customer approval for CPNI use and disclosure for that carrier and its affiliates. Where there is an existing relationship between the carrier and customer, any form of customer approval, including notice and opt out, should be acceptable, and would be in keeping with §222 and customer expectations. For disclosure to third parties, an affirmative customer approval should be required, to protect both customers and other carriers. We believe written approval provides the greatest

protection. The nondiscrimination requirements should be only that when a BOC is provided with an appropriate form of customer approval, it will disclose CPNI to the provider of that customer approval on the same rates, terms, and conditions regardless of whether that provider is a §272 or 274 affiliate or an unaffiliated entity. The nondiscrimination requirements need not require that the same form of customer approval be accepted (that would be inconsistent with customer expectations), nor that CPNI be disclosed to all other carriers when used for or disclosed to a §272 or 274 affiliate (that would violate customers' privacy rights), nor that a BOC do customer approval solicitation for unaffiliated entities (that would violate the BOC's First Amendment rights).

The Commission should also reject the narrow definitions of joint marketing proposed by some commenters. Use of CPNI is part of marketing and selling, and when it is marketing and selling of an affiliate's services under §272(g), it is joint marketing. Such activity is exempt from the nondiscrimination requirements of §272(c)(1).

Finally, the Commission should reject the attempts to impose other, unrelated nondiscrimination requirements on the use and disclosure of CPNI. Congress addressed CPNI in a unified manner in §222. The Commission is examining interpretations that will apply §§272 and 274 to CPNI. There is no need or legitimate purpose to be served by using further interpretation of unrelated provisions (*i.e.*, §§201, 202, 272(e)(2), the CMRS rules) to further complicate the Commission's effort to establish CPNI rules.

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CC Docket No. 96-115

REPLY COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("Pacific") hereby submits Reply Comments in the above-referenced proceeding pursuant to the Public Notice issued on February 20, 1997.

I. **THE INTERPRETATIONS PROPOSED BY SOME COMMENTERS HAVE A SINGLE, CLEAR MOTIVE -- TO LIMIT COMPETITION**

Despite comments suggesting an understanding of and agreement with Congress' goal of increasing competition in all types of telecommunications services, the BOCs' competitors, particularly the IXCs who are beneficiaries of the opening of the local exchange service market, propose interpretations of §§222, 272, and 274 that would seriously hinder, if not completely stifle, the BOCs' ability to compete in the interLATA and electronic publishing markets. AT&T, for example, talks about consumers reaping "the fruits of competition through

increased choice, the convenience of 'one-stop shopping', innovative new service offerings, and lower prices."¹ AT&T then goes on to propose an interpretation of §§222, 272, and 274 that would effectively eliminate a BOC's ability to market and sell the services of its §272 affiliate or to engage in the forms of joint marketing permitted by §274(c)(2)², thereby decreasing customer choice, discouraging new service offerings, and eliminating a source of one-stop shopping. This unbalanced approach should be rejected.

AT&T and other commenters would only permit a BOC to use CPNI for marketing and selling its §272 affiliate's services, or to provide CPNI to its §272 affiliate with appropriate customer authorization, on the condition that the same CPNI be disclosed at the same time to all other entities requesting it.³ This proposal would have the effect of preventing a BOC's §272 affiliate from being able to compete in the provision of long distance service. CPNI cannot, under §222, be disclosed to third parties without customer approval, and it is very unlikely that customers would grant such a blanket approval, even if it were appropriate to require a BOC to seek such approval, which it is not. (See Section VI below.) Without such customer approval for disclosure to third parties, under the commenters' proposals, the BOC could not use CPNI to market and sell its §272 affiliate's services, and CPNI could not be disclosed to the §272 affiliate, even if the customer had approved such use and disclosure by the BOC.

¹AT&T, p. 3.

² *Id.* at 6-7, 20-23.

³ *Id.* See also Alltel, pp. 2-3; TRA, p. 3; Cox, pp. 2-3; Competition Policy Institute, pp. 7-8; CPUC, pp. 4-5.

Commenters make similar proposals regarding permissible joint marketing under §274,⁴ which would essentially prevent BOCs from taking advantage of the joint marketing opportunities expressly granted to them by the statute.

Commenters also attempt to expand the meaning of the "operate independently" provision of §272(b)(1) to encompass the use of CPNI.⁵ The Commission has already interpreted that provision, which provides that a BOC's §272 affiliate shall "operate independently" from the BOC, in CC Docket No. 96-149. There, the Commission determined the additional requirements, beyond those specified by Congress, that should be encompassed within the meaning of "operate independently."⁶ CPNI and its uses were not among those additional requirements. These attempts to expand the interpretation of §272(b)(1) through the "back-door" of this separate proceeding should be rejected.

Fundamentally, there are two problems with many of the comments. First, they assume that there is only one source of CPNI -- the BOCs -- and that the point of §222 is to provide means for others to get that CPNI. The fact is, all telecommunications carriers possess CPNI about their customers that is useful in offering new services, and all other telecommunications carriers would like access to that CPNI.⁷ Congress created §222 to address that situation -- it establishes an

⁴ AT&T, pp. 20-23; Cox, pp. 11-12.

⁵ AT&T, pp. 7-8; MCI, pp. 15-16; WorldCom, pp. 20-21.

⁶ 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 Comm. Reg. 696 (1996) ("Non-Accounting safeguards Order"), ¶¶156-170.

⁷ Arguably, the CPNI of IXCs may be more valuable than that of LECs, including the BOCs. (Ameritech, pp. 2-3).

orderly process, that applies to all telecommunications carriers, that does not convey competitive advantages to some at the expense of others, and that protects the privacy of customers. The Commission should not disrupt that process by accepting the unbalanced proposals of the IXCs. Second, the commenters attempt to use the nondiscrimination provisions of § 272 and 274 as an offensive weapon to prevent BOCs' § 272 and 274 affiliates from being able to compete effectively. That is not the purpose of the nondiscrimination provisions. They are intended to promote BOC participation in new markets and ensure fair, not one-sided, competition.

The Commission must reconcile those sections with § 222, and its goal in doing so should be to interpret them harmoniously, to give effect to each section without impeding the effect of the other sections. The Commission should strive for an interpretation that does not elevate the nondiscrimination provisions of § 272 and 274 over the CPNI provisions of § 222.

II. CONGRESS MADE § 222 APPLICABLE TO ALL TELECOMMUNICATIONS CARRIERS

Section 222 applies by its terms to all telecommunications carriers, not just to BOCs or ILECs. Congress certainly knew how to create provisions that apply on a more limited basis, *e.g.*, § 272, 274, and that portion of § 222(c)(3) regarding LEC use of aggregate customer information for purposes other than the provision of the services from which it is derived. As Sprint stated, "the Telecommunications Act of 1996 makes an explicit distinction between the BOCs

and other telecommunications carriers in several crucial aspects.”⁸ However, CPNI is not one of them. Section 222 does not even mention BOCs. If Congress had intended to create different CPNI rules for BOCs, it would have done so. It did not. Yet some commenters state that their proposed interpretations -- which impose vastly different CPNI rules and restrictions on BOCs and limit BOCs’ ability to use CPNI in the same ways that other carriers will use their CPNI -- were part of Congress’ plan.⁹ They base this view on sections of the Act that do not even mention CPNI.

Congress was clear in §222 that the CPNI rules apply to all telecommunications carriers in the same way -- there are no distinctions drawn among types of carriers in §222.¹⁰ This makes sense when §222 is viewed properly as a provision to protect customer privacy. There is no reason that BOC customers should be viewed as having less interest in protecting their privacy than customers of other carriers, and Congress gave no indication that it was affording less protection to BOC customers. On the other hand, the application of §§272 and 274 to CPNI is a matter of interpretation -- Congress did not make specific reference to CPNI in either of those sections. In making that interpretation, the Commission must balance the various provisions in a way that leaves §222 and its purpose as envisioned by Congress as intact as possible.

⁸ Sprint, p. 4.

⁹ Sprint, p. 1; WorldCom, pp. 2-3.

¹⁰ One exception is the use of aggregate customer information described in §222(c)(3), but that is not relevant to a discussion of CPNI, because aggregate customer information is not CPNI.

This balance can be achieved by applying the nondiscrimination requirements to the process of disclosing CPNI. That is, when provided with an appropriate form of customer approval, a BOC will disclose CPNI under the same rates, terms, and conditions regardless of whether the requester is a §272 affiliate or a competitor.¹¹ The same process should also apply with respect to §274. This approach balances all of the sections, and leaves the application to all telecommunications carriers as similar as possible. It is also consistent with the language of §272(c)(1), which prohibits discrimination by the BOC in the "provision . . . of . . . information" to its §272 affiliate.

III. MANY COMMENTERS MISCHARACTERIZE BOC JOINT MARKETING AND HOW CPNI FITS INTO IT

Many commenters argue that use and disclosure of CPNI, and the act of seeking customer approval for such use or disclosure, are not within the scope of joint marketing under §272(g), and are not exempted by §272(g)(3) from the §272(c)(1) nondiscrimination requirements.¹² The comments provide a distorted definition of marketing and selling that limits those activities to such things as designing advertising and disseminating advertising and direct mail, and suggest that obtaining customer approval to use or disclose CPNI is preparatory to

¹¹ Pacific, pp. 1-4, 6-7; Bell Atlantic/NYNEX, p. A-2; SBC, pp. 5-7; US West, pp. 4-5.

¹² AT&T, pp. 13-16; MCI, pp. 21-23; Sprint, pp. 11-13; WorldCom, pp. 13-16; Alltel, pp. 6-7; TRA, pp. 13-14; AirTouch, pp. 5-7; Cox, pp. 7-9.

marketing, but is not part of marketing, and that use of CPNI is helpful to, but not part of, marketing and selling.¹³

Marketing and selling certainly includes the activities described by the comments, but is not limited to those activities. While many varied activities are included, marketing and selling always come down to an interaction with a customer to discuss or describe services, answer questions, and take orders. It is particularly, although not exclusively, during that interaction that the use of CPNI becomes important. Customers expect carriers with which they have an existing relationship to have and use information about that existing relationship when discussing new products and services.¹⁴ When the service provider is a telecommunications carrier, that information is CPNI. Thus, customers expect a BOC to use CPNI when discussing services, including its §272 affiliate's services; the use of CPNI in this way is part of joint marketing.¹⁵ That expectation also includes a BOC's affiliate having and using CPNI in offering its services, including the services of the BOC that it markets and sells. That too is joint marketing, under §272(g)(1), and like BOC use of CPNI in joint marketing, is exempt from nondiscrimination requirements of §272(c)(1).

Similarly, because customer approval is necessary before CPNI can be used as part of marketing and selling services other than those from which the

¹³ If the commenters actually believe that CPNI plays such a small part in marketing and selling services, it is hard to see why they are so determined to receive the same CPNI that the BOC affiliate receives.

¹⁴ BellSouth, pp. 5-6; Ameritech, p. 2; Ex parte letter of Gina Harrison, Pacific Telesis Group, dated December 11, 1996, to William F. Caton, Acting Secretary, FCC, Attachment A at pp. 8-10.

¹⁵ *Id.*

CPNI is derived, the process of obtaining customer approval also must be part of the marketing process. As Sprint points out, securing customer approval and disclosing CPNI are not financially viable activities on their own -- the viability depends on the sale of telecommunications goods and services.¹⁶ This further supports the proposition that soliciting customer approval and use of CPNI are indeed part of marketing, and therefore part of joint marketing. In addition, in many instances a carrier representative may be seeking customer approval during the marketing interaction, *e.g.*, a telephone call, with the customer. This is obviously part of marketing and selling and is also entirely consistent with §222(d)(3). What would be inconsistent would be to prohibit the BOC representative from using that CPNI, as specifically authorized by the customer, until it can be made available to other carriers.¹⁷ This would not serve customers well and is not required by the Act. Because solicitation of customer approval and use of CPNI in marketing and selling are within the scope of joint marketing under §272(g), the BOCs may engage in those activities without reference to §272(c)(1).

Some commenters suggest that BOCs are attempting to use §272(g)(3) as a basis for not complying with the customer approval requirements of §222(c)(1).¹⁸ That is not the case. We recognize that if the Commission creates separate "buckets" containing local service and long distance service, it will be necessary to obtain customer approval to use local CPNI to market long distance

¹⁶ Sprint, p. 11.

¹⁷ AT&T has suggested a waiting period of 10 days before CPNI can be used. (AT&T, pp. 17-18)

¹⁸ Cox, p. 7; CPUC, pp. 2-3.

service, and vice versa. What §272(g)(3) does is put BOCs and their §272 affiliates on the same footing as other carriers in obtaining that customer approval and using the CPNI. All providers marketing and selling local and long distance service will be able to obtain customer approval and use their CPNI in that activity without an obligation either to seek approval for others or to disclose CPNI to others before being permitted to use it.

IV. SOME COMMENTERS IGNORE CUSTOMER WISHES AND THE PRIVACY PURPOSE OF §222

It is suggested by some commenters that a BOC may not provide CPNI to its §272 affiliate, or use CPNI on the affiliate's behalf, unless the same CPNI is made available to other carriers at the same time, even if the customer has approved such disclosure or use vis-a-vis the affiliate, and even if the customer has not given approval for the disclosure to the other carriers.¹⁹

This suggested procedure violates the fundamental premise of §222 -- that a customer may decide who has access to information about that customer's telecommunications services. Some proposals would require disclosure of CPNI without the customer's approval, in the name of nondiscrimination, so that a BOC would be required to provide its customers' CPNI to carriers that the customers may never have heard of and may not wish to hear from.²⁰ Other proposals would

¹⁹ AT&T, pp. 6-7; WorldCom, pp. 4-5; TRA, pp. 3-4; Cox, pp. 2-3; Directory Dividends Inc., pp. 1-3.

²⁰ Competition Policy Institute, pp. 1-2.

refuse to honor a customer's desire to give access to its CPNI to only the BOC or its §272 affiliate, and not to third parties.

Under §222, CPNI must be disclosed only with customer approval, unless it is being disclosed in the provision of the service from which it is derived, or provision of services necessary to or used in the provision of the service from which it is derived.²¹ The Commission should find that the form of approval required for such disclosure may vary depending on who (*i.e.*, an affiliate of the discloser or an unaffiliated entity) is to receive the CPNI. That would be consistent with customer expectations and entirely appropriate. Customers expect a service provider with which the customer has a relationship, and its affiliates, to have access to and use customer information. That expectation supports use of any form of customer approval, including notice and opt out.²² Conversely, customers do not expect that their information will be shared with third parties without the customer's approval.²³ That expectation supports a requirement of affirmative

²¹ Directory Dividends, Inc. has suggested in its comments that customer name and address, including those for unlisted customers, is CPNI that is subject to the customer approval requirements. (p. 3) We do not agree. To the extent such information is listed, it will be included as subscriber list information, governed by §222(e) of the Act. To the extent the information is different than subscriber list information, we do not believe it is CPNI, and is therefore not governed by §222. (Ex parte letter of Gina Harrison, Pacific Telesis Group, dated November 22, 1996, to William F. Caton, Acting Secretary, FCC, Attachment at p. 3.) However, such information (*i.e.*, a customer list which is not readily discernible or publicly available and which is the subject of reasonable efforts to ensure its confidentiality) is protected trade secret information which need not be disclosed to competitors. Maharis v. Omaha Vaccine Co., 967 F.2d 588 (9th Cir. 1992).

²² 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.

²³ In addition to customer expectations, some states have enacted privacy provisions that protect customer information. In California, §2891 of the California Public Utilities Code prohibits a telephone corporation from disclosing information relating to residential customers to third parties without the customer's written consent. That will therefore, in California, limit the form of appropriate customer approval permissible for disclosure of CPNI to third parties.

approval, and we believe affirmative written approval provides the greatest protection for customers and other carriers.²⁴

Regardless of the form of customer approval, the unavoidable requirement is that customer approval be obtained.²⁵ This requirement can be harmonized with the nondiscrimination requirements of §§272 and 274 by a rule providing that when an entity satisfies the requirements of §222 (*i.e.*, provides the form of approval that the Commission determines to be appropriate), a BOC will provide the CPNI to that entity on the same rates, terms, and conditions, whether the entity is an affiliate under §§272 and 274 or an unaffiliated entity.²⁶ This gives full effect to all of the relevant sections of the Act, respects customers' wishes, and permits BOC affiliates under §272 to engage in the same marketing activities as other providers, as authorized by §272(g) and the Non-Accounting Safeguards Order.²⁷

V. MANY COMMENTERS FAIL TO DISTINGUISH BETWEEN BOC USE OF CPNI AND DISCLOSURE OF CPNI TO §272 AFFILIATES

Throughout many of the comments, BOC use of CPNI for or on behalf of a §272 affiliate (*e.g.*, for marketing and selling the affiliate's services) is

²⁴ If the Commission permits the use of some other form of approval for disclosure to third parties, a carrier should be permitted to require indemnification to protect itself from misrepresentations about receipt of customer approval.

²⁵ To the extent a carrier provides the service from which the CPNI is derived, that carrier does not need customer approval to use that CPNI, even if that carrier is a §272 affiliate. This fact appears to have escaped one commenter. (TRA, p. 7).

²⁶ The nondiscrimination provisions of §§272 and 274 apply only with respect to affiliates engaged in the activities covered by those sections. They do not apply to any other BOC affiliate, and a BOC may provide CPNI to such other affiliates under different terms and conditions, just as any other carrier may do with its own affiliates.

²⁷ Non-Accounting Safeguards Order, ¶291.

discussed together with disclosure of CPNI to a §272 affiliate as though there were no difference between the two activities. This in effect writes §272(g)(2) out of the Act if the Commission incorrectly rules that a BOC can only use CPNI with the same form of customer approval as required for disclosure to third parties, or only if the CPNI is shared with third parties before it can be used. A BOC may market and sell its §272 affiliate's services, and its activities in doing so are not subject to §272(c)(1). As discussed above, such marketing and selling will generally include use of CPNI. This is exactly what other carriers will do in jointly marketing their services. This BOC use of CPNI should be subject to the same customer approval requirements as any other BOC use of CPNI across "buckets." Customers expect such use, and are very accepting of a notice and opt out procedure for obtaining the customer approval.²⁸ This does not involve providing anything to the §272 affiliate except the marketing and sales service permitted by §272(g)(2), and does not in any way implicate §272(c)(1).²⁹

Of course, disclosure of CPNI to a §272 affiliate may also be exempt from §272(c)(1), if it involves joint marketing. This will require a case by case analysis to determine if joint marketing is involved; if it is not, the nondiscrimination requirement would be triggered. In that case, the CPNI would be disclosed to the affiliate with appropriate customer approval and upon the same terms and

²⁸ 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.

²⁹ California Public Utilities Commission, pp. 5-6.

conditions as apply to disclosure to third parties that provide appropriate customer approval.

VI. BOCS CANNOT BE REQUIRED TO PROVIDE A CUSTOMER APPROVAL SOLICITATION SERVICE

To the extent a BOC solicits customer approval to disclose CPNI to the BOC's §272 affiliate for purposes of joint marketing, the nondiscrimination requirement does not apply and BOCs cannot be required to provide a customer approval solicitation service for other carriers.³⁰ Beyond that, an "approval solicitation service" requirement would violate the BOC's First Amendment rights. Such a requirement would force a BOC to disseminate a message for the BOC's competitors that it would not otherwise choose to disseminate.³¹ Such a message is not required by the nondiscrimination provisions of §§272 and 274. Rather, solicitation of customer approval should be viewed as the BOC seeking response from its customers about what the BOC may do with the customer's CPNI.³² The Commission should determine that each carrier subject to §222 may perform its own customer approval solicitation, and may include a request for approval to disclose CPNI to some or all of the carrier's affiliates.³³ No carrier should be required to obtain customer approval for other, unaffiliated carriers.

³⁰ Bell Atlantic/NYNEX, p. A-4; BellSouth, pp. 19-20.

³¹ US West, pp. 18-21; Ameritech, p. 10; BellSouth, pp. 19-20; Pacific, pp. 12-14.

³² *Id.*

³³ Another affiliate of a BOC, such as a holding company or services affiliate, may solicit customer approvals for all parts of the enterprise with no question that any nondiscrimination obligation would apply. The Commission in its Non-Accounting Safeguards Order found that such affiliates may provide services for both the BOC and the §272 affiliate, so long as the costs are properly apportioned and fully documented. (Non-Accounting Safeguards Order, ¶182)

VII. SECTION 272(e)(2) DOES NOT INCLUDE CPNI

Section 272(e)(2) addresses a BOC's provision of exchange access service to its §272 affiliate and other providers of interLATA service.³⁴ It has nothing to do with provision of services to end users, and so does not involve CPNI. The Commission examined §272(e)(2) in its Non-Accounting Safeguards Order, and there correctly found that §272(e)(2) information relates to network functionality and that the information requirements of §272(e)(2) can be sufficiently met by network disclosure rules.³⁵ This determination is much more compatible with the language of §272(e)(2) than an attempt to read CPNI into that provision. Inclusion of CPNI under §272(e)(2) would be incompatible with §222's requirement for customer approval prior to disclosure of CPNI.³⁶ Furthermore, Congress specifically addressed CPNI in §222, and the Commission has made CPNI subject to the nondiscrimination provision of §272(c)(1). There is no legitimate need to also include CPNI by interpretation (and it could only be included by interpretation, since §272(e)(2) does not mention CPNI) in the scope of §272(e)(2). Finally, even if §272(e)(2) did address CPNI, it would only be CPNI associated with exchange access services provided to providers of interLATA service, and not the CPNI of end users.

³⁴ Several commenters suggested that CPNI is encompassed with §272(e)(2), including AT&T, pp. 16-17; MCI, p. 24; Sprint, p. 14-15; WorldCom, pp. 16-18; AllTel, pp. 7-8; TRA, p. 15; and Cox, pp. 9-10.

³⁵ Non-Accounting Safeguards Order, ¶253; see, also, SBC, p. 14; BellSouth, p. 23.

³⁶ Since "information" under that section does not include CPNI, "service" certainly does not include a customer approval solicitation service.

VIII. MCI'S RELIANCE ON §§201(b) AND 202(a) IS MISPLACED

MCI asserts that §§201(b) and 202(a) of the Act apply to carrier provision of CPNI³⁷ and PIC-freeze information³⁸. MCI is plainly wrong. It is well established that both of these sections apply only to the provision of common carrier communications services regulated under Title II.³⁹ Two distinct questions must be asked in order to determine whether a particular activity is subject to such Title II regulation.⁴⁰ Is the activity an interstate or foreign communications service by wire or radio? Is the person or entity offering the service as a common carrier? Although carrier use of CPNI or PIC-freeze information to provide a communications service may be an incidental part of that communications service, carrier provision of such information to another carrier or other entity is not a communications service for purposes of Title II of the Communications Act.

The provision of CPNI or PIC-freeze information does not employ wire or radio facilities and does not allow recipients of the information to "communicate or transmit intelligence of their own design and choosing."⁴¹ The provision of this

³⁷ MCI at 12-14, 18, 22-23.

³⁸ MCI at 28.

³⁹ See, e.g., Amendment of Sections 64.702 of the Commission's Rules and Regulations ("Third Computer Inquiry"), 2 FCC Rcd. 3035 (1987); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 430-32 (1980), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 207-11 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

⁴⁰ Detariffing of Billing and Collection Services, CC Dkt. No. 85-88, Report and Order, 102 F.C.C.2d 1150, 1168 (1986)

⁴¹ National Ass'n of Regulatory Util. Com'rs v. FCC, 525 F.2d 630, 641 n.58 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976), quoting Industrial Radiolocation Service, Docket No. 16106, 5 FCC 2d 197, 202 (1966).

information is an administrative or marketing function, not a communications service, and it does not fall within the first criterion.

The provision of CPNI or PIC-freeze information to another carrier could not properly be described as a "common carrier" service even if it were deemed to be a "communications" service. Under the *NARUC I* test, an entity is a common carrier with respect to a particular service if it is under a legal compulsion to "hold [itself] out indiscriminately to the clientele [it] is suited to serve."⁴² Nothing in the Act compels a carrier to offer CPNI or PIC-freeze information indiscriminately to others. Indeed, the entire structure of §222 compels carriers to be selective in providing access to CPNI to others, releasing it only with customer approval to designated recipients. Accordingly, the provision of this information does not satisfy the second Title II criterion.

Even if §§201(b) or 202(a) were relevant to the provision of CPNI or PIC-freeze information, they do not compel disclosure of such information to third parties on the same basis of approval as may be sufficient for internal use by the carrier and its affiliates. Both of these sections include an explicit standard of reasonableness. They prohibit only *unreasonable practices and unreasonable discrimination*. Section 222 establishes a standard of reasonableness with respect to disclosure of CPNI. In the interest of protecting customer privacy while preserving carrier efficiency, §222 allows internal use of CPNI in some cases without customer approval, *e.g.*, in the provision of the services under §222(c)(1),

⁴² *Id.* at 641. See also, Norlight Request for Declaratory Ruling, File No. PRB-LMMD 86-07, Declaratory Ruling, 2 FCC Rcd. 132 (1987).

or pursuant to the exceptions of §222(d), and in some cases with approval that may be opt-out, oral, or written. In contrast, §222(c)(2) establishes the reasonable standard of "affirmative written request" for disclosure of CPNI to third parties, thereby balancing consumer privacy with competitive concerns. Nothing in §§201(a) or 202(b), which are general in nature, undercuts the specific distinctions established by §222 between a carrier's own use and disclosure to third parties.

On a different issue, MCI makes the extraordinary suggestion that "the Commission should require all carriers to purge all databases, related to or used in marketing, of all CPNI."⁴³ They base this suggestion on their belief that any CPNI rules fashioned by the FCC in this proceeding "may be frustrated without a general database 'cleansing' rule."⁴⁴ This suggestion is extreme, unnecessary, and completely impractical. Carrier databases that include CPNI are used for many purposes, including ordering, provisioning, billing inquiry, and sales and marketing. These databases are vital tools supporting the ongoing business. Companies simply cannot function without them. MCI suggests that all carriers go to great expense and completely disrupt their businesses without knowing what the CPNI rules will be, and based solely on an unsubstantiated "belief" that the rules "may" be frustrated. It is not even clear from MCI's comments how this action would lead to compliance with the CPNI rules adopted in this proceeding. This suggestion must be rejected.

⁴³ MCI, pp. vi, 29-30.

⁴⁴ *Id.*

IX. THE COMMISSION SHOULD NOT ADOPT AIRTOUCH'S
NONDISCRIMINATION PROPOSAL FOR CMRS AFFILIATES

We agree with AirTouch that §222 is in force regardless of whether §272⁴⁵ applies. However, it does not follow that a nondiscrimination approach similar to §272(c)(1) must be applied to a BOC's CMRS affiliate, particularly a PCS affiliate.

Congress specifically declined to require a separate affiliate for the provision of CMRS. The FCC is currently examining LEC/CMRS safeguards⁴⁶ and has proposed a separate corporate affiliate for the provision of PCS but not a fully structurally separate affiliate. This proposal means that there would be no requirements for separate officers, separate debt, or independent operation of the PCS affiliate.⁴⁷ This is quite different from the requirements of a §272 affiliate. In the LEC/CMRS docket, the Commission specifically asked for comment on organizational or procedural guidelines for the protection and dissemination of CPNI. The paragraph AirTouch cites simply recites AirTouch's position on the relationship between §22.903(f) and §222 of the Act.

No further organization structure needs to be put in place to protect CPNI. Under §222, CPNI between the BOC and the PCS affiliate could only be shared pursuant to whatever customer approval is adopted by the Commission for

⁴⁵ AirTouch, p. 5.

⁴⁶ Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Services, Notice of Proposed Rulemaking, WT Docket No. 96-162, FCC 96-319 (August 13, 1996).

⁴⁷ Id., ¶118.

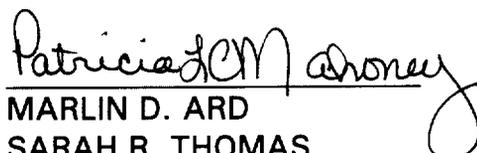
sharing of CPNI among affiliates. This may well be a different form of approval than required for disclosure of CPNI to third parties.

X. CONCLUSION

We urge the Commission to reject the proposals of some commenters that are designed to create unbalanced competition that would ignore the privacy rights of the BOCs' customers. Congress had a reason for including each of the provisions at issue here, and the Commission must establish rules that implement that Congressional intent for all of the provisions, not just the nondiscrimination requirements. The Commission has received proposals that gives full effect to the purposes of §§222, 272, and 274, and it is those proposals that the Commission should adopt.

Respectfully submitted,

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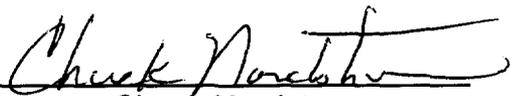
Date: March 27, 1997

CERTIFICATE OF SERVICE

I, Chuck Nordstrom, hereby certify that on this 27th day of March, 1997, copies of the foregoing "REPLY COMMENTS OF PACIFIC TELESIS GROUP" re: CC Docket No. 96-115, were served by hand to the parties listed below.

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