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June 2, 1997

EX PARTE

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Ex Parte Filing in CC Docket Nos. 96-115; 96-149; 96-162

Dear Mr. Caton,

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. Section 1.1206(a)(1), enclosed please find six copies of materials, two for each of the above-cited proceedings, that are today being submitted to Messrs. Metzger, Nakahata and Ms. Attwood.

Please see that these materials are associated with the appropriate dockets. Thank you in advance for your kind cooperation.

Sincerely,

Kathryn Marie Krause (RW)

Kathryn Marie Krause

No. of Copies rec'd 0+5
List A B C D E

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EX PARTE

Mr. A. Richard Metzger, Deputy Bureau Chief, Common Carrier Bureau
Ms. Dorothy T. Attwood, Senior Attorney, Common Carrier Bureau,
Policy and Planning Division
Mr. John Nakahata, Chief, Competition Division, Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 500 (Metzger)
Room 533 (Attwood)
Room 658 (Nakahata)
Washington, D.C. 20554

RE: Ex Parte Filing in CC Docket Nos. 96-115; 96-149; 96-162

Dear Messrs. Metzger and Nakahata and Ms. Attwood,

Enclosed please find an analytical piece authored by Professor Laurence H. Tribe regarding the First Amendment issues associated with U S WEST's access and use of Customer Proprietary Network Information ("CPNI") and the sharing of that CPNI among affiliated U S WEST companies. Professor Tribe was retained by U S WEST to conduct such an analysis. And, as he notes in his attached letter, he was retained on the condition that he exercise his independent judgment on the relevant First Amendment issues, whether or not they coincided with the business interests of U S WEST.

Professor Tribe's conclusions can be summarized as follows: CPNI is "information," the collection and distribution of which is protected under the First Amendment and the regulation of which is governed by free speech principles and precedents.

1. The CPNI owned by and in the possession of U S WEST was most often collected in the context of engaging in protected speech activities with its customers. It provides

the foundation for informed communication between U S WEST personnel and its customers -- a form of protected First Amendment speech.

2. The communication of CPNI between or among U S WEST corporate entities is itself a protected speech activity.

3. Given the clear First Amendment attributes of the above speech activities, statutes which might be interpreted either to impede U S WEST's use of CPNI or interfere with the communication of CPNI within its corporate family should be narrowly construed. Specifically, Section 222 -- which contains no affirmative approval requirement on its face -- should not be construed to require U S WEST to obtain affirmative customer approval before it can access or use its CPNI or share that CPNI with <u>any</u> of its affiliates (including a Section 272 affiliate).

4. Nor should U S WEST be put in the position where it must choose between exercising its free speech rights and respecting a customer's expectations of privacy. That would be an unlawful conditioning of U S WEST's constitutional rights. Thus, any requirement that a BOC must share CPNI equally as between an affiliated company and an unaffiliated telecommunications provider, or that a BOC must use the same process of customer approval for both entities, would be constitutionally suspect.

While certain BOCs, such as U S WEST and Pacific Telesis, have asserted in their advocacy that the CPNI proceedings do implicate First Amendment issues and principles, the propositions put forward by Professor Tribe are newly presented in the context of CPNI. They are, however, of long duration in the context of speech that naturally occurs within any business -- speech that drives organizational governance, marketing and sales, public policy, and other lawful business activities. Those employed by a business clearly have free speech rights to communicate factual, truthful information to others similarly employed and are encouraged to share information of importance to the business to advance the interests of that business. Those interests are sometimes purely commercial, sometimes of a policy nature, sometimes altruistic. But, in any event, the speech is clearly entitled to protection against governmental actions in the nature of overbroad governmental interference, prior restraints or censorship. Thus, while we request here only a limited action -- avoidance of the clearly unconstitutional device of prior customer approvals to access, use or share CPNI -- Professor Tribe's analysis indicates that the First Amendment must play a more significant role in all future analyses regarding CPNI communications.

During the course of his analysis, Professor Tribe repeatedly notes that a prior authorization requirement imposed on one of U S WEST's telecommunications carriers or mandated as a condition of sharing CPNI with other U S WEST affiliates would raise serious First Amendment issues. He states that it would be a mistake for the Commission to construe 47

U.S.C. Section 222 as authorizing such a requirement. Such burdens on the First Amendment ought to be imposed, if at all, he notes, only pursuant to the clearest and most unambiguous congressional mandate and after the most explicit congressional determination that the ends Congress seeks to achieve are worth the burdens on First Amendment rights the Commission is considering imposing. He concludes that the standard is not met in the current situation.

Professor Tribe's opinion involves the access, use and sharing of CPNI. That subject is implicated not only by the Commission's current and ongoing CPNI proceedings (CC Docket No. 96-115), but also its proceeding addressing the appropriate Section 272 affiliate safeguards (CC Docket No. 96-149) and the wireless safeguards proceeding (CC Docket No. 96-162). All these proceedings involve, to some extent, access, use and sharing of CPNI. While that sharing is sometimes discussed within the context of intra-corporate sharing, across product lines (for example, local service and wireless service), it also implicates inter-corporate sharing (between a U S WEST local exchange telecommunications carrier and a Section 272 affiliate, for example). The teachings of Professor Tribe's analysis is that within both of these contexts, U S WEST and its customers have protectable First Amendment free speech rights and that such rights would be severely and negatively impacted by a prior customer authorization approval requirement before CPNI could be accessed, used or shared.

The Commission itself, in its appellate capacity, has explicitly acknowledged the pro-competitive value in intra/intercorporate CPNI information sharing, including the consequential benefits to consumers. While that acknowledgment was made with a particular focus on the effect of such sharing on competition and the consumer marketplace, the underlying logic of the position is equally applicable to a CPNI First Amendment analysis. Not only from a competition and consumption perspective, but from a First Amendment one, as well, "maximum freedom" in accessing, using and sharing CPNI should be the goal. Certainly, there is nothing about the passage of Section 222 or its language that suggests a contrary position is required. Furthermore, such a position will clearly increase consumer awareness and choices. As the Supreme Court has well observed, "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

Based on Professor Tribe's analysis, we urge the Commission to refrain from adopting a prior customer approval authorization for the use and sharing of CPNI within a single corporate enterprise. As Professor Tribe persuasively asserts, there are other approval models more aligned with the relationship between U S WEST and its customers and the protection of First Amendment values. For example, an opt-out process would fully address customers' privacy expectations (as required by Section 222), but would still permit communication to flow freely and spontaneously between U S WEST and its customers and within U S WEST itself.

Furthermore, while there may be certain "nondiscrimination" obligations imposed on a BOC's behavior *vis-a-vis* certain of its affiliates (Section 272(c)(1)), those obligations should be construed to require no more than that CPNI be provided equally to all those authorized to receive it. The process for securing the requisite approvals should not be required to be the same. Indeed, in fairness to customer privacy expectations, they cannot be the same. Consistent with First Amendment principles, U S WEST should be able to share CPNI based on an opt-out approval process. That free speech advancing model should not be extended to third parties who have no business relationship with the customer. Nor should the BOC be required to abandon that model for one involving an affirmative prior authorization in the name of "equality of access."

We appreciate your consideration of the attached analysis. As stated in the letter, we would welcome the opportunity to meet with you on these issues.

Sincerely,

Kathryn Marie Krause (RW)

Kathryn Marie Krause

LAURENCE H. TRIBE
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June 2, 1997

EX PARTE

Mr. A. Richard Metzger, Deputy Bureau Chief, Common Carrier Bureau
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Federal Communications Commission
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Room 658 (Nakahata)
Washington, D.C. 20554

RE: Ex Parte Filing in CC Docket Nos. 96-115; 96-149; 96-162

Dear Messrs. Metzger, Nakahata and Ms. Attwood,

I am writing on behalf of U S WEST, Inc., a corporation whose affiliates include local telecommunications carriers, cellular and other wireless operations, database and publishing services (both print and electronic), Internet access and interactive electronic services, cable operations and an interexchange toll carrier (which, in the future, will function as a Section 272 affiliate). I have been retained to provide my legal opinion on the constitutionality of a regulatory mandate imposing an "affirmative customer approval requirement" before a U S WEST's carrier operation can access or use Customer Proprietary Network Information ("CPNI") internally or before it can share the CPNI with an affiliated company. This opinion is relevant to the Commission's ongoing proceedings in the above-referenced dockets.[1]

[1] I should note that I was retained on the condition that I would exercise my independent judgment on the First Amendment issue, whether or not it coincided with the business interests of U S WEST.

In the course of crafting this opinion, I have consulted not only Supreme Court precedent but also counsel for U S WEST and have been made aware of prior Commission decisions in the CPNI and privacy area. My conclusion is that an affirmative prior authorization approval requirement for a telecommunications carrier to access or use CPNI, or to share CPNI with an affiliate, would impinge seriously upon important First Amendment rights and that, even if it could in the end withstand the appropriate level of judicial scrutiny (something that is by no means clear and in fact seems doubtful), it would be a mistake for the Commission to construe 47 U.S.C. Section 222 as authorizing such a requirement. Such burdens on the First Amendment ought to be imposed, if at all, only pursuant to the clearest and most unambiguous congressional mandate and after the most explicit congressional determination that the ends Congress seeks to achieve are worth the burdens on First Amendment rights the Commission is considering imposing. That standard is not met here.

Executive Summary

CPNI is information the collection and distribution of which is protected under the First Amendment and the regulation of which is governed by free speech principles and precedents.

1. The CPNI owned by and in the possession of U S WEST was most often collected in the context of engaging in protected speech activities with its customers. It provides the foundation for informed communication between U S WEST personnel and its customers — a form of protected First Amendment speech.

2. The communication of CPNI between or among U S WEST corporate entities is itself a protected speech activity.

3. Given the clear First Amendment attributes of the above speech activities, statutes which might be interpreted either to impede U S WEST's use of CPNI or to interfere with the communication of CPNI within its corporate family should be narrowly construed. Specifically, Section 222 — which contains no affirmative approval requirement on its face — should not be construed to require U S WEST to obtain affirmative customer approval before it can access or use its CPNI or share that CPNI with any of its affiliates (including a Section 272 affiliate).

4. Nor should U S WEST be put in the position where it must choose between exercising its free speech rights and respecting a customer's expectations of privacy.

That would be an unlawful conditioning of U S WEST's constitutional rights. Thus, any requirement that a BOC must share CPNI equally as between an affiliated company and an unaffiliated telecommunications provider, or that a BOC must use the same process of customer approval for both entities, would be constitutionally suspect.

CPNI Is Information Forming The Foundation For Protected Speech

CPNI is information owned and collected by U S WEST in its capacity as a provider of service to millions of customers. As such, it is the foundation for informed speech between U S WEST and its customers or potential customers. The creation, compilation and communication of information lie at the core of what the First Amendment protects.

CPNI is an essential ingredient of expression — the raw material, as it were, for informed and protected speech. In this regard, CPNI is similar to other data inputs, such as wire service reports that serve as raw material for newspaper stories. This raw data is sometimes used unedited and is sometimes rewritten into stories which are then compiled into a newspaper and distributed to readers.

The connection between information and speech is inextricable. Indeed, the Supreme Court has applied the First Amendment even to regulations dealing merely with *physical* objects and substances essential — in a purely instrumental rather than intrinsic sense — to the formulation and communication of speech. For example, in Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 574, 581 (1983), the Court held that the imposition of a state use tax on the cost of paper and ink products consumed in production of newspapers violated the First Amendment. Again, in Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426-29 (1993), the Court struck down a ban prohibiting the use of newsracks to hold "commercial handbills" when no comparable ban applied to newsracks containing "newspapers."[2] It follows *a fortiori* that similar restrictions on intangible, information-bearing inputs, such as CPNI, that go beyond reasonable time, place and manner restrictions and that directly burden the constitutive elements of speech itself, would not be upheld.

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[2] See also Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) (striking down statute giving mayor unbridled discretion over whether to permit newsracks to be affixed to public property on city streets).

Communication Of CPNI Between U S WEST Affiliates Is Itself Protected Speech

While the fact that CPNI forms the foundation for speech activities is quite obvious, less obvious might be the constitutionally significant fact that the communication of CPNI between and among U S WEST affiliates is itself protected speech. The fact that one U S WEST affiliate might have a relationship with a given customer, while another might not, does not eliminate the constitutional protection to which the communication of information between and among U S WEST's affiliates is entitled.

For example, in Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), the Supreme Court rejected any attempt to impose a requirement that speech, in order to be afforded First Amendment protection, occur publicly, *i.e.*, from within an organization to those outside. As the Court succinctly stated,

> The First Amendment forbids abridgment of the "freedom of speech." Neither the First Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

Id. at 415-16. The clear teaching of Givhan is that speech such as that under consideration here, *i.e.*, speech between two affiliated entities, is not stripped of First Amendment protection simply because it does not amount to a public communication.

While in certain specialized contexts (such as the discipline or discharge of public employees, where the government acts in a proprietary as well as sovereign capacity) speech on matters of purely private concern may be subject to more extensive government regulation,[3] it is obvious that the communication of CPNI between different units of

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[3] See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 593 (1985) (holding that false statements in a company's credit report did not involve matters of public concern which would have required a showing of actual malice for recovery of presumed and punitive damages under the standard of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)); Connick v. Meyers, 461 U.S. 138 (1983) (holding that an assistant district attorney's discharge did not violate her free speech rights, where the attorney was discharged for circulating a questionnaire concerning internal office affairs, which the Court deemed to be speech on an issue of personal, not public, concern).

I believe that the holdings of both these cases are inapposite to the current analysis. The Dun & Bradstreet case should be limited to the defamation context, and even in that context does not

U S WEST is not purely a matter of private concern. CPNI is valuable commercial information that is central to developing, designing, and marketing new kinds of telecommunications and other services for U S WEST's customers and communicating with its customers about those offerings. It is precisely the kind of information that the Supreme Court has described as being the lifeblood of a free enterprise economy:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[4]

Based on the above, I believe that the communication of CPNI between and among U S WEST affiliates is itself protected speech. As such, any restriction on that speech should be confined to appropriate time, place and manner regulations. An outright ban on such communication, or the adoption of a "manner" restriction that would effectively operate as a ban (*e.g.*, the requirement of affirmative approval), would violate the First Amendment.

A Prior Approval Requirement To Access, Use Or Share CPNI Would Violate U S WEST's Free Speech Rights, As Well As Those Of Its Customers

Any rule requiring that U S WEST secure a customer's affirmative "opt-in" approval before it could make use of CPNI would raise serious First Amendment questions. Response

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stand for the proposition that speech involving matters of "private" concern is generally accorded diminished First Amendment protection. See Gertz, 418 U.S. at 346 (noting the impropriety of a standard that would force state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not). Similarly, Connick should be limited to the specialized context of public employers' decisions to discipline or discharge public employees. Again, the Connick Court took pains to make clear that its holding was not meant to cast doubt on the general principle that speech on "private matters" was not outside the First Amendment's protections. 461 U.S. at 147.

[4] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Indeed, the Commission itself has cited to this language in recognition of the societal and economic value associated with such speech. See Memorandum Opinion and Order, CC Docket No. 78-100, 77 FCC 2d 1023, 1035-36 para. 32 (1980).

rates for opt-in requests are notoriously low, and an opt-in rule would be, in effect, a prohibition on the use and transmission of CPNI.[5] Such a restrictive approach is all the more dubious because there are other obvious ways of securing customer approvals that do not intrude on speech, *e.g.*, through a notice and "opt-out" scheme reflecting the customer's expectations given his or her existing relationship with U S WEST.

In a variety of contexts, the Supreme Court has recognized that imposing an "opt-in" requirement to speak or gain access to information can be an unconstitutional burden on speech. For example, in Martin v. Struthers, 319 U.S. 141 (1943), the Court invalidated a city ordinance that forbade door-to-door solicitation unless the residents of the household had affirmatively requested the solicitor to approach. The Court explained that:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the

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[5] In prior contexts, the Commission has acknowledged the problem any business — including one with an existing relationship with a customer — would have in securing an affirmative written document, particularly from a residential customer. Moreover, in the context of existing business relationships the Commission has held such authorizations unnecessary to protect consumer privacy. These findings have been repeatedly made over more than a decade, and in varying factual contexts, strongly suggesting that the findings are universal and not context-specific. See, e.g., BNA Second Recon. Order, 8 FCC Rcd. 8798, 8810 (1993); the Commission's Briefs in People of the State of California, et al. v. FCC, Nos. 92-70083, *et al.*, (9th Cir.), filed July 14, 1993; AT&T/MCI Order, 7 FCC Rcd. 1038, 1045 para. 44 (1992) (carriers have had little success getting customers to return written authorizations); Computer III Remand Order, 6 FCC Rcd. 7571, 7610 n.155 (1991) (under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction); Phase II Recon. Order, 3 FCC Rcd. 1150, 1163 para. 98 (1988) (customers would not object to use of CPNI to increase offerings made available to them); Phase II Order, 2 FCC Rcd. 3072, 3094 para 153 (such authorizations unnecessary to protect consumer privacy), 3116 n. 300 (1987); Bureau Waiver Order, 101 FCC 2d 935, 942 para. 21 (1985) (noting that even customers who make a verbal commitment to a company to engage in business might not return a signed authorization); 1985 FCC Waiver Order, 102 FCC 2d 503, 506 para. 6 (1985). Nothing about the adoption of Section 222 changes these prior observations, which essentially amount to "regulatory notice" of generally understood facts.

community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants.[6]

The Martin Court premised its decision on the right of the audience to receive information, as well as the speaker's right to convey it.[7] Compare Lamont v. Postmaster General, 381 U.S. 301 (1965) (where the Court invalidated a requirement that recipients of literature first notify the Post Office that they wished to receive it); and Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2391 (1996) (where the Court noted the "obvious restrictive effects" of a statutory regime which resulted in individuals being deprived of the ability to access information "without considerable advance planning . . . [Such] restrictions [would] prevent programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute); to viewers who would like occasionally to watch a few, but not many, of the programs . . . ; and to viewers who simply tend to judge a program's value through channel reputation, *i.e.*, by the company it keeps").[8]

As in the Denver Telecom case, customers of U S WEST might well want to decide what information they want to receive offering by offering, or month by month, or circumstance by circumstance.[9] A prior affirmative approval requirement would deprive both U S WEST

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[6] 319 U.S. at 141.

[7] See id. at 143 ("this freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.").

[8] Certain of the Supreme Court holdings in the area of opt-in requirements arise in the context of information that might be deemed unpopular or embarrassing. See, e.g., the Martin decision (distribution of information by "poorly financed causes of little people," 319 U.S. at 146); Lamont (access to Communist literature); McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516-17 (1995) (anonymous campaign materials). Compare Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986). The holdings of Martin and Denver Telecom, however, cannot be so limited, since the unpopular or embarrassing nature of the information was offered up only as a secondary or tertiary ground in support of the decisions.

[9] Indeed, my understanding is that the Commission has evidence before it, in the nature of a customer survey, that demonstrates that a substantial volume of customers want to receive information from their telecommunications provider about new products and services, and that this interest is particularly pronounced in certain identifiable customer segments. See Pacific Telesis Survey, Questions 9-11 and Analysis at page 9.

and its customers of the ability to engage in such speech activities, in the absence of the customer's considerable advance planning in ensuring that a previous communication had been made to U S WEST pre-approving the future dialogue.[10]

The teaching of the above cases is that any affirmative approval requirement to access or to use information in one's possession, or to fashion communications from that information, would be presumptively unconstitutional. In the context of Section 222, I do not believe such a requirement could be upheld.

Because it is undisputed that an affirmative written approval requirement would result in a telecommunications carrier's being cut off from all but a small portion of the CPNI in its possession, it is clear that such a requirement would severely restrict access to the raw data for speech and the communication of speech itself. That would violate the First Amendment rights not only of U S WEST but of its customers as well. Certainly, nothing in the recently enacted Section 222 specifically imposes such a constitutionally infirm customer-approval process.

It is clear that Section 222 seeks to protect certain customer privacy interests in the information possessed by telecommunications carriers generally. But it is equally clear that that Section does not mandate affirmative written approvals from customers before telecommunications carriers with existing business relationships, or their affiliates, access,

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[10] I am aware of Section 222's provisions for oral approval on inbound calls, see Section 222(d)(3), as well as the fact that, theoretically, an oral outbound telemarketing campaign for approval is not beyond the statute's permissible "approval" methodologies. However, where U S WEST's main telecommunications operations have between 10 and 11 million customers, such an approval methodology is certain to suppress speech for some significant period because the process of securing approvals itself would be extremely labor-intensive and quite expensive, undoubtedly causing U S WEST to refrain from speaking in situations where it might otherwise be inclined to speak. Compare Denver Telecom, 116 S. Ct. at 2391 (rejecting an "opt-in" approach to information access in part due to the added costs and burdens that these requirements impose upon a cable system operator, which might encourage an operator to ban programming that the operator would otherwise permit to run). I believe a similar situation would arise were U S WEST required to secure affirmative oral approvals from its existing customer base.

use or share CPNI. Indeed, such a requirement, with respect to any business and its speech activities with its customers, would be unprecedented.[11]

It is equally clear, however, that customer privacy protection can be assured by utilizing much less speech-suppressing mechanisms than affirmative approvals. The Commission's obligation to construe federal statutes in a manner that attempts to sustain their constitutionality strongly argues for a statutory interpretation that looks to some privacy-protection method other than affirmative approvals. See Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988).

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[11] Compare 47 U.S.C. Section 551(b)(1) (requiring written or electronic consent (i.e., affirmative approval) only to share subscriber information with unaffiliated third parties). Indeed, I have been advised that the only affirmative written consent requirement involving a business' own use of its information is found in the Commission's current CPNI rules, stemming from its Open Network Architecture (ONA) environment. There, the Commission has required that BOCs (and GTE) secure affirmative written consent from customers with more than 20 lines before those companies are permitted to use CPNI in the marketing and selling of enhanced services and customer premises equipment (CPE). A failure to secure such affirmative approval renders the information "restricted," such that it can be used only for network services marketing and sales.

Nothing about the history of the Commission's current CPNI rules calls into question the constitutional arguments developed here. Even if estoppel-like arguments were applicable — despite such cases as New York v. United States, 505 U.S. 144, 183 (1992), and despite the fact that in the First Amendment realm the rights of listeners as well as those of speakers are at stake — it is my understanding that the BOCs did not contest the constitutionality of the current CPNI rule largely because they did not perceive the rule as operating as a fundamental (almost *per se*) barrier to their speech with customers with more than 20 lines. As the Commission itself acknowledged, carriers often have a special relationship with larger customers and can fairly easily secure approval to use the information or obtain it outside the customer record itself. See Computer III Remand Order, 6 FCC Rcd. at 7611 para. 86; Communications Satellite Corporation Petition for Declaratory Ruling, 8 FCC Rcd. 1531, 1535 n.39 (1993). Thus, the Commission's rule was not anticipated to (nor did it) suppress speech to any significant extent.

Moreover, the Commission's rules pertained to the use of CPNI only with respect to two related markets, i.e., enhanced services and CPE. This "affirmative consent" regime should be compared to that currently being proposed by the Commission, where an affirmative approval requirement is being suggested across a telecommunications carriers' entire base of customers and with respect to any services not stemming from the service from which the CPNI was derived. The contexts are totally different.

There are certainly other models for protecting customer privacy, while still accommodating customer expectations. For example, the Martin case, as well as others,[12] demonstrate that the First Amendment permits government to empower individuals with the means to ensure that they are left alone. Indeed, the Commission's own cases and rules establish a "do not disturb" policy with respect to telemarketing, whereby an individual can request not to be contacted even by a business with which he or she has an existing business relationship.[13] Such "opt out" processes permit communication to flow freely and spontaneously, restricting speech only in those circumstances where an individual makes clear his/her desire not to engage in it.

Thus, I conclude that a customer's privacy interests would be fully addressed by the kind of "opt-out" procedure that I understand U S WEST and other telecommunications carriers are proposing. Any customer who wishes to prevent CPNI relating to him or her from being used by U S WEST's telecommunications carriers, or from being shared with other U S WEST affiliates, would have the opportunity to accomplish precisely that result through a notice and opt-out procedure. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1510 (1996) (noting availability of alternatives that would not intrude on speech in holding restriction unconstitutional); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593-94 (1995) (same); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech).

The Commission Should Not Condition U S WEST's Exercise Of Its Constitutional Rights

I understand that arguments are being made, in portions of the above-referenced proceedings, that a BOC Section 272 affiliate and all third parties must be treated "equally" with respect to access and use of CPNI. In part, this obligation is said to derive from the language of Section 272(c)(1), and from the Commission's prior determination that CPNI is included in the word "information" used in that Section, thereby creating an obligation to provide CPNI on a non-discriminatory basis as between the BOC affiliate and non-affiliates.

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[12] See also Rowan v. Post Office Dept., 397 U.S. 728 (1970) (government may confer on an addressee the power to compel a mailer to remove his or her name from a mailing list); Frisby v. Schultz, 487 U.S. 474, 493 (1988) (Brennan, J., dissenting) ("unwanted mail may be forbidden").

[13] TCPA Order, 7 FCC Rcd. 8752 (1992); 47 CFR Section 64.1200(e)(2).

While there might be a non-discrimination obligation contained in Section 272(c)(1) with respect to providing CPNI to those duly authorized to receive it, any such obligation does not warrant treating U S WEST's affiliates the same way as non-affiliates with respect to the approval processes associated with access to CPNI. Indeed, treating both entities the same way would amount to an unconstitutional conditioning of U S WEST's First Amendment rights.

In particular, I focus here on proposals providing that whatever customer approval methods a BOC uses with respect to CPNI access, use and sharing within the BOC and among its affiliates would be deemed an appropriate customer authorization method to use in forcing the disclosure of CPNI outside the BOC and its affiliated companies. Under such proposals, if a BOC used an opt-out procedure to secure prior affirmative approvals from its customers, then such an opt-out procedure would automatically be deemed appropriate to force disclosure of the CPNI to unrelated telecommunications providers as well.

These proposals raise constitutional difficulties because they ignore the vital distinction between a BOC's own affiliates and unrelated third parties. As the Commission itself has recognized, and as seems self-evident, a customer's privacy expectations vary by relationship. There are minimal (if any) privacy concerns within an existing business relationship.[14] And the lack of privacy concerns extends to affiliated companies.[15] In contrast, in the absence of an ongoing business relationship with the customer, there arise special privacy concerns which must be accommodated.[16]

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[14] TCPA NPRM, 7 FCC Rcd. 2736, 2738 paras. 13-14 (1992); TCPA Order, 7 FCC Rcd. at 8770 para. 34. And see the Commission's Computer III Remand Order, 6 FCC Rcd. at 7610 para. 86 (where it noted that internal BOC access to CPNI did not raise significant privacy concerns); Phase II Recon. Order, 3 FCC Rcd. at 1163 para. 98 (where it noted that most RBOC customers would not object to having CPNI shared internally to increase offerings to customers).

[15] TCPA Order, id.; Bank America Order, 8 FCC Rcd. 8782, 8787 para. 27 (1993) (holding that information sharing between affiliates was not improper). See also U S WEST Comments, n.18, filed June 11, 1996 (citing to 1994 Louis Harris & Associates and Dr. Alan F. Westin survey done for MasterCard International, Inc. and VISA, USA, Inc. The survey demonstrated that a majority of those surveyed approved sharing information with affiliates to bring new or additional services, with the percentages increasing as the specific type of sharing and service offered was made explicit).

[16] The Commission has recognized that disclosure of CPNI to third parties, when not associated with a customer request to release the information, raises privacy concerns. Computer

Thus, it is reasonable to conclude that customers ordinarily desire (or, at a minimum, do not object to) communications from businesses with which they already have a relationship and from their affiliates. Accordingly, an opt-out arrangement fully protects customers' interests in these circumstances. But customers do not ordinarily expect a company to share confidential information with unrelated third parties. In that context, inferring customer approval on the basis of an opt-out procedure for an unrelated party would violate customer privacy expectations, whose protection is the ostensible purpose of 47 U.S.C. Section 222.

Therefore, forcing a BOC to use the same method for obtaining customer approval for affiliates and third parties would cause serious problems. In practical terms, a BOC's choice would be between (i) using an opt-out procedure for both itself and unrelated entities, thereby violating the trust of established customers (and concomitantly forfeiting their goodwill),[17] and (ii) using an opt-in procedure throughout that would effectively silence the BOC because of the difficulty of obtaining affirmative approvals. Imposing such a Hobson's choice would be constitutionally questionable under the doctrine of unconstitutional conditions.

In order to engage in constitutionally protected speech, U S WEST would be forced to compromise or violate its customers' privacy expectations, in contravention of the intentions of Section 222 itself, if it desired to make use of its own commercial information to communicate either internally or externally. Since, as survey evidence before the Commission demonstrates, local telecommunications carriers hold a place of high trust in the minds of their customers, and are not thought to release information inappropriately,[18] it would be unconscionable to force such carriers to release CPNI to third parties based on a notice and opt-out model solely to ensure their own continued access to the CPNI. I am

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III Remand Proceedings, 6 FCC Rcd. at 7611 para. 86. Compare 47 U.S.C. Section 631(b)(1) (holding that subscriber information cannot be released to third parties except with the written or electronic consent of the subscriber).

[17] A notice and opt-out model might be appropriate for the release to third parties of name and address information only. See 47 U.S.C. Section 551(c)(2)(C)(i) (cable act); 18 U.S.C. Section 2710(b)(2)(D)(i) (video privacy act). Compare BNA Second Report and Order, 8 FCC Rcd. 4478, 4486 para. 39 (1993) and 47 C.F.R. 64.1201(e) (allowing for release of name and address information). But it has generally not been considered appropriate for the transfer of other, more substantive, information. See 47 U.S.C. Section 551(b)(1) (requiring written or electronic consent to release subscriber information).

[18] Pacific Telesis Survey, Questions 2C, 3.

advised that, in practical effect, an "equality" principle applied to a notice and opt-out approval methodology would most likely result in information not being accessed or used internally in forming the foundation for constitutionally protected speech.[19]

In effect, the government would impose a penalty on BOCs — the disruption of their relationships with existing customers — if the BOCs were to choose an opt-out CPNI procedure to permit themselves to speak. Such a forced choice raises serious questions, to say the least, under the unconstitutional conditions doctrine, which recognizes that "'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.'" Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2347 (1996) (internal citation omitted); see also O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2357 (1996).[20]

In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), for example, the Supreme Court held that a state agency could not condition the approval of a rebuilding permit for beachfront property on the owners' agreement to waive their property right to deny free public access to the beach. The Court explained that, even though the state agency could

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[19] For example, the Commission's cellular CPNI rule (47 C.F.R. Section 22.903) contains a "share equally" requirement, the result of which (I have been advised) is that carriers have chosen not to share the CPNI at all. Not only does such a regulatory mandate seem strange, given the fact that competitors of RBOCs have no absolute legal claim to CPNI (see, e.g., Catlin v. Washington Energy Company, 791 F.2d 1343 (9th Cir. 1986)), but it appears contrary to both commercial and public interests. See SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1494-95 (1995). Indeed, in the SBC case, the Commission itself argued that "courts have consistently recognized that capitalizing on informational efficiencies . . . is not the sort of conduct that harms competition," and that it "is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers" by utilizing CPNI. FCC Final Brief in SBC v. FCC at 49-50. There is nothing about the passage of Section 222 or its language that suggests a contrary position.

[20] Under this doctrine, public broadcasting stations, for example, cannot be required to choose between accepting public funds and engaging in editorial speech. See FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984). Public employees cannot be put to the "choice" of joining the prevailing political party or leaving their jobs. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 69, 72 (1990). Recipients of unemployment compensation cannot be told to change their religious views or forgo public assistance. See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-43 (1987).

have denied the permit outright, linking it to a waiver of the right to exclude amounted to an inappropriate "leveraging of the police power." Id. at 837 n.5. See also Dolan v. Tigard, 512 U.S. 574 (1994) (reaffirming Nollan and invalidating a rule that a property owner could not expand her store and pave her parking lot unless she dedicated a portion of her property for a public greenway and a pedestrian/bicycle pathway).

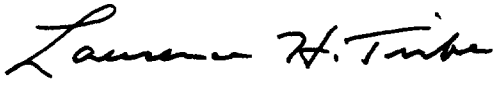
In Nollan, the Court held that the refusal to issue the needed permit was an unconstitutional condition on the owners' property rights — "not a valid regulation of land use but 'an out-and-out plan of extortion.'" 483 U.S. at 837. In the CPNI context, forcing BOCs to use the same methods for securing customer authorizations for both their affiliates and their competitors has a similar extortionate effect: if the BOC wishes to use a notice and opt-out procedure (the only effective method for enabling the BOC itself to speak), it must violate its customers' trust by affording its competitors access to the CPNI unless customers opt out. Such a choice is impermissible under the unconstitutional conditions doctrine.

Conclusion

For all these reasons, I conclude that an affirmative approval requirement for a telecommunications carrier to access or use CPNI internally or to share it with its affiliates would raise serious questions under the First Amendment. Thus, in keeping with the Commission's obligation to construe legislative enactments in a manner that avoids rather than raises constitutional difficulties, the Commission should not impose such a requirement.

U S WEST, and I, appreciate your consideration of this opinion. We would be happy to pursue the matters addressed herein at your convenience. Should you wish such a discussion, please advise Kathryn Marie Krause, Esq., U S WEST's counsel, at (303) 672-2859. She will be responsible for making the appropriate arrangements.

Sincerely,



Laurence H. Tribe