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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

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

Re: CC Docket Nos. 96-115; 96-149; 96-162

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, enclosed for filing are six copies of a letter from Bruce J. Ennis, Jr. to Richard A. Metzger, Dorothy T. Attwood and John Nakahata concerning the constitutional implications of certain approaches to the implementation of Section 222 that have been proposed in the above dockets, primarily CC Docket No. 96-115.

Please place copies of these materials in the above-captioned public dockets.

Yours truly,

Frank W. Krogh

Frank W. Krogh

cc: Jeannie Su
Carol Mattey
Richard Welch
William E. Kennard
Suzanne Tetreault
Richard A. Metzger
Dorothy T. Attwood
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July 7, 1997

EX PARTE

Mr. Richard A. 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 (Mr. Metzger)
Room 533 (Ms. Attwood)
Room 658 (Mr. Nakahata)
Washington, DC 20554

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

Dear Mr. Metzger, Ms. Attwood and Mr. Nakahata:

We have been asked by MCI Telecommunications Corporation to evaluate the constitutionality of certain proposals to implement the mandates of Section 222 of the Communications Act of 1934, 47 U.S.C. § 222 et seq. as amended (the Communications Act), regarding the use and disclosure of customer proprietary network information (CPNI).

We conclude that to interpret section 222(c)(1) to require affirmative customer approval for the use or disclosure of CPNI is fully consistent with the First Amendment to the United States Constitution. We have reviewed Professor Tribe's letter of June 2, 1997, (Tribe Letter) in which he concludes that there are potential constitutional problems with such an interpretation. In our judgment, these constitutional claims, which also implicitly challenge Section 222(c)(1) itself, are insubstantial.

I. The Statutory Scheme

With exceptions not relevant here, Section 222(c)(1) of the Act provides that a telecommunications carrier may not "use, disclose, or permit access to" CPNI absent customer

"approval" except as necessary to "provide the telecommunications service from which such information is derived," or to provide "services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." Section 222(d) provides for certain exceptions to this prohibition, none of which is relevant here. Section 222(c)(2) provides that a telecommunications carrier shall disclose CPNI "upon affirmative written request by the customer to any person designated by the customer."

Section 222 does not prohibit the use of aggregate customer information; indeed section 222(c)(3) expressly authorizes the use or disclosure of such information as long as it is used or disclosed on a nondiscriminatory basis. Thus, section 222 prohibits only the use or dissemination of individually identifiable customer proprietary data.

Although Professor Tribe seems to suggest that the Commission could interpret section 222 to allow BOCs to use or share CPNI with their long-distance affiliates without prior customer approval, see Tribe Letter at 2, the statute does not support such a reading. Section 222(c)(1) expressly prohibits local exchange carriers (such as U S West) from using CPNI for any purpose other than providing the telephone service from which the CPNI was derived, absent customer approval.[1] It is plain that it therefore prohibits BOCs from disclosing that information to their long distance affiliates, just as it prohibits use or disclosure to anyone else, absent customer approval.

The Commission is not, of course, free to ignore the clear mandates of the Communications Act because a party asserts that the statute violates the Constitution. In any event, as set out in further detail below, implementation of section 222(c)(1) by imposing a requirement of affirmative customer "approval" could not plausibly be attacked on First Amendment grounds.

II. The CPNI Provisions are Consistent with the First Amendment

Section 222 of the Act regulates a business activity: the collection and use of CPNI. The data at issue -- data related to the quantity, type, and amount of a telecommunications service subscribed to by a customer -- is data that telecommunications carriers possess only because that information has been provided by the customer in order to obtain service, or because the

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[1] We understand that the NPRM proposes, and almost all commenting parties have agreed, that the term "telecommunications service" in section 222(c)(1) is properly interpreted to mean "telecommunications service category." We express no opinion on that issue, and use "service" rather than "service category" simply as shorthand, not to suggest how "service" should be interpreted.

information is generated in the course of providing that service.[2] Restrictions on the use of such data for purposes other than the provision of the telecommunications service from which the CPNI is derived do not violate the First Amendment.[3]

As the Supreme Court noted in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" Id. at 456 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). Indeed, the Ohralik Court cited examples of regulation of business activity that do not offend the First Amendment which are similar to the regulation at issue here, including regulation of "the exchange of information about securities . . . corporate proxy statements . . . the exchange of price and product information among competitors . . . and employers' threats of retaliation for the labor activities of employees." Id. (citations omitted).

Professor Tribe cites no case that suggests otherwise. The cases he does cite are inapposite. In Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), for example, the Court invalidated a special tax on paper and ink that was used to publish newspapers, only because the tax singled out the press for differential treatment, raising fears that the government was using taxation as a tool to censor the press. Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), is similarly inapposite. That case involved a statute which banned the public dissemination of certain types of published material by banning the newsstands in which the material was distributed. As in Minneapolis Star, the Court's concern lay in the differential treatment of the press or of certain members of the press, a concern

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[2] Specifically, Section 222(f) of the Act protects from disclosure:

> information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and . . . information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

[3] Section 222 does not prevent U S West from engaging in protected speech regarding its business or its products. It does not prevent U S West from advertising or from engaging in telephone solicitation. It and other telecommunications carriers are free to promote their service offerings, rates, or products. All that Section 222(c)(1) prohibits is the unapproved use or disclosure of CPNI that U S West obtains in the course of providing local telephone service, for purposes other than those contemplated by the statute.

obviously unrelated to the statute at issue here.[4]

This is not to say, of course, that expressive activity engaged in by business entities is never entitled to any constitutional protection. Commercial speech -- that which "propose[s] a commercial transaction," Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980) (quoting Ohralik, 436 U.S. at 455-56), or informs the public so that it can make a reasoned choice among products or services, Central Hudson, 447 U.S. at 563 -- is entitled to constitutional protection, though not the same protection non-commercial speech enjoys. See id. (explaining that the "First Amendment's concern for commercial speech is based on the informational function of advertising"). The sharing of proprietary information internally or with an affiliate does not, however, amount to "propos[ing] a commercial transaction," nor does it represent speech that informs the public. Id. The proposed regulations at issue here thus do not impact commercial speech at all.

Even if the Commission were to conclude that section 222's restriction on the use of proprietary information is a restriction on commercial speech, interpreting section 222 to prohibit the use or disclosure of such information without affirmative customer approval would easily survive the scrutiny to which regulations of commercial speech are subjected.

"'[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." Board of Trustees v. Fox, 492 U.S. 469, 477 (1989), (quoting Ohralik, 436 U.S. 447 (1978)). Restrictions on commercial speech will be upheld if the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn. See Central Hudson 447 U.S. at 557.

There are two plainly substantial interests Congress has identified in support of its prohibition on the unauthorized use of CPNI. As this Commission noted, in the Joint Explanatory Statement Congress stated that section 222 "strives to balance both competitive and

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[4] Professor Tribe also cites Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), for the proposition that communication occurring within an organization is no different for First Amendment purposes from public communication. Givhan, however, dealt with the free speech protections provided to public employees vis a vis their government employer. Thus, Givhan and similar cases delineate to what extent the government, acting as employer, can punish its employees for engaging in protected speech, and present questions of law that are simply not applicable in this context.

consumer privacy interests with respect to CPNI." NPRM at 13; see also NPRM at ¶ 24, n.60.[5]

The Supreme Court has held that protecting the privacy of consumers is a "substantial" governmental interest. See, e.g., Edenfield v. Fane, 507 U.S. 761, 769. Congress reasonably concluded that regulation of CPNI is necessary to protect the privacy of telecommunications users. Telecommunications carriers possess the type of data at issue only because such data is obtained or created in the provision of telephone service. This information includes detailed information about the amount a customer spends on telecommunications services, the types of services utilized by a customer, the phone numbers a customer calls, and the length of the calls. Congress could reasonably conclude that most customers do not want this vast quantity of proprietary data used for purposes other than providing the telecommunications services from which the CPNI is derived. Cf. Turner Broad. Sys. Inc. v. F.C.C., 117 S.Ct. 1174, 1189 (1997) (holding that in assessing the constitutionality of a statute, courts must show deference to Congress' judgments).

The competitive concerns the CPNI restrictions are designed to address are also substantial, and Professor Tribe does not even address this interest. See Turner Broad. Sys., Inc. v. F.C.C., 115 S.Ct. 2445, 2470 (1994) ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.") (citations omitted). Local Bell operating companies such as U S West currently enjoy a virtual monopoly over the provision of telecommunications services in local markets. They possess CPNI about virtually all consumers of residential phone service in the country. There is no question that this data -- including details about customers' calling patterns and the amounts they spend on telephone service -- would be invaluable marketing tools to a BOC affiliate marketing its new long distance service. Thus, the sharing of CPNI with an affiliate would allow a BOC to leverage its dominant control of customer information to perpetuate dominant control of emerging competitive markets.[6] See Reply Comments of MCI Telecom. Corp. at 3, 8-9 (June 26, 1996), and Further Comments of MCI Telecom. Corp. at 6-7 (March 17, 1997), Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary network Information and Other Customer Information, CC Docket No. 96-115 (hereinafter "MCI Reply Comments" and "MCI Further Comments," respectively). Indeed,

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[5] See also NPRM at ¶ 24 (noting that the restriction on CPNI both "enhances customer privacy by giving customers greater control over CPNI use" and "prohibits carriers that are established providers of certain telecommunications services from gaining an advantage by using CPNI to facilitate entry into new telecommunications services .")

[6] This concern is highlighted by U S West's argument that it must be allowed to provide this data to its own long distance affiliate, but cannot be required to provide the same data to other, competing long distance companies. See Tribe letter at 2-3, 12-13.

the main focus of the Senate bill from which section 222 was drawn was restricting BOCs' own use of CPNI. See Comments of MCI Telecom. Corp. at 3 (June 11, 1996), Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary network Information and Other Customer Information, CC Docket No. 96-115 (hereinafter "MCI Comments") and MCI Further Comments at 6.

Under Central Hudson and its progeny, the next inquiry is whether the prohibition on the use or dissemination of CPNI directly advances the substantial governmental interests identified. It does. The prohibition on the dissemination of CPNI for unauthorized purposes directly furthers the interest in protecting consumer privacy. Indeed, no more direct fit can be imagined -- the prohibition prevents private data about a customer from being used or shared, absent customer approval.

The interest in facilitating the development of competition by preventing the leveraging of monopoly-derived advantages is also directly furthered by a requirement of affirmative customer approval under section 222(c)(1) before CPNI can be used or shared. As discussed above, the detailed information that incumbent, dominant local telecommunications carriers such as U S West possess would be invaluable to their long-distance affiliates in marketing long-distance services. The extent of the potential competitive advantage conferred by their monopoly-derived CPNI database is difficult to overstate. A BOC's long distance affiliate could use this data, for example, to target certain local customers. Requiring affirmative customer approval before CPNI may be used limits the BOC's advantage to some extent, allowing the development of competitive conditions.

Thus, the only remaining inquiry is whether a requirement of an affirmative customer approval under section 222(c)(1) is sufficiently narrowly drawn. "With respect to [this] prong, the differences between commercial speech and noncommercial speech are manifest." Florida Bar v. Went For It, et al.; 115 S. Ct. 2371, 2379 (1995). This is not a "least restrictive means test." See id. ("the 'least restrictive means' test has no role in the commercial speech context."). Instead, what is required "'is a fit between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" Id. (citations omitted).

Section 222(c)(1) and the proposal of affirmative customer approval are plainly sufficiently narrowly drawn. The statute prohibits only the unauthorized use or sharing of CPNI; it allows for the use of such data upon approval by the customer. No other effective alternative is readily apparent. Construing section 222(c)(1) to allow the use of an "opt-out" mechanism, as suggested by Professor Tribe, in which the use and dissemination of CPNI would be allowed unless a customer affirmatively and expressly forbade it, is not only flatly foreclosed by the

statute -- which expressly requires customer "approval"[7] -- but would also be ineffective.[8]

Moreover, in advocating an "opt-out" requirement, Professor Tribe implicitly recognizes that a customer's privacy interest can override any First Amendment interest possessed by the holders of a customer's CPNI. Although Congress could have chosen to accommodate that privacy interest by providing an "opt-out" requirement, there is no question that Congress can reasonably conclude, as it did, that all or most customers would prefer to have this individualized private information remain private, and enact a prohibition on the use or dissemination of CPNI, absent affirmative customer approval to the contrary.

In any event, even if an "opt-out" requirement were consistent with the statute and did effectively protect customers' privacy interests, it would do nothing to advance the other, equally important purpose of the statute -- to prevent the anti-competitive leveraging of the BOCs' monopoly-derived information advantage. Again, it is unlikely that most consumers would go through the process of making a written decision regarding the use of their CPNI. Congress has determined that the unrestricted use or dissemination of CPNI to market other services would harm competition, and Congress could reasonably conclude that consumers wanted the benefit of fair competition among all long-distance carriers, whether or not affiliated with a BOC. A regime in which the unregulated disclosure of CPNI was the norm, and individual customers were charged with policing this by affirmatively requesting their carrier not to use or disseminate CPNI, is not a plausible method of furthering the statutory goal.

It is true, as Professor Tribe notes, that in certain contexts courts have struck down

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[7] Section 222(c)(1) prohibits the use or dissemination of CPNI without customer "approval." The only reasonable interpretation of that phrase requires some affirmative act on the part of the customer -- such as the affirmative provision of verbal or written approval. See MCI Comments at 8-11 and MCI Reply Comments at 8-9. Professor Tribe, however, would interpret "approval" to mean passive acquiescence -- an interpretation not supported by the language or purpose of the statue.

[8] In his analysis, Professor Tribe assumes that the approval a customer will be required to provide will be written. Express written approval from the customer is not the only way to secure affirmative customer approval under section 222(c)(1). As Professor Tribe notes, commenters (including MCI) have urged that section 222(c)(1) should be interpreted to allow oral customer approval. See Tribe Letter at 8, n.10. That interpretation is completely consistent with the statutory language. Professor Tribe further asserts that an oral approval requirement would also be overly burdensome, and that only an opt-out requirement would pass constitutional muster. That is wrong on all counts. An opt-out requirement is clearly not constitutionally mandated. And, an oral approval method would plainly be significantly less restrictive than any written approval method. See MCI Reply Comments at 7-9.

statutes requiring recipients of information to affirmatively request access to that information before it can be received by them. In none of the cases cited by Professor Tribe, however, was a speaker attempting to disclose confidential information about an individual to a third party unless the individual affirmatively opposed disclosure. The cases cited in his letter involve governmental prohibitions on solicitation of the public, or on receipt by the public of constitutionally protected information. The statute at issue here does no such thing. It does not prohibit the solicitation of telecommunications customers, either by telephone or in person. It does not require that U S West or any other telecommunications carrier obtain prior permission from a consumer before that consumer can receive information about products or service offerings. It only prohibits telecommunications carriers from using CPNI without the consent of the individual for a purpose different from that for which it was obtained on a confidential basis, including disclosing such data to others, including a carrier's affiliates. The concerns expressed by the Court in the cases cited by Professor Tribe are simply not present here.

Finally, Professor Tribe asserts that telecommunications carriers must not only be allowed to share customer proprietary data with their own affiliates, but are also constitutionally protected from being required, pursuant to Section 272(c) and other nondiscrimination requirements, to share such data with third parties who are situated similarly to the carrier's affiliates. Thus, Professor Tribe argues that the Constitution mandates that U S West's long-distance affiliate be provided free access to proprietary customer data that can be used to market long distance services, but that the Constitution precludes the Commission from requiring that in those circumstances other long distance companies have nondiscriminatory access to that same information. That argument is wrong.

Professor Tribe argues that if a BOC is required to share with other long distance companies the same CPNI it shares with its affiliates, this will anger customers who will not want their CPNI so widely disseminated. If, however, the BOC attempts to obtain prior affirmative approval to share such information with non-affiliate long distance companies, the customers would not provide such approval. Thus, he asserts, BOCs are put in an "unconscionable" position of angering their customers or attempting to gain consent to the sharing of proprietary information that amounts to an unconstitutional condition on BOCs' ability to share proprietary data with their affiliates.[9]

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[9] In determining how section 272(c) and other nondiscrimination requirements should apply to CPNI use and disclosure, there are, of course, options other than the "all or nothing" approach posited by Professor Tribe. For example, the Commission could promulgate a rule requiring a telecommunications carrier to disclose CPNI to a third party demonstrating the requisite customer approval if the carrier discloses CPNI to its own affiliate with such approval. See MCI Further Comments at 11-13, 18-19. Under such a discrimination regime, the customer would retain control over disclosure of CPNI to all parties, thus removing the factual predicate for this portion of Professor Tribe's argument. None of these policy choices are inconsistent

This argument is flawed for several reasons. First, as discussed above, the BOCs do not have a constitutional right to share CPNI with their affiliates, or with anyone else. Second, although Professor Tribes asserts that it is so, there is no empirical basis for his factual conclusion that consumers would be angered if local exchange carriers disclosed individually identifiable CPNI to some or all long distance carriers, but would not be angered if BOCs disclosed that information to the BOC's affiliated long distance company. Indeed, the opposite conclusion is equally reasonable. Local customers currently have pre-existing relationships with long distance companies who are unrelated to their local phone service provider. It is certainly rational to assume that if individual customers were in favor of having their CPNI disseminated to any long distance carrier, it would be to the long distance carrier with whom they have an existing relationship.

Even if Professor Tribe's assumptions were correct, however, they would be irrelevant because the unconstitutional conditions doctrine does not apply in this context at all. The unconstitutional conditions doctrine "holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech.'" Board of County Comm'rs v. Umbehr, 116 S.Ct. 2342, 2347 (1996), quoting Perry v. Sinderman, 408 U.S. 593, 597 (1972). Thus, it is certainly true that, for example, a government contractor cannot lose his contract because he engages in speech critical of the government, Umbehr, supra, that the government cannot refuse to fund public broadcast stations because the stations editorialize, FCC v. League of Women Voters, 468 U.S. 364 (1984), and that public employees cannot be fired for failing to join a given political party, Rutan v. Republican Party, 497 U.S. 62 (1990).

Here, however, the government is not penalizing telecommunications carriers because they are engaging in protected speech. There is no government benefit being denied, nor is the government imposing a special burden on carriers. The mere fact that the regulation prevents U S West from behaving exactly as it wishes does not transform that regulation into an unconstitutional condition on a protected speech activity. Nor has Professor Tribe cited any case that suggests otherwise.

CONCLUSION

Congress has made the determination that the use of CPNI for a purpose different from that for which it was obtained, and the sharing of CPNI with carriers providing different services, whether or not affiliated, raises privacy and competitive concerns, and has forbidden the unauthorized use or sharing of such information on those grounds. Neither that legislative

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with the Constitution.

judgment nor an implementing regulation prohibiting use or disclosure of CPNI without affirmative customer approval violates the First Amendment.

Sincerely,

Bruce J. Ennis Jr.

Bruce J. Ennis, Jr.