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EX PARTE OR LATE FILED

Kathryn Marie Krause
Senior Attorney

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SEP 10 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 10, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222, SC-1170
1919 M Street, N.W.
Washington, DC 20554

RE: Ex Parte -- Customer Approval For Internal Access, Use and Disclosure of Customer Proprietary Network Information ("CPNI"), CC Docket No. 96-115 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149; and Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162.

Dear Mr. Caton:

Pursuant to Commission rule 47 C.F.R. § 1.1206(b)(1) attached are an original and six copies of a written ex parte presentation which was submitted to Mr. A. Richard Metzger, Ms. Dorothy T. Attwood and Mr. John Nakahata on September 10, 1997. Please associate this presentation with the above-referenced proceedings.

Acknowledgment of this submission is requested. A copy of this letter and the ex parte presentation is provided for this purpose. Please date stamp this copy and return it to the messenger who has been instructed to wait for it.

Please call if you have any questions.

Sincerely,

No. of Copies rec'd
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Attachment

Kathryn Marie Krause
(RM)

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LAURENCE H. TRIBE
1575 MASSACHUSETTS AVENUE
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September 10, 1997

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, Nakahata and Ms. Attwood,

In a letter dated June 2, 1997, I wrote to you on behalf of U S WEST, Inc. with respect to certain proposals before the Commission regarding the use and disclosure of customer proprietary network information (CPNI).

Although it was not sent directly to me, I have been made aware of an ex parte letter filed with the Commission on July 7, 1997 by Mr. Bruce Ennis on behalf of MCI Telecommunications Corporation, which purports to take issue with my analysis. However, significant portions of Mr. Ennis' letter are premised on misapprehensions of my prior communication to you.

In my prior letter, I explained that:

- Given the clear First Amendment attributes of CPNI-related speech, the 1996 Telecommunications Act — whose provisions (including Section 222) contain no affirmative consent requirement on their face — should not be construed to require a BOC to obtain affirmative customer consents before it can use its CPNI or share that CPNI with any of its

Messrs. Metzger and Nakahata and Ms. Attwood
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affiliates (including a Section 272 affiliate). Instead, the Act should be interpreted as permitting an "opt-out" approval mechanism whereby, so long as customers did not object, a BOC would be permitted to access and use CPNI internally and to share CPNI with its affiliates.

- Nor should the Act be interpreted as requiring BOCs to share CPNI equally as between an affiliated company and an unaffiliated telecommunications provider, or to use the same process for customer approval for both entities. In practical terms, such a rule would force a BOC to choose between (i) using an opt-out procedure for both itself and unrelated entities, thereby violating the trust of established customers (who would not expect CPNI to be shared with unrelated entities absent affirmative consent by customers), and (ii) using an opt-in procedure throughout that would effectively silence the BOC because of the difficulty of obtaining affirmative consents.

Mr. Ennis proceeds from the view that I advocate a construction of Section 222 that would "allow BOCs to use or share CPNI with their long-distance affiliates without prior customer approval," Ennis Letter at 2 — even though Section 222 specifically requires customer "approval" except in certain circumstances. That description of my position is not correct, on a number of levels.

As I made clear in my initial letter, I assuredly do not advise the Commission to forgo the requirement of customer approval. Rather, the question is how approval is to be measured. Nothing in the statute requires an opt-in procedure rather than an opt-out arrangement, and Mr. Ennis cites no legislative history or canon of statutory construction on the matter. My point is that — given the absence of an unambiguous congressional statement compelling such a burden on First Amendment activities — the 1996 Telecommunications Act should not be construed as requiring express affirmative consent by customers in order to allow BOCs to use CPNI or share it with their affiliates. Mr. Ennis admits that "it is unlikely that most consumers would go through the process of making a written decision regarding the use of their CPNI." (Page 7). Accordingly, a requirement of express affirmative consent would in effect silence the BOCs. It is well-settled that statutes are to be construed where possible to avoid constitutional questions, and the Commission should heed that maxim in construing Section 222. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Moreover, Mr. Ennis is wrong to focus on Section 222 as a statutory provision imposing special CPNI obligations specific to BOCs. Section 222 applies to all

telecommunications carriers. The Commission has proposed deriving special CPNI rules for BOCs based on the nondiscrimination provisions of Sections 272 and 274 — provisions that say nothing about customer consent (or about CPNI in particular). There is every reason to read the nondiscrimination provisions narrowly to avoid the constitutional question that would otherwise be presented.

Mr. Ennis contends that the communication and use of CPNI are not protected by the First Amendment because they are “business activities.” That is a non sequitur. Operating a cable system or publishing a newspaper are “business activities” as well, but they are certainly entitled to First Amendment protection. The CPNI owned by U S WEST is a vital data input which provides the foundation for informed communication between U S WEST personnel and its customers. It is much more integral to protected expression than were the purely physical inputs whose regulation was held to violate the First Amendment in Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 574, 581 (1983) (paper and ink products), or Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426-29 (1993) (newsracks).

Further, the sharing of CPNI between or among U S WEST corporate entities is itself a protected speech activity. It represents the communication of information — which of course is just what the First Amendment protects. If anything, CPNI is far more informative than many of the forms of expression that are protected under the First Amendment. *E.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (plurality opinion) (nude dancing); Ward v. Rock Against Racism, Inc., 491 U.S. 781, 790 (1989) (music); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (assuming that sleeping in park is protected expression); Spence v. Washington, 418 U.S. 405, 409 (1974) (*per curiam*) (hanging American flag upside down with peace symbol taped to it); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (wearing black arm bands to school). For example, a federal district court recently ruled that computer software programs are a form of protected expression “like music and mathematical equations.” Bernstein v. United States Dept. of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996).¹

That the expression occurs within the U S WEST corporate family does not eliminate the constitutional protection to which the communication is otherwise entitled, under

¹ On August 25, 1997, the court reaffirmed its prior ruling, holding that the Clinton Administration’s revised restrictions on encryption software exports are an unconstitutional prior restraint in violation of the First Amendment. Bernstein v. United States Dept. of State, No. C-95-0582 MHP (N.D. Cal. Aug. 25, 1997).

decisions like Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 415-16 (1979).² Indeed, any other rule would be unthinkable: it would permit the government to prohibit communications between a company's executives or between a parent corporation and its subsidiary.³

Mr. Ennis does not deny any of this; in fact, he admits (at page 4 of his letter) that "[t]he sharing of proprietary information internally or with an affiliate does not . . . amount to 'propos[ing] a commercial transaction.'" That is just the point. The sharing of CPNI between or among U S WEST corporate entities is entitled to full, undiluted First Amendment protection — not simply to the intermediate scrutiny applicable to restrictions on commercial speech.

The bulk of Mr. Ennis' argument is that an affirmative customer consent requirement can be justified by an interest in consumer privacy and what Mr. Ennis calls an interest in "competition." (Page 7 of his letter). Much of his analysis is beside the point or in fact supports my view. Of course I do not deny that Section 222 reflects a concern for consumer privacy. My point is that this concern can be fully accommodated by an opt-out arrangement which permits consumers to take steps to prevent BOCs from sharing CPNI with their affiliates. Such an opt-out procedure is hardly meaningless — it is used, for example, to measure consent in class actions under Fed. R. Civ. P. 23 — and in fact it reflects the expectations of consumers that CPNI relating to them would, absent objection, in fact be shared among members of a corporate family.

Mr. Ennis further asserts — with no supporting citation — that "Congress has determined that the unrestricted use or dissemination of CPNI to market other services would harm competition." (Page 7). Congress has made no such determination, and in fact unrestricted use of CPNI is typically understood to be pro-competitive. See People of State

² Mr. Ennis attempts to relegate Givhan to the context of the government's power to regulate speech in its capacity as employer (page 4 n.4 of his letter). The attempt backfires. It is settled that, when government acts in a proprietary capacity as employer, it has even greater authority to discipline or discharge employees based on their speech. The principle manifested in Givhan applies a fortiori here.

³ Mr. Ennis' reference to forms of speech that are themselves instruments of crimes or wrongful conduct — such as speech constituting an agreement to fix prices in violation of the antitrust laws (page 3 of his letter) — is utterly beside the point. The substance of the communication at issue here is not itself illegal, and no one suggests otherwise.

of California v. FCC, 39 F.3d 919, 931 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995) (“The FCC found that the BOCs are uniquely positioned to reach small customers, and that it would be economically infeasible to develop a mass market for enhanced services if prior authorization was required for access to CPNI. If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option and thereby impair the development of the mass market for enhanced services in the small customer market.”); SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1495 (D.C. Cir. 1995) (upholding FCC judgment that it was in the public interest to allow AT&T/McCaw’s use of CPNI to enhance its ability to market its service directly to the customers of other cellular carriers, because such use “should lead to lower prices and improved service offerings designed to lure those customers away”).

Indeed, unrestricted use of individually identifiable customer information is the norm in contexts as diverse as cable service, credit cards, mail order catalogs, and grocery purchases. Competitors have no legally enforceable right to receive such information. See, e.g., Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986) (utility was not guilty of monopolization under § 2 of the Sherman Act for passing along customer information to its merchandising division while withholding it from its competitors).

In fact, Mr. Ennis’ proposal would disserve competitive equity: long-distance providers have substantial CPNI in their possession, yet under Mr. Ennis’ view they would have no reciprocal obligation to provide customer information to BOCs absent affirmative customer request. In addition, his solution — that BOCs be forced to divulge CPNI to competing long-distance providers if they wish to share the CPNI within the BOC corporate family — runs afoul of the obvious purpose of Section 222 in protecting consumer privacy interests. The undenied evidence (see pages 7 & n.9, 11 & n.15 of my letter of June 2, 1997) is that a majority of consumers approve of sharing information with affiliates to develop and market new and additional services. By contrast, consumers would not likely expect U S WEST to share CPNI with unrelated companies.

Mr. Ennis also contends that the burden on U S WEST of an affirmative customer consent requirement could be minimized by permitting “oral” approval to suffice. As I noted in my original letter, however (page 8 n.10), U S WEST has between 10 and 11 million customers. Any campaign to solicit oral approvals would be extremely labor-intensive and costly. U S WEST has informed me of the results of its affirmative consent CPNI trial, which confirm my views on this point.

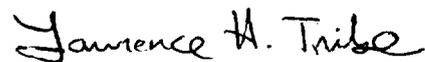
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Finally, Mr. Ennis takes issue with the point that BOCs would suffer an unconstitutional burden by being forced to choose between not sharing CPNI with their affiliates, or sharing it on equal terms with their competitors. He insists that "the unconstitutional conditions doctrine does not apply in this context at all." Letter, p. 9. But there is no CPNI exception to the Constitution. The reality — as the filings before the Commission demonstrate — is that competitors like MCI have a keen interest in obtaining the BOCs' CPNI and in preventing BOCs and their affiliates from using the CPNI. If BOCs are required to divulge this sensitive information to competitors as a condition of the BOCs' own speech — i.e., the BOCs' expression of the information to their affiliates and the BOCs' use of it to communicate with their customers — then the BOCs' speech will be penalized and discouraged. That is precisely the sort of Hobson's choice that triggers the unconstitutional conditions doctrine.

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

Sincerely,

A handwritten signature in cursive script that reads "Laurence H. Tribe".

Laurence H. Tribe

cc: Mr. Bruce Ennis