

cently when usage information enabled the carrier to defend itself against a multimillion-dollar lawsuit from AT&T. The interexchange carrier claimed Ameritech had overcharged for three-way calls. In the past, the local carrier would have had no means of challenging the IXC's claims, but usage data indicated that those claims were inflated.

To support their modeling and on-line analytical capabilities, many carriers also have loaded demographic data—often at the household level—into their warehouses. Users, however, say internal information has much more predictive value.

"We haven't found much relationship to demographic variables," says Farler. "For example, there is no relationship between income and anything."

Christine Wright, vice president of database services for Matrixx Marketing, agrees that demographic information is of little value in segmenting customers, but she says it is useful in developing telemarketing scripts targeting different types of customers.

BellSouth's Bennett says demographic data has been more useful in the business market than for residential applications. Vendor-supplied data might reveal, for example, that purchase decisions for a chain of restaurants are made at corporate headquarters.

GTE has used demographics to corroborate information learned from internal analysis, says Forringer. The carrier built a database of small office/home office users based on information contained in its own systems, then verified the results by comparing them with data from an outside supplier.

What new developments will occur in data warehousing moving forward?

Forringer lists several areas he wants to analyze. One area would look at groups of customers that behave similarly and link them to primary market research to better understand how to communicate with different behavioral groups. Another area would study how segments differ in response to different types of communication and measure the market response to GTE's and competitors' actions. U S West's Farler says she'd like to keep closer tabs on the responses to campaigns, including those who made inquiries but did not purchase a service.

An area that is beginning to get attention is text mining. Like data mining, this would involve looking for patterns in information—but the input would be customer service records and other sources

that are not easily quantified. A prerequisite for text mining will be to develop standard terminology for customer service representatives to use in describing their interactions with callers.

W.H. Inmon, author of "Building the Data Warehouse," the book many credit with helping to create the data warehousing boom, says companies that have built data warehouses will turn their attention next to managing those warehouses. Inmon has founded Pine Cone Systems to provide tools that will enable users to apportion data warehousing costs to various departments within an organization.

There also may be an opportunity for intelligent agents that would automatically deliver vital information to key executives without requiring the executives to generate an inquiry, says David Newman, senior manager for KPMG's data warehousing practice.

Clearly, data warehousing is becoming entrenched in carriers' business operations. Bell Atlantic's Ingalls describes the technology as "table stakes" for playing in the new competitive market. "If you look at our competitors now, AT&T, MCI and Sprint have been at this game for some time," he says. "Using data warehousing and data mining is how they've operated. This will be one of the assets we'll have to develop. Data warehousing will be critical to being successful." ☐

Churn control

Several firms are offering wireless carriers data analysis models that they have developed to help prevent churn.

Mercury Cellular in Lake Charles, La., and GTE Wireless in Tampa are using a system developed by GTE's Mike O'Brien, GTE's product manager for Churn Manager.

The Churn Manager system collects data from switches, customer service and billing systems, and activation systems. Results are presented to customer service representatives through a graphical user interface, which indicates the probability that a particular customer will churn, how valuable that customer is and the customer's credit class. For customers likely to churn, the system can suggest an action such as an alternative rate plan, which the carrier can customize.

The system also can be used to create lists of customers to call for specific campaigns. A carrier wishing to convert callers from analog to digital service might target a customer with high revenue and feature usage who carries an old phone.

Cincinnati Bell Information Systems and fellow Cincinnati Bell subsidiary Matrixx Marketing have teamed to offer another churn management system.

A customer likely to churn in three months is different from one who'll churn after one year, says Christine Wright, vice president of database services for Matrixx Marketing. Those in the first group primarily drop out for financial reasons, while the second group is more rate plan-oriented.

Using information from billing systems, the CBIS/Matrixx product segments customers into four groups, including those who are primarily price-driven, hassle-free or service-oriented, says Wright. The final group evaluates all criteria equally.

There are two components of price that drive churn, according to Wright—the number of free minutes and the peak price per minute. Matrixx works with customers to pilot and test offers to address these concerns.

Churn management software is also available from Lightbridge and Coral Systems. JE



APPENDIX B

Section 222(c), entitled “Confidentiality of Customer Proprietary Network Information,” allows carriers to access, use or disclose CPNI with respect to the provision of a telecommunications service from which such information is derived or services necessary or used in the provision of such telecommunications service. No customer approval is required to use information for these purposes. Beyond Section 222(c)(1)(A) and (B) purposes, customer approval (or operation of law) is necessary.

As is obvious from the statutory language, the statute does not specify the type of “approval” necessary to allow for broad CPNI use or the means required to be utilized to obtain such approval. It is clear, under standard rules of statutory construction, that a written consent requirement should not be read into the provisions of Section 222(c)(1), in light of the express mention of a writing in Section 222(c)(2).¹ The absence of such an expression in (c)(1) is a patent indication of Congress’ intent not to impose such a requirement with respect to that statutory provision.²

As to affirmative consents in general, an expanded view of the legislative history of Section 222 patently demonstrates that such an approach was also rejected. Furthermore, as pointed out by U S WEST in earlier filings, an expanded legislative history of Section 222(c) demonstrates that it was the last in a number of iterations of House Bills initiated by Representative Markey over a period of legislative sessions. The two bills addressing CPNI that immediately preceded the language in H.R. 1555 were H.R. 3432 and H.R. 3626. H.R. 3432 pertained only to LECs and required “affirmative request[s]” to use CPNI broadly. H.R. 3626 changed the scope of the statutory provision to all common carriers and changed the standard for broad use to “approval.” Clearly, the deletion of the word “affirmative” in the bill immediately preceding the language chosen for inclusion in H.R. 1555 is significant. It demonstrates a clear Congressional intent that the approval requirements of Section 222(c)(1) have a different aspect than the carrier obligation outlined in Section 222(c)(2) and that an affirmative consent requirement was rejected with respect to CPNI access and use for a statutory standard that allows for a more benign implementation.

It is obvious that Congress mandated nothing “affirmative” by way of customer approval in Section 222. Thus, Congress could certainly not have meant to erect a material and substantial barrier to a business’ use of its internal information in a manner that verges on infringing on two fundamental constitutional rights, *i.e.*, property rights and speech rights. A Commission conclusion to the contrary would be unlawful.

¹ The latter section requires a carrier to provide CPNI to any entity designated by the customer in writing. In this regard, the requirement is a codification of the Commission’s existing CPNI rules.

² A sound rule of statutory construction holds that an express statutory requirement in one place, contrasted with statutory silence elsewhere, shows an intent to confine the requirement to the specified instance. *See Field v. Mans*, 116 S. Ct. 437, 442 (1995). *See also Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *American Civil Liberties Union v. Reno*, 929 F. Supp 824, 850 (E.D.PA. 1996).

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September 10, 1997

EX PARTE

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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

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.

Messrs. Metzger and Nakahata and Ms. Attwood
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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.

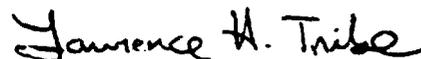
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Finally, Mr. Ennis takes issue with the point that BOCs would suffer an unconstitutional burden by being forced to choose between not sharing CPNI with their affiliates, or sharing it on equal terms with their competitors. He insists that "the unconstitutional 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,



Laurence H. Tribe

cc: Mr. Bruce Ennis