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Communications

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 24, 1997

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RE: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Docket No. 96-115)

Dear Ms. Salas:

On Monday, November 24, 1997, on behalf of AirTouch Communications, Inc., the attached material was delivered to Dorothy Atwood, Tonya Rutherford, and Lisa Choi of the FCC's Common Carrier Bureau. Please associate the attached material with the above-referenced proceedings.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4960 should you have any questions or require additional information concerning this matter.

Sincerely,

Kathleen Q. Abernathy

Attachments

cc: Dorothy Atwood
Tonya Rutherford
Lisa Choi

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AIRTOUCH COMMUNICATIONS, INC.

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FEDERAL COMMUNICATIONS COMMISSION
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LEGAL ANALYSIS OF USE OF CPNI BY CMRS CARRIERS TO MARKET CPE AND ENHANCED SERVICES

CC Docket No. 96-115

INTRODUCTION

On June 11, 1996, AirTouch Communications, Inc. ("AirTouch") filed comments on the Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding.[1] AirTouch's comments generally supported the Commission's proposed approach to implementing new Section 222 of the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act"). Specifically, AirTouch concurred with the Commission's tentative conclusion that the reference to "telecommunications service" in Section 222(c)(1) meant that the Commission should segregate the different categories of telecommunications services such that CPNI obtained in connection with the provision of one category of service may not be utilized with regard to one of the other categories in the absence of customer approval.[2] AirTouch also supported the tentative decision to treat local, interexchange, and commercial mobile radio services ("CMRS") as the three categories of telecommunications services for purposes of implementing Section 222.[3] AirTouch believes that the approach reasonably balances the legitimate privacy concerns of consumers with the interests of competitive carriers.[4]

Despite its general support of the *NPRM*, AirTouch urges the Commission to reconsider the tentative finding that CPNI may not be used in connection with the marketing of enhanced services and customer premises equipment ("CPE").[5] Section 222 should be broadly read to permit carriers to use CPNI in the provision of non-telecommunications services, including enhanced services and CPE, without prior authorization. The Commission's tentative finding to the contrary is not a correct reading of Section 222 and is otherwise unreasonable and unworkable, particularly as applied to CMRS carriers.

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[1] *Implementation of the Telecommunications Act of 1996; Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking*, 11 FCC Rcd 12513 (1996)("*NPRM*").

[2] AirTouch Comments at 2-4; *NPRM*, 11 FCC Rcd at 12524 ¶ 22.

[3] AirTouch Comments at 2.

[4] *Id.* at 2-4.

[5] *NPRM*, 11 FCC Rcd at 12526 ¶ 26.

DISCUSSION

I. New Section 222 Expressly Permits Carriers to Utilize CPNI in Marketing Enhanced Services and CPE

New Sections 222(c) and (d) establish requirements for maintaining the confidentiality of CPNI gathered or obtained in the provision of a telecommunications service. Section 222(c)(1) states:

> Except as required by law or with the approval of the customer a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, *or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.*[6]

The Commission has properly concluded that this language requires that CPNI obtained in connection with the provision of one category of telecommunications service (either local, interexchange, or CMRS) may not be utilized with regard to one of the other categories in the absence of customer approval.[7] The Commission also tentatively found that CPNI may not be used in connection with the marketing of enhanced services and CPE.[8]

AirTouch submits that the Commission's tentative conclusion regarding the use of CPNI in connection with the marketing of enhanced services and CPE is wrong. Nothing in new Section 222 prohibits a carrier from using CPNI obtained from providing a telecommunications service to market enhanced services or CPE to its customers of that

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[6] 47 U.S.C. § 222(c)(1)(emphasis supplied).

[7] *NPRM*, 11 FCC Rcd at 12524 ¶ 22.

[8] Paragraph 26 states in pertinent part: "The CPNI prohibition restricts unauthorized use of CPNI for any purpose other than those specified in Section 222(c)(1) and the exceptions listed in Section 222(d). For example, CPNI obtained from the provision of any telecommunications service may not be used to market information services or CPE without prior customer authorization." *Id.* at 12526 ¶ 26 (footnote omitted).

telecommunications service. Indeed, this conclusion finds substantial support in the record of this proceeding.[9]

The use of the term "services," rather than the narrower term "telecommunications services," makes clear that Section 222(c)(1)(B) permits carriers to use CPNI without prior authorization in the provision of non-telecommunications services, as long as those services are "necessary to, or used in, the provision" of the telecommunications service from which the CPNI was derived (*viz.*, local, interexchange, or CMRS). This conclusion is bolstered by reference to the sole example of the type of service encompassed by Section 222(c)(1)(B) offered by Congress, *i.e.*, "the publishing of directories." Directory publishing, like enhanced services and CPE, is not a telecommunications service. Thus, if Congress intended the language of Section 222(c)(1)(B) to cover a non-telecommunications service such as directory publication, it would be unreasonable to conclude that the language does not cover other non-telecommunications services such as enhanced services and CPE.

II. Permitting CMRS Carriers to Use CPNI to Market Enhanced Services and CPE is Reasonable and in the Public Interest

Permitting CMRS carriers to use CPNI to market enhanced services and CPE is not only consistent with the language of new Section 222(c)(1)(B), but also is consistent with the intent of Section 222(c)(1)(B) to balance consumer privacy with competitive and efficiency concerns. Enhanced services and CPE are sufficiently related to CMRS service offerings such that it is reasonable to conclude that enhanced services and CPE are "necessary to or used" in the provision of CMRS. Indeed, it is difficult to imagine cellular or PCS service offerings without the concomitant CPE.[10] Voice messaging service is another example of this phenomenon. Voice messaging is an information service that permits the completion of calls that otherwise would go unanswered, and in this respect is similar to telecommunications services such as call waiting, caller ID, call forwarding, and call answering. All of these services are reasonably viewed by the customer as an integral part of the package of services offered by CMRS providers.

In addition, marketing related non-telecommunications services in conjunction with the provision of CMRS services offers customers the benefit of "one-stop

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[9] *See, e.g.*, Ameritech Comments at 2-6; AT&T Comments at 5-11; Bell Atlantic Comments at 4-5; NYNEX Comments at 11-13; U S WEST Comments at 14-15.

[10] *See Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4032 ¶¶ 29-30 (1992).

shopping." Indeed, the Commission has long recognized the important consumer benefits of "one-stop shopping." For example, in the *McCaw/AT&T Transfer of Control* proceeding, the Commission stated:

> We believe that the benefits to consumers of "one-stop shopping are substantial . . . The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company . . . "One-stop shopping" promotes efficiency and avoids consumer confusion.[11]

AirTouch believes that CMRS customers can and should *expect* carriers to use CPNI to develop and market new services to them. If a prior authorization requirement prohibited the use of CPNI for the provision of enhanced services and CPE in conjunction with the three main categories of telecommunications services, however, the consumer benefits of "one-stop shopping" would be lost.

Further, the use of CPNI for the provision of enhanced services and CPE under Section 222(c)(1)(B) would not compromise the CMRS consumers' privacy interests. A CMRS customer's privacy rights are not adversely affected when a customer receives marketing information regarding non-telecommunications services from a CMRS carrier. Further, and perhaps more important, a CMRS customer has a *voluntary* business relationship with the carrier and thus can easily choose to give their business to another carrier if a given provider does a poor job of maintaining customer confidentiality. Given the difficulty and expense of attracting and maintaining new customers, CMRS carriers have strong incentives to use CPNI in a responsible manner.

In short, AirTouch submits that nothing in Section 222 restricts a carrier's ability to use CPNI to market enhanced services and CPE provided that the carrier is marketing such services to customers of the same telecommunications service segment (local, interexchange, and CMRS) from which the CPNI was derived. Indeed, this

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[11] *McCaw/AT&T Transfer of Control, Reconsideration Order,* 10 FCC Rcd 11786, 11795-96 ¶¶ 15-16 (1995). *See also McCaw/AT&T Transfer of Control,* 9 FCC Rcd 5836, 5886 ¶ 83 (1994); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7610 ¶ 94 (1991); *Bell Operating Company CPE Relief Order*, 2 FCC Rcd 143, 147-48 ¶¶ 29, 31 (1987).

interpretation of new Section 222 is the most reasonable reading of the statute as applied to CMRS carriers.[12] AirTouch notes however that while new Section 222 permits identical treatment among carriers (local, interexchange, or CMRS) regarding the use of CPNI to market enhanced services and CPE, the Commission may conclude that for competitive reasons it must restrict the use of CPNI by local exchange carriers. As discussed below, if competitive concerns dictate establishing more restrictive CPNI requirements for monopoly carriers, the Commission should not extend such restrictions to CMRS carriers.

III. At a Minimum, the Commission Should Maintain the Status Quo With Regard to Restricting the Use of CPNI to Provide Enhanced Services and CPE

In addressing new Section 222, the Commission has concluded that it should endeavor to fashion a regulatory regime for CPNI "that balances consumer privacy and competitive concerns."[13] In that regard, the Commission has long held that the use of CPNI in the provision of enhanced services and CPE by monopoly carriers raises significant competitive concerns.[14] It is for this reason that, prior to the 1996 Act, the Commission established restrictions applicable to the use of CPNI for the marketing of enhanced services and CPE by AT&T, the BOCs, and GTE.[15]

As discussed above, AirTouch believes that the language of new Section 222 clearly permits carriers to use CPNI in providing enhanced services and CPE. Nevertheless, should the Commission determine that competitive concerns still require

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[12] For the Commission to do otherwise would effectively establish four rather than three categories of service. For CPNI purposes, a telecommunications carrier's services would in essence be segregated into the local, interexchange, and CMRS categories as well as an enhanced services and CPE category and CPNI could not be utilized between any of the four categories without prior customer authorization.

[13] *NPRM*, 11 FCC Rcd at 12514, 12521 ¶¶ 2, 15; *see also* H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 205 (1996).

[14] *See Computer III Remand Proceedings*, 6 FCC Rcd at 7611.

[15] "With respect to marketing enhanced services, written prior authorization has been required from customers that subscribe to more than 20 lines. BOC personnel could use the CPNI of customers that subscribe to 20 or fewer lines, however, without prior authorization. Unaffiliated ESPs by contrast have been required to obtain prior customer authorization to obtain access to CPNI maintained by the BOCs." *NPRM*, 11 FCC Rcd at 12516.

restrictions on the use of CPNI for marketing enhanced services and CPE by monopoly carriers, such restrictions should not and need not be imposed upon CMRS carriers.

The competitive concerns associated with the use of CPNI in the provision of enhanced services and CPE by monopoly carriers simply do not apply to competitive carriers. Unlike the market for local service, the CMRS industry is a competitive industry in which the rigors of market-place discipline eliminate opportunities and incentives for CMRS carriers to act in an anticompetitive or discriminatory manner even with regard to the use of CPNI. This conclusion is reflected in the fact that CMRS had no restrictions upon their use of CPNI to market enhanced services and CPE to their subscribers prior to the 1996 Act.[16] The competitive realities of the CMRS market are essentially the same after the 1996 Act as before the 1996 Act except that competition continues to increase as PCS and enhanced SMR systems are deployed. Further, as discussed above, new Section 222 clearly demonstrates Congressional intent to free carriers from restrictions upon the use of CPNI to provide enhanced services and CPE. Thus, there is no reason for the Commission to take the step of placing restrictions upon a CMRS carrier's ability to utilize CPNI for the provision of CPE or enhanced services. Should the Commission decide that competitive concerns require safeguards to be placed upon monopoly carriers' use of CPNI in the provision of enhanced services and CPE, then those restrictions should be narrowly tailored to address those concerns without imposing undue restrictions upon competitive carriers such as CMRS providers. Such an approach would be consistent with the Commission's regulatory treatment of CPNI *prior* to the 1996 Act.

CONCLUSION

In sum, AirTouch submits that nothing in Section 222 restricts a carrier's ability to use CPNI to market enhanced services and CPE provided that the carrier is marketing such services to customers of the same telecommunications service segment (local, interexchange, and CMRS) from which the CPNI was derived. Indeed, this interpretation of new Section 222 is the most reasonable reading of the statute as applied to CMRS carriers. AirTouch notes further that nothing in new Section 222 compels identical

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[16] Indeed, more than ten years ago, the Commission elected to permit BOC-affiliated cellular carriers to market enhanced services and CPE to their customers. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 57 Rad. Reg.2d 989 (1985). As the Commission recognized, "the competitive structure of the cellular radio-telephone industry adequately protects the public from the dangers of potential anticompetitive abuse arising from the joint provision of cellular services and CPE by the [BOCs'] cellular subsidiaries." *Id.* at 1002.

treatment among carriers (local, interexchange, or CMRS) regarding the use of CPNI to market enhanced services and CPE. Therefore, if the Commission concludes that it must restrict the use of CPNI by local exchange carriers, it should not extend such restrictions to CMRS carriers.