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February 10, 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222, SC-1170
Washington, DC 20554

RE: Customer Proprietary Network Information, CC Docket No. 96-115,
Non-Accounting Safeguards, CC Docket No. 96-149

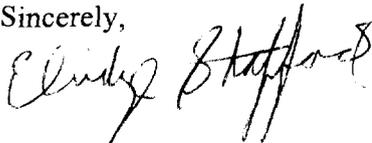
Dear Ms. Salas:

Please be advised that yesterday, on behalf of Ameritech, Bell Atlantic, BellSouth, SBC, and U S WEST, Kirven Gilbert of BellSouth, Robert Gryzmala of SBC, Kathryn Krause of U S WEST, Joseph Mulieri of Bell Atlantic, and the undersigned met with Christopher Wright, Paula Silberthau and Suzanne Tetreault of the Office of General Council and Dorothy Attwood of the Policy and Program Planning Division of the Common Carrier Bureau. The purpose of this meeting was to present a coalition position on CPNI issues. The attached material covers the points that were discussed.

In accordance with Section 1.1206(a)(2) of the Commission's Rules, the original and one copy of this letter are being filed with your office for inclusion in the public record for the above-mentioned proceedings. Because the meeting concluded late in the day, this letter is being submitted on the next business day. Acknowledgment of date of receipt of this transmittal is requested. A duplicate of this letter is provided for this purpose.

Please contact me if you have any questions

Sincerely,



Attachment

cc: Mr. Christopher Wright

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BOC Coalition
Ameritech, Bell Atlantic, BellSouth, SBC, U S WEST

**AFFIRMATIVE CONSENT REQUIREMENT IS NOT MANDATED BY STATUTORY
LANGUAGE, IS CONTRARY TO CUSTOMER EXPECTATIONS, REASONABLE
COMMERCIAL PRACTICE AND FIRST AMENDMENT**

Statutory Interpretation

- Section 222(c)(1) uses word “approval” (compare H.R. 3626) – not proceeded by word “affirmative” (compare H.R. 3432, requiring “affirmative request”)
 - » Compare language of next section (Section 222(c)(2)) “affirmative written request” (which was included in both H.R. 3626 and H.R. 3432).
 - » Section 222 is a derivative Markey bill; taken from H.R. 1555, which included a requirement for a Commission rulemaking in which methods by which consumers would be enabled to have knowledge about telecommunication carrier collection and use practices, to have notice about such practices and to stop the reuse or sale of that information were to be considered.
 - * Elimination of rulemaking provisions from ultimate Section 222 supports argument that statute is basically self-effectuating, accommodating a range of carrier-chosen “approval” options.
 - * Record incorporates Markey remarks on his “Knowledge, Notice and No” approach to information use and individual approval.
- Congress has never required affirmative consent for a business to use its own commercial information. While not worded precisely as Section 222,
 - » Cable Act (47 USC § 551) (requires written or electronic consent only for subscriber information to be shared with third parties; allows notice and opt-out for name and address lists);
 - » Video Act (18 USC § 2710) (requires affirmative consent only for release of information to third parties, other than name and addresses associated with categories of viewing (which is satisfied by an opt-out)).
- Administrative Agencies Involved in Fair Information Practices Associated With Individually-Identifiable Information, such as CPNI, have not generally endorsed an opt in requirement
 - » Information Infrastructure Task Force (“IITF”) Privacy Working Group Report, June, 1995, Section II.B, ¶¶ 11-16 (the securing of consent should be goal-oriented, such that “individual has sufficient information in an understandable form to make an informed decision”), which observations argue against oral communications because of their necessary brevity and in favor of written notifications which are more aligned with market practice and reflection.
 - » NTIA Report, “Privacy and the NII: Safeguarding Telecommunications-Related Personal Information,” Oct. 1995, Section III (finding that a written notification is adequate notification for most information collection and use purposes and that use of opt-out is an appropriate consent device for non-sensitive information, with example of “medical information” as sensitive information).

BOC COALITION

Customer Expectations, Behaviors and Commercial Practice

- **Businesses routinely collect information with respect to institution of business relationship and often with respect to usage of service. No evidence to suggest individuals are uncomfortable with these practices. Indeed, solid record evidence to the contrary.**
 - » Undisputed record evidence of long-standing position of trust held by telephone companies.
 - » Record evidence through statistically valid survey that customers expect such collection and use and that approval regarding such practices increases if they are informed of practices and permitted opportunity to opt out.
 - » Record evidence that some constituents, i.e., women, minorities, younger Americans, are even more interested than general public overall in hearing from existing business suppliers – including telephone companies.

- **Individuals will not return written documents to “consent” to use of this commercial information. Nor will they respond verbally in sufficient numbers to allow businesses to operate reasonably or efficiently.**
 - » Prior FCC findings and representations regarding inertia preventing the return of written documents; also carrier assertions to the same effect.
 - » Record evidence regarding carrier trials attempting to secure written documents (return is within 1-3% range).
 - » U S WEST affirmative consent trial demonstrating that oral affirmative consent cannot be secured in sufficient numbers to allow for normal commercial operation, despite general lack of concern over use of information.
 - * Ameritech and U S WEST evidence that when customer is engaged and initiates call, approvals are very high. **However**, cannot rely on inbound calling for approvals, because only about 15% of customer base calls in in any given year.
 - * U S WEST evidence that oral approval experience involved in inbound calling scenario cannot be replicated in outbound calling environment where there is telephonic intrusion and lack of engagement.

- **Chairman Kennard has stressed the need for rules that reflect “common sense,” that “should be practical, and reflect an understanding of the markets and the businesses they affect.”**
 - » Affirmative consent requirement is not practical across an entire customer base.
 - » Affirmative consent requirement is add odds with customers “needs and daily demands”.
 - » Affirmative consent requirement will operate to frustrate desires of consumers, some more than others (minorities, women, younger Americans).
 - » Affirmative consent requirement across entire customer base is administratively impossible --not just burdensome.

BOC COALITION

First Amendment Issues

- CPNI is raw element of accurate, truthful information which is either “communicated” between company operations (including affiliates) or forms the foundation for more narrative commercial speech with customers – many of whom actually want to be communicated with.
 - » Compare Professor Lawrence Tribe’s communication with the FCC, outlining how “opt in” arrangements have been rejected as constitutionally permissible because they create a barrier to the speech rights of both speaker and listener
- FCC has an obligation to construe statutory enactments in a manner that avoids constitutional infirmity. Thus, should allow for “opt out” approval process.
 - » Statute does not mandate “affirmative” process.
 - » Record is compelling that affirmative process will impede educated speech.
 - » Record is compelling that individual’s privacy expectations are satisfied by “opt out” process.

Section 272 Issues

- Section 272 affiliate should share in benefits of communication of CPNI from other affiliates, provided appropriate “approval” (through an opt-out mechanism) is obtained. Without such ability, joint marketing is compromised such that it cannot exist in educated fashion and neither BOC nor its interexchange carrier can jointly market just like any other carrier, contrary to FCC’s adopted position.
 - » Section 222, which comprehensively addresses a specific type of information, *i.e.*, CPNI, should control customer approval process for use, sharing and distribution of CPNI.
 - » Section 272, dealing with nondiscrimination, should not be construed to override provisions of Section 222 in a manner that would frustrate and compromise customer expectations.
 - » Even if Section 272 has general applicability, sharing of CPNI would be permitted under Section 272(g)(2) (would allow such use with no nondiscrimination obligation because CPNI is integral to joint marketing, as FCC has consistently concluded over time)
 - » FCC has held that once a BOC receives interLATA authorization under Section 271, it should be permitted to jointly market and sell interLATA services of its affiliate and “to engage in the same kind of marketing activities as other service providers” (First Report and Order, CC Docket No. 96-149, ¶ 291). Such cannot occur if affiliate must obtain affirmative customer consent to use CPNI unlike other carriers and their affiliates.

103D CONGRESS
1ST SESSION

H. R. 3432

IN THE HOUSE OF REPRESENTATIVES

Mr. MARKEY (for himself [insert attached list of cosponsors]) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Communications Act of 1934 to prohibit the disclosure of certain information concerning customer's uses of telephone services, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Telephone Consumer
5 Privacy Protection Act of 1993".

1 **TITLE I—PRIVACY OF CUS-**
2 **TOMER PROPRIETARY NET-**
3 **WORK INFORMATION**

4 **SEC. 101. AMENDMENT TO THE COMMUNICATIONS ACT OF**
5 **1934.**

6 Title II of the Communications Act of 1934 is
7 amended by adding at the end the following new section:

8 **"SEC. 229. PRIVACY OF CUSTOMER PROPRIETARY NET-**
9 **WORK INFORMATION.**

10 **"(a) PRIVACY REQUIREMENTS FOR COMMON CAR-**
11 **RIERS.—A local exchange carrier—**

12 **"(1) shall not, except as required by law or**
13 **upon the affirmative request of the customer to**
14 **which the information relates—**

15 **"(A) use customer proprietary network in-**
16 **formation in the provision of any service other**
17 **than (i) telephone exchange service or telephone**
18 **toll service, or (ii) a service necessary to or used**
19 **in the provision of telephone exchange service**
20 **or telephone toll service:**

21 **"(B) use customer proprietary network in-**
22 **formation in the identification or solicitation of**
23 **potential customers for any service other than**
24 **the service from which such information is de-**
25 **rived;**

1 “(C) use such information in the provision
2 of customer premises equipment; or

3 “(D) disclose such information to any affil-
4 iate of such common carrier or any other per-
5 son that is not an employee of such carrier;

6 “(2) shall disclose such information upon af-
7 firmative written request by the customer, to any
8 person designated by the customer;

9 “(3) shall, whenever such common carrier pro-
10 vides any aggregate information based on customer
11 proprietary network information or any data base or
12 other compilation of customer proprietary informa-
13 tion to any personnel of such common carrier, or
14 any affiliate of such common carrier, that are en-
15 gaged in providing any service that is not necessary
16 to the provision of telephone exchange service, or
17 that are engaged in the provision of customer prem-
18 ises equipment, or to any other person that is not
19 an employee or affiliate of such carrier, notify the
20 Commission of the availability of such aggregate or
21 compiled information and shall provide such aggre-
22 gate or compiled information on reasonable terms
23 and conditions to any other service or equipment
24 provider upon reasonable request therefor; and

103D CONGRESS
2D SESSION

H. R. 3626

IN THE SENATE OF THE UNITED STATES

JUNE 30 (legislative day, JUNE 7), 1994

Received; read twice and referred to the Committee on Commerce, Science,
and Transportation

AN ACT

To supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, United States District Court for the District of Columbia; to amend the Communications Act of 1934 to regulate the manufacturing of Bell operating companies, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLES; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE OF THIS ACT.**—This Act may be
5 cited as the “Antitrust and Communications Reform Act
6 of 1994”.

1 “(11) The term ‘Bell operating company’ means
2 the corporations subject to the Modification of Final
3 Judgment and listed in Appendix A thereof, or any
4 entity owned or controlled by such corporation, or
5 any successor or assign of such corporation, but
6 does not include an electronic publishing joint ven-
7 ture owned by such corporation or entity.”.

8 **SEC. 204. PRIVACY OF CUSTOMER INFORMATION.**

9 (a) **PRIVACY OF CUSTOMER PROPRIETARY NETWORK**
10 **INFORMATION.—**

11 (1) **AMENDMENT.—**Title II of the Communica-
12 tions Act of 1934 is amended by adding at the end
13 the following new section:

14 **“SEC. 232. PRIVACY OF CUSTOMER PROPRIETARY NET-**
15 **WORK INFORMATION.**

16 “(a) **DUTY TO PROVIDE SUBSCRIBER LIST INFOR-**
17 **MATION.—**Notwithstanding subsections (b), (c), and (d),
18 a carrier that provides subscriber list information to any
19 affiliated or unaffiliated service provider or person shall
20 provide subscriber list information on a timely and
21 unbundled basis, under nondiscriminatory and reasonable
22 rates, terms, and conditions, to any person upon request.

23 “(b) **PRIVACY REQUIREMENTS FOR COMMON CAR-**
24 **RIERS.** [REDACTED]

1 “(1) shall not, except as required by law or with
2 the [REDACTED] which the informa-
3 tion relates—

4 “(A) use customer proprietary network in-
5 formation in the provision of any service except
6 to the extent necessary (i) in the provision of
7 common carrier communications services, (ii) in
8 the provision of a service necessary to or used
9 in the provision of common carrier communica-
10 tions services, including the publishing of direc-
11 tories, or (iii) to continue to provide a particu-
12 lar information service that the carrier provided
13 as of March 15, 1994, to persons who were cus-
14 tomers of such service on that date;

15 “(B) use customer proprietary network in-
16 formation in the identification or solicitation of
17 potential customers for any service other than
18 the service from which such information is de-
19 rived;

20 “(C) use customer proprietary network in-
21 formation in the provision of customer premises
22 equipment; or

23 “(D) disclose customer proprietary net-
24 work information to any person except to the
25 extent necessary to permit such person to pro-

1 vide services or products that are used in and
2 necessary to the provision by such carrier of the
3 services described in subparagraph (A);

4 “(2) shall disclose customer proprietary net-
5 work information, upon affirmative written request
6 by the customer, to any person designated by the
7 customer;

8 “(3) shall, whenever such carrier provides any
9 aggregate information, notify the Commission of the
10 availability of such aggregate information and shall
11 provide such aggregate information on reasonable
12 terms and conditions to any other service or equip-
13 ment provider upon reasonable request therefor; and

14 “(4) except for disclosures permitted by para-
15 graph (1)(D), shall not unreasonably discriminate
16 between affiliated and unaffiliated service or equip-
17 ment providers in providing access to, or in the use
18 and disclosure of, individual and aggregate informa-
19 tion made available consistent with this subsection.

20 “(c) **RULE OF CONSTRUCTION.**—This section shall
21 not be construed to prohibit the use or disclosure of cus-
22 tomer proprietary network information as necessary—

23 “(1) to render, bill, and collect for the services
24 identified in subparagraph (A);

1 “(2) to render, bill, and collect for any other
2 service that the customer has requested;

3 “(3) to protect the rights or property of the
4 carrier;

5 “(4) to protect users of any of those services
6 and other carriers from fraudulent, abusive, or un-
7 lawful use of or subscription to such service; or

8 “(5) to provide any inbound telemarketing, re-
9 ferral, or administrative services to the customer for
10 the duration of the call if such call was initiated by
11 the customer and the customer approves of the use
12 of such information to provide such service.

13 “(d) **EXEMPTION PERMITTED.**—The Commission
14 may, by rule, exempt from the requirements of subsection
15 (b) carriers that have, together with any affiliated carriers,
16 in the aggregate nationwide, fewer than 500,000 access
17 lines installed if the Commission determines that such ex-
18 emption is in the public interest or if compliance with the
19 requirements would impose an undue economic burden on
20 the carrier.

21 “(e) **REGULATIONS.**—The Commission shall pre-
22 scribe regulations to carry out this section within 1 year
23 after the date of its enactment.

24 “(f) **DEFINITION OF AGGREGATE INFORMATION.**—
25 For purposes of this section, the term ~~“aggregate information”~~

"(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

"(3) forbearance from applying such provision or regulation is consistent with the public interest.

"(b) **COMPETITIVE EFFECT TO BE WEIGHED.**—In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."

SEC. 104. PRIVACY OF CUSTOMER INFORMATION.

(a) **PRIVACY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.**—Title II of the Act is amended by inserting after section 221 (47 U.S.C. 221) the following new section:

"SEC. 222. PRIVACY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.

"(a) **SUBSCRIBER LIST INFORMATION.**—Notwithstanding subsections (b), (c), and (d) a carrier that provides local exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

"(b) **PRIVACY REQUIREMENTS FOR COMMON CARRIERS.**—A carrier—

"(1) shall not, except as required by law or with the approval of the customer to which the information relates—

"(A) use customer proprietary network information in the provision of any service except to the extent necessary (i) in the provision of common carrier services, (ii) in the provision of a service necessary to or used in the provision of common carrier services, including the publishing of directories, or (iii) to continue to provide a particular information service that the carrier provided as of May 1, 1995, to persons who were customers of such service on that date;

"(B) use customer proprietary network information in the identification or solicitation of potential customers for any service other than the telephone exchange service or telephone toll service from which such information is derived;

"(C) use customer proprietary network information in the provision of customer premises equipment; or

"(D) disclose customer proprietary network information to any person except to the extent necessary to permit such person to provide services or products that are used in and necessary to the provision by such carrier of the services described in subparagraph (A);

"(2) shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer;

"(3) shall, whenever such carrier provides any aggregate information, notify the Commission of the availability of such aggregate information and shall provide such aggregate information on reasonable terms and conditions to any other service or equipment provider upon reasonable request therefor; and

"(4) except for disclosures permitted by paragraph (1)(D), shall not unreasonably discriminate between affiliated and unaffiliated service or equipment providers in providing access to, or in the use and disclosure of, individual and aggregate information made available consistent with this subsection.

"(c) **RULE OF CONSTRUCTION.**—This section shall not be construed to prohibit the use or disclosure of customer proprietary network information as necessary—

"(1) to render, bill, and collect for the services identified in subsection (b)(1)(A);

"(2) to render, bill, and collect for any other service that the customer has requested;

"(3) to protect the rights or property of the carrier;

"(4) to protect users of any of those services and other carriers from fraudulent, abusive, or unlawful use of or subscription to such service; or

"(5) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

"(d) **EXEMPTION PERMITTED.**—The Commission may, by rule, exempt from the requirements of subsection (b) carriers that have, together with any affiliated carriers,

in the aggregate nationwide, fewer than 500,000 access lines installed if the Commission determines that such exemption is in the public interest or if compliance with the requirements would impose an undue economic burden on the carrier.

"(e) **DEFINITIONS.**—As used in this section:

"(1) **CUSTOMER PROPRIETARY NETWORK INFORMATION.**—The term 'customer proprietary network information' means—

"(A) information which relates to the quantity, technical configuration, type, destination, and amount of use of telephone exchange service or telephone toll service subscribed to by any customer of a carrier, and is made available to the carrier by the customer solely by virtue of the carrier-customer relationship;

"(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; and

"(C) such other information concerning the customer's use of the carrier's telephone exchange service or telephone toll services, and specified as within the definition of such term by such rules as the Commission shall prescribe consistent with the public interest;

except that such term does not include subscriber list information.

"(2) **SUBSCRIBER LIST INFORMATION.**—The term 'subscriber list information' means any information—

"(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

"(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

"(3) **AGGREGATE INFORMATION.**—The term 'aggregate information' means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed."

(b) **CONVERGING COMMUNICATIONS TECHNOLOGIES AND CONSUMER PRIVACY.**—

(1) **COMMISSION EXAMINATION.**—Within one year after the date of enactment of this Act, the Commission shall commence a proceeding—

(A) to examine the impact of the integration into interconnected communications networks of wireless telephone, cable, satellite, and other technologies on the privacy rights and remedies of the consumers of those technologies;

(B) to examine the impact that the globalization of such integrated communications networks has on the international dissemination of consumer information and the privacy rights and remedies to protect consumers;

(C) to propose changes in the Commission's regulations to ensure that the effect on consumer privacy rights is considered in the introduction of new telecommunications services and that the protection of such privacy rights is incorporated as necessary in the design of such services or the rules regulating such services;

(D) to propose changes in the Commission's regulations as necessary to correct any defects identified pursuant to subparagraph (A) in such rights and remedies; and

(E) to prepare recommendations to the Congress for any legislative changes required to correct such defects.

(2) **SUBJECTS FOR EXAMINATION.**—In conducting the examination required by paragraph (1), the Commission shall determine whether consumers are able, and, if not, the methods by which consumers may be enabled—

(A) to have knowledge that consumer information is being collected about them through their utilization of various communications technologies;

(B) to have notice that such information could be used, or is intended to be used, by the entity collecting the data for reasons unrelated to the original communications, or that such information could be sold (or is intended to be sold) to other companies or entities; and

(C) to stop the reuse or sale of that information.

(3) **SCHEDULE FOR COMMISSION RESPONSES.**—The Commission shall, within 18 months after the date of enactment of this Act—

(A) complete any rulemaking required to revise Commission regulations to correct defects in such regulations identified pursuant to paragraph (1); and

(B) submit to the Congress a report containing the recommendations required by paragraph (1)(C).