



MCI Telecommunications Corporation

1801 Pennsylvania Avenue, NW
Washington, DC 20006
202 887 2372
FAX 202 887 3175

EX PARTE OR LATE FILED

Frank W. Krogh
Senior Counsel and Appellate Coordinator
Federal Law and Public Policy

ORIGINAL

DOCKET FILE COPY ORIGINAL

February 11, 1998

EX PARTE

RECEIVED

FEB 11 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115

Dear Ms. Salas:

Today, Lanese Jorgensen and the undersigned, on behalf of MCI Telecommunications Corporation (MCI), spoke by telephone with Tom Power, legal advisor to Chairman Kennard, concerning the issues raised in the above-captioned proceeding. The discussion tracked MCI's previous discussions of the issues in its filings in this docket, which are summarized in the attached outline and other material attached hereto, a copy of which was faxed to Mr. Power. MCI also faxed to Mr. Power its ex parte letter filed in this docket on February 9, 1998, a copy of which is also attached hereto.

The original and one copy of this letter and its attachments are being submitted for inclusion in the public record of this proceeding. Any inquiries about this letter may be directed to the undersigned.

Yours truly,

Frank W. Krogh
Frank W. Krogh

cc: Tom Power
Richard K. Welch
Dorothy T. Attwood
Blaise Scinto

No. of Copies rec'd
List ABCDE

24

CPNI Issues

Section 222 should be interpreted so as to ensure customer control over CPNI and enable carriers to overcome others' monopoly-derived customer database advantages through the application of marketing skill and effort, thereby fulfilling both its privacy and competitive goals.

Meaning of Section 222(c)(1)

"Except ... with the approval of the customer, a ... carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to [CPNI] in its provision of ... the ... service from which such information is derived"

- "Service" should be interpreted to mean "category of service." "All local" and "all interexchange" should be categories around which the restrictions are framed, with wireless and intraLATA toll as "floating" categories. "Single bucket" would effectively eliminate 222(c) completely.
- Absent customer approval, 222(c)(1) only permits use of CPNI for the provision and marketing of service in same category. With customer approval, carrier may "use" CPNI itself or "disclose" it to any other entity.
- Legislative history and text show that restrictions intended to be applied within each carrier and between affiliates; "use ... or permit access to" CPNI can only logically refer to use of CPNI by carrier that already has it.

Type of Approval

"[A]pproval of the customer" in 222(c)(1) requires explicit oral approval following notification informing customer of nature of request and proposed use. Implied or "opt-out" approval would have effect similar to single bucket approach by turning over virtually all CPNI for use by carriers that already have most or all CPNI, snuffing out competition.

- Explicit oral approval would also protect customers' privacy interests more effectively than opt-out approach by ensuring greater customer understanding of approval being sought, thereby maintaining greater customer control over CPNI.

Interplay of 222 and Nondiscrimination Safeguards

Where carrier may disclose CPNI to another entity -- such as where customer gives oral approval under 222(c)(1) or where other entity needs CPNI to initiate service under 222(d)(1) -- carrier must treat all other carriers the same as its own affiliates, under 272(c)(1) and (e).

- BOCs are abusing their monopoly access to CPNI and other information by denying it to MCI. Section 272(c) and (e), as well as Sections 201(b) and 202(a), require that where carrier uses CPNI or discloses it to its affiliate under a particular approval process, same process should be followed in determining whether to disclose to others.

"SEC. 222. PRIVACY OF CUSTOMER INFORMATION.

"(a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

"(b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

"(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.—

"(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.—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.

"(2) DISCLOSURE ON REQUEST BY CUSTOMERS.—A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

"(3) AGGREGATE CUSTOMER INFORMATION.—A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

"(d) EXCEPTIONS.—Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

"(1) to initiate, render, bill, and collect for telecommunications services;

"(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

"(3) 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.

"(e) **SUBSCRIBER LIST INFORMATION.**—Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone 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.

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

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

"(A) 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

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

except that such term does not include subscriber list information.

"(2) **AGGREGATE INFORMATION.**—The term 'aggregate customer 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.

"(3) **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."

SEC. 703. POLE ATTACHMENTS.

Section 224 (47 U.S.C. 224) is amended—

(1) in subsection (a)(1), by striking the first sentence and inserting the following: "The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.";

(2) in subsection (a)(4), by inserting after "system" the following: "or provider of telecommunications service";

(3) by inserting after subsection (a)(4) the following:

"(5) For purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h).";

Pursuant to the provisions of this section, information providers must obtain legal, informed consent from a caller through either a written pre-authorized contract between the information providers and the caller, or through the use of an instructive preamble at the start of all non-free 800 calls. Both of these options ensure that consumers know there is a charge for the information service and that they are giving their consent to be charged.

Conference agreement

The conference agreement adopts the Senate provisions with modifications. The conferees agreed to close a loophole in current law, which permits information providers to evade the restrictions of section 228 by filing tariffs for the provision of information services. Many information providers have taken advantage of this exemption by filing tariffs—especially for 1-500, 1-700 and 10XXX numbers—and charging customers high prices for the services. This exemption has proven to be a problem because consumers have none of the protections that were enacted as part of the Telephone Disclosure and Dispute Resolution Act (P.L. 102-556). Section 701(b) of the conference agreement closes that loophole.

SECTION 702—PRIVACY OF CUSTOMER INFORMATION

Senate bill

Section 102 of the Senate bill amends the Communications Act to add a new section 252 to impose separate affiliate and other safeguards on certain activities of the BOCs. Subsection (g) of new section 252 establishes rules to ensure that the BOCs protect the confidentiality of proprietary information they receive and to prohibit the sharing of such information in aggregate form with any subsidiary or affiliate unless that information is available to all other persons on the same terms and conditions. In general, a BOC may not share with anyone customer-specific proprietary information without the consent of the person to whom it relates. Exceptions to this general rule permit disclosure in response to a court order or to initiate, render, bill and collect for telecommunications services. For purposes of this subsection the term "customer proprietary information" does not include subscriber list information.

Subsection 301(c) of the Senate bill defines the term "subscriber list information" and requires local exchange carriers to provide subscriber list information on a timely and unbundled basis and at nondiscriminatory and reasonable rates, terms and conditions to anyone upon request for the purpose of publishing directories in any format.

Subsection 301(d) provides that telecommunications carriers have a duty to protect the confidentiality of proprietary information of other common carriers and customers, including resellers. A telecommunications carrier that receives such from another carrier may not use such information for its own marketing efforts.

House amendment

Section 105 of the House amendment adds a new section 222 to the Communications Act. Section 222 establishes privacy protections for customer proprietary network information (CPNI). Section

222(a) imposes on carriers a statutory duty to provide subscriber list information on a timely basis, under nondiscriminatory and reasonable rates, terms and conditions, to any publisher of directories upon request.

Section 222(b)(1)(B) prohibits the use of CPNI "in the identifications or solicitation of potential customers for any service other than the service from which such information is derived."

With respect to section 222(b)(2), the House recognizes that carriers are likely to incur some costs in complying with the customer-requested disclosures contemplated by this section. This section does not preclude a carrier from being reimbursed by the customers or third parties for the costs associated with making such disclosures. In addition, the disclosures described in this section include only the information provided to the carrier by the customer. A carrier is not required to disclose any of its work product based on such information.

In section 222(b)(3), the term "aggregate information" should not be construed as a mechanism whereby carriers are forced to disclose sensitive information to their competitors. Indeed, the key component of "aggregate information" is that such information would have to be able to be disclosed only to those persons who have the approval of the customer. Thus, the House intends that the use of "aggregate information" would be rather limited or restricted.

Section 222(c) states that this section shall not prevent the use of CPNI to combat toll fraud or to bill and collect for services requested by the customers.

Section 222(d) allows the Commission to exempt from its requirements of subsection (b) carriers with fewer than 500,000 access lines, if the Commission determines either that such an exemption is in the public interest or that compliance would impose an undue burden.

Section 222(e) defines terms used in this section.

Section 104(b) directs the Commission to review the impact of converging communications technologies on customer privacy. This section requires the Commission to commence a proceeding within one year after the date of enactment to examine the impact of converging technologies and globalization of communications networks has on the privacy rights of consumers and possible remedies to protect them. This section also directs changes in the Commission's regulations to ensure that customer privacy rights are considered in the introduction of new telecommunications service and directs the Commission to correct any defects in its privacy regulations that are identified pursuant to this section. The Commission is also directed to make any recommendations to Congress for any legislative changes required to correct such defects within 18 months after the date of enactment of this Act.

This section defines three fundamental principles to protect all consumers. These principles are: (1) the right of consumers to know the specific information that is being collected about them; (2) the right of consumers to have proper notice that such information is being used for other purposes; and (3) the right of consumers to stop the reuse or sale of that information.

Conference agreement

The conference agreement adopts the Senate provisions with modifications. Section 702 of the conference agreement amends title II of the Communications Act by adding a new section 222.

In general, the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI. New subsection 222(a) stipulates that it is the duty of every telecommunications carrier to protect the confidentiality of proprietary information of and relating to other carriers, equipment manufacturers and customers, including carriers reselling telecommunications services provided by a telecommunications carrier.

New subsection 222(b) provides that a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose and shall not use such information for its own marketing efforts.

In new subsection 222(c) use of CPNI by telecommunications carriers is limited, except as provided by law or with the approval of the customer. New subsection (c) specifies that telecommunications carriers shall only use, disclose, or permit access to individually identifiable CPNI in its provision of the telecommunications service for which such information is derived or in its provision of services necessary to or used in the provision of such telecommunications service, including directory services. The conferees also agreed upon a provision that will require disclosure of CPNI by a telecommunications carrier upon affirmative written request by the customer, to any person designated by the customer.

The conference agreement also asserts carriers' rights in new subsection 222(d) to use CPNI to initiate, render, bill, and collect for telecommunications service. New subsection (d) also allows use of CPNI to protect the rights or property of the carrier. The conferees intend new subsection 222(d)(2) to allow carriers to use CPNI in limited fashion for credit evaluation to protect themselves from fraudulent operators who subscribe to telecommunications services, run up large bills, and then change carriers without payment.

New subsection 222(e) stipulates that subscriber list information shall be made available by telecommunications carriers that provide telephone exchange service on a timely and unbundled basis to any person upon request for the purpose of publishing directories in any format. The subscriber list information provision guarantees independent publishers access to subscriber list information at reasonable and nondiscriminatory rates, terms and conditions from any provider of local telephone service.

New subsection 222(f) contains definitions of CPNI, aggregate information and subscriber list information.

SECTION 703—POLE ATTACHMENTS

Senate bill

Section 204 of the Senate bill amends section 224 of the Communications Act. Section 204 requires that poles, ducts, conduits and rights-of-way controlled by utilities are made available to cable television systems at the rates, terms and conditions that are just



**MCI Telecommunications
Corporation**

1801 Pennsylvania Avenue, NW
Washington, DC 20006
202 887 2372
FAX 202 887 3175

Frank W. Krogh
Senior Counsel and Appellate Coordinator
Federal Law and Public Policy

February 9, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Telecommunications Carriers' Use of Customer Proprietary
Network Information and Other Customer Information,
CC Docket No. 96-115

Dear Ms. Salas:

MCI Telecommunications Corporation (MCI) submits this letter in response to questions raised by Commissioner legal advisors in recent discussions concerning the above-referenced docket. MCI has been asked to state its views as to the interplay between the restrictions on the use of customer proprietary network information (CPNI) in Section 222 and the nondiscrimination requirements of Section 272(c)(1) of the Communications Act. In particular, where a Bell Operating Company (BOC) solicits its customer's approval under Section 222(c)(1) to use the customer's CPNI to market services on behalf of its Section 272 affiliate or to disclose such CPNI to the affiliate, does MCI view such solicitation as a "service" to the affiliate under Section 272(c)(1) and, if so, must the BOC provide such solicitation services to all unaffiliated entities requesting such services in a nondiscriminatory manner? In other words, where a BOC solicits such approval, must it also provide the same "approval solicitation service" in the same manner for all requesting interexchange carriers (IXCs)?

MCI did not take a position on this question when it was posed in the Commission's Public Notice requesting further comment in this docket.¹ MCI has argued, however, in response to the Public Notice and in other filings in this proceeding, that Section 272(c)(1) does require that where a BOC obtains its customer's approval to use her CPNI on behalf of its Section 272 affiliate or to disclose it to the affiliate, it must also provide her CPNI to any third party whenever that entity can demonstrate that it has obtained her approval in the same manner. In other words, although Section 222(c)(1) by itself allows, but does not require, a carrier to use or disclose CPNI with the

Letter to Magalie Roman Salas
February 9, 1998
Page 2

customer's approval, the nondiscrimination requirements of Section 272(c)(1) make that otherwise permissive authorization in Section 222(c)(1) mandatory where an IXC demonstrates that it has obtained the same type of approval from the customer that the BOC obtains on behalf of its affiliate.² To enable other entities to fully exercise such nondiscrimination rights under Section 272(c)(1), the BOCs should also be required to provide all requesting IXCs with complete customer lists so that the IXCs can seek such customer approvals and submit them to the appropriate BOC.³

MCI did not take a position on the "approval solicitation service" issue because it is skeptical of the actual competitive and practical implications of such a reading of Section 272. There are a number of variations on the approval solicitation service requirement proposal in the record,⁴ each of which would have to be developed in greater detail before MCI could endorse any one of them with any degree of assurance. For example, there is the issue of whether the BOC solicitation would draw a distinction between the BOC's affiliate and all other entities or instead would seek blanket approval for all entities.⁵ The former approach would raise a host of administrative problems, such as how to ensure a completely neutral solicitation.

These concerns would be magnified if the Commission were to adopt any form of an approval solicitation service requirement in tandem with an "opt-out" implied approval process under Section 222(c)(1). MCI has explained at length the absolute necessity of

² See Further Comments of MCI Telecommunications Corporation at 11-15, 20 (March 17, 1997).

³ MCI has explained in previous filings that customer names, addresses and telephone numbers do not constitute CPNI. See Response to Commission Staff Questions Re: CC Docket No. 96-115 at 4-8, attached to ex parte letter from Frank W. Krogh, MCI, to William F. Caton, Acting Secretary, FCC, dated Aug. 15, 1997.

⁴ See, e.g., Comments of AT&T Corp. at 12-13 (March 17, 1997); Reply Comments of the National Telecommunications and Information Administration at 34-37 (March 27, 1997).

⁵ Another possible application of Section 272(c)(1) would require that a BOC automatically provide all requesting carriers with any CPNI that it used on behalf of or disclosed to its affiliate. Such other carriers, however, would still not have the customer's approval to use the CPNI and thus would still be at a great disadvantage.

Letter to Magalie Roman Salas
February 9, 1998
Page 3

an explicit, knowing oral approval under Section 222(c)(1) before a carrier may use or disclose CPNI. Only an affirmative approval process will satisfy the competitive goals of that provision, and such a process will protect consumers' privacy interests far more effectively than an opt-out process.⁶ Under an opt-out process, almost all CPNI will become available to the carriers that possess it, reinforcing the monopoly-derived advantages of those carriers with the largest and most complete customer databases. Use of an opt-out procedure thus would effectively nullify any distinctions among services, resulting in the equivalent of a "single bucket" service definition approach, thereby eliminating Section 222(c)(1) as a meaningful safeguard.

It is crucial that the Commission understand that an approval solicitation service requirement in no way would make up for the anticompetitive effects of an opt-out approval procedure. While an opt-out procedure would make almost all of the BOCs' CPNI available to their affiliates, a biased solicitation could make much of that CPNI unavailable to other carriers. Moreover, AT&T would benefit disproportionately from an opt-out procedure combined with an approval solicitation service requirement. That is because BOCs presumably would not seek customer approvals on behalf of other carriers and their own affiliates until the BOCs or their affiliates were in a position to use the CPNI for their own long distance service marketing. Thus, a BOC would not solicit customers' approvals until it received in-region interLATA service authority in a given state.⁷ Until a BOC obtained in-region authority for a given state, therefore, AT&T would be the only carrier with ready access to a large CPNI database -- namely, its own. AT&T would be able to use its vast reserve of CPNI for local service marketing immediately, while other IXCs would not have whatever benefits may accrue from BOC solicitations of customer approvals until each BOC obtained in-region authority in each state, thereby providing AT&T a tremendous head-start over other IXCs.

An approval solicitation service requirement would present other problems as well. Questions would arise as to how the CPNI

⁶ See, e.g., Further Comments of MCI Telecommunications Corporation at 5-10 (March 17, 1997).

⁷ If BOCs are securing customer approvals now for purposes of long distance service marketing, that presents another set of problems. Obviously, if such approvals are not obtained using the procedure ultimately required in the order to be issued in this docket, any marketing database containing the CPNI for which approval was sought will have to be purged of all improperly approved CPNI.

Letter to Magalie Roman Salas
February 9, 1998
Page 4

should be transmitted to other IXCs, particularly if a given IXC wanted CPNI delivered in a different format from the way in which a BOC transmitted the CPNI to its own affiliate. Timing would also be problematical and difficult to enforce, since the slightest disparity in CPNI delivery times between the BOC's affiliate, or long distance marketing staff, and other IXCs would be extremely prejudicial. Timing issues would be especially difficult to resolve in situations where a BOC obtained customer approval on an inbound call. Charges for such information would also raise another set of issues. A BOC might charge its affiliate and all other carriers the same exorbitant price for CPNI. Nominally, the charge would be nondiscriminatory, but its economic impact would be anticompetitive. While the charge would be merely an intracorporate transfer for the BOC, it would be a real cost to all other IXCs.

MCI is so wary of the approval solicitation service proposals because it has experienced tremendous frustration in its dealings with the BOCs in analogous circumstances involving the transmission of information and, more generally, interconnections between networks. The inexplicably tenacious BOC resistance to the development and installation of nondiscriminatory OSS is a vivid illustration of the types of problems that will inevitably plague any approval solicitation service requirement and nondiscriminatory transmission of CPNI required as part of such a process. Given MCI's experiences, it is not reasonable to expect that a truly nondiscriminatory approval solicitation service requirement could ever be implemented and enforced. As explained above, the anticompetitive risks posed by such problems would be aggravated by opt-out approval. Such an approval process would give the BOCs and AT&T access to almost all of their CPNI, while an approval solicitation service requirement could well fail to provide other carriers equivalent access to the BOCs' CPNI. In short, the disastrous effects of an opt-out approval mechanism would not be cured by an approval solicitation service requirement.

If, in spite of all of these competitive dangers and administrative headaches, the Commission nevertheless were to adopt an approval solicitation service requirement in tandem with an opt-out approval mechanism, it would be absolutely necessary that all of the competitive and administrative problems discussed above be thoroughly analyzed and addressed. In order to minimize the administrative problems, it would probably be preferable to require that the BOC seek a blanket approval for all carriers, including its affiliate, without giving the customer the option of choosing among carriers. Although such an "all or nothing" approach would not fully maintain consumer control over CPNI, MCI would view that weakness as a necessary evil -- necessary to

Letter to Magalie Roman Salas
February 9, 1998
Page 5

counteract at least some of the competitive impact of opt-out approval combined with an approval solicitation service requirement. It would also be necessary for the Commission to make it clear that such blanket approval covers any telecommunications service, since while the BOC would want to use the CPNI for long distance service marketing, IXCs would want to use it for local service marketing.

In order to ensure as neutral and smoothly running an approval solicitation mechanism as possible, the Commission might well want to consider the use of a third party administrator. MCI has proposed the use of such a neutral administrator in the presubscribed interexchange carrier change context as a technique to prevent "slamming," and the same approach might be useful in ensuring neutral solicitation and nondiscriminatory disclosure of CPNI. Again, MCI must stress that even with such a third party administrator, an approval solicitation service requirement would not significantly ameliorate the dangers posed by an opt-out approval process.

MCI appreciates the opportunity to respond to these questions concerning the interplay of Sections 222 and 272. The original and one copy of this letter are being submitted for inclusion in the public record of this proceeding. Any inquiries about this letter may be directed to the undersigned.

Yours truly,


Frank W. Krogh

cc: James L. Casserly
Paul Gallant
Kyle D. Dixon
A. Richard Metzger
Richard K. Welch
Dorothy T. Attwood
Blaise Scinto