

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)
)
Implementation of the) CC Docket No. 96-115
Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)
)
Implementation of the Non-Accounting) CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)
Communications Act of 1934, as Amended)
_____)

**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

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March 30, 1998

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SUMMARY

USTA hereby submits its comments in response to several questions raised by the Commission in its Further Notice in this proceeding.

The Commission asks if it can and should allow customers to bar all use of their CPNI by their telecommunications carriers for marketing purposes. USTA concludes that to do so would be inappropriate since such a bar would conflict with the express reservation of a carrier's right to use a customer's CPNI that is found in subsection 222(c)(1) of the Communications Act.

The Commission also asks whether additional safeguards and enforcement mechanisms are needed in order to ensure carrier compliance with section 222 and its CPNI rules. USTA concludes that no additional safeguards or enforcement mechanisms are needed unless and until it can be demonstrated that existing safeguards and enforcement mechanisms are inadequate.

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**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA),¹ through the undersigned, hereby provides its comments in response to the Federal Communications Commission's (Commission) Further Notice of Proposed Rulemaking (Further Notice) in the above-captioned proceeding.² USTA's comments are limited at this time to the questions posed by the Commission concerning

¹ USTA is the nation's oldest trade organization for the local exchange carrier industry. USTA currently represents more than 1200 small, mid-size and large companies worldwide.

² Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 and 96-149, FCC 98-27 (rel. Feb. 26, 1998).

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its ability to restrict carrier use of CPNI beyond the limits imposed by Congress in section 222 of the Communications Act;³ the need, if any, for additional safeguards to protect carrier information; and the need, if any, for additional enforcement mechanisms.⁴ As discussed below, USTA maintains: 1) that it would be inappropriate for the Commission to adopt a rule that allows for a bar on carrier use of CPNI; 2) that additional safeguards are unnecessary; and 3) that existing enforcement mechanisms are sufficient to address violations of section 222 and the Commission's CPNI rules.

DISCUSSION

I. The Commission Should Not Disrupt The Balance Between Competing Interests Established By Congress In Section 222

In the Further Notice, the Commission asks for comment on whether customers have the right to restrict all marketing uses of their CPNI by their carrier, including those expressly authorized by Congress in subsections 222(c)(1)(A) and (B) of the Communications Act.⁵ Although it asks for comments on this question, the Commission acknowledges that section 222 "is silent on whether a customer has the right to restrict a telecommunications carrier from using, disclosing, or permitting access to CPNI within the circumstances defined by subsections

³ 47 U.S.C. § 222.

⁴ Further Notice at ¶¶ 204-207.

⁵ Id. at ¶ 204.

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222(c)(1)(A) and (B).”⁶ USTA believes that congressional silence on this question is indicative of the answer to the Commission’s question -- Congress intended that carriers have the right to use CPNI for marketing, consistent with the express reservation of the right that is found in subsection 222(c)(1) .

A review of subsections 222(c) through (f) evidences no reticence or inability on the part of the Congress to define CPNI or explicitly enumerate rights and obligations with respect to its use, disclosure and protection. While subsection 222(a) begins with a general statement concerning a carrier’s duty to protect CPNI, subsection 222(c)(1) specifically describes the CPNI privacy requirements for telecommunications carriers. The decision by Congress to limit but not bar a carrier’s use of its customers’ CPNI indicates that Congress established a framework in section 222 that, in its view, balances competing commercial speech, privacy and competitive carrier interests. Although some may debate whether Congress struck the right balance, it would be inappropriate for the Commission to second guess the judgment of Congress and adopt a rule sanctioning a customer’s right to bar all carrier use of CPNI. Such a rule would conflict with the right of use reserved to telecommunications carriers in subsection 222(c)(1).

In passing section 222, Congress did not limit its consideration of competing interests to those of customer privacy and carrier competition. The reservation of the right of use of CPNI by telecommunications carriers represents an acknowledgment by Congress that carriers have a recognizable interest in being allowed to speak to their customers concerning the services that

⁶ Id.

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they provide to those customers. The Commission should not attempt to rewrite section 222 through the administrative rulemaking process by conferring upon customers a right that is not found in section 222. The Commission should be respectful of the balance struck by Congress and refrain from sanctioning additional constraints on carriers' commercial speech rights.

II. Additional Safeguards And Enforcement Mechanisms Are Unnecessary

The Commission asks if any additional safeguards are needed to protect confidential carrier information, "including that of resellers and information service providers."⁷ The Commission also asks whether there are additional enforcement mechanisms that it should adopt to ensure that carriers comply with subsection 222(a) of its rules.⁸

In asking about safeguards, the Commission indicates that they may be needed in order to protect the confidential information of carriers, including resellers and information service providers (ISPs). It is curious that the Commission would reference ISPs among telecommunications carriers since neither subsection 222(a), General, nor subsection 222(b), Confidentiality of Carrier Information, mention ISPs specifically. Further, information services are different from telecommunications services under the Communications Act,⁹ and the Commission has said that an ISP is not a telecommunications carrier unless it also provides

⁷ Id. at ¶ 206.

⁸ Id. at ¶ 207.

⁹ See 47 U.S.C. §§153(20) and (46).

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domestic or international telecommunications.¹⁰ ISPs are covered by section 222 if they are customers for a carrier's telecommunications services or if they also provide telecommunications services. They are not covered by subsection 222(b) in their role as ISPs.

No additional safeguards or enforcement mechanisms are necessary to protect confidential carrier information. Unless and until there is evidence that carriers are not protecting the confidential information of other carriers, the Commission should not presume bad faith and impose a burdensome array of additional safeguards. The protection of confidential information of customers, vendors and cocarriers is nothing new for telecommunications carriers. It is successfully managed on a day-to-day basis. It is bad business to violate customer, vendor or cocarrier confidences. Between the damage to a carrier's reputation and the legal and business consequences associated with such a breach of trust, a carrier has substantial incentives to protect carrier, vendor and customer proprietary information.

There is also no need for additional enforcement mechanisms. Between existing Commission enforcement mechanisms (complaints and forfeiture proceedings) and judicial enforcement mechanisms, it is hard to imagine a violation for which existing remedies would be inadequate. Unless it can be demonstrated that there are potential violations of subsection 222(a) for which no adequate remedy exists, additional enforcement mechanisms are unwarranted.

¹⁰ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, 15990, ¶ 995 (1996). See also 47 U.S.C. § 153(44).

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CONCLUSION

On the basis of the foregoing, the Commission should take no action to increase the restrictions on carrier use of CPNI beyond what is expressly set forth in section 222. The Commission should also not adopt additional safeguards or enforcement mechanisms unless and until it is clearly demonstrated that existing safeguards and enforcement mechanisms are inadequate.

Respectfully submitted,

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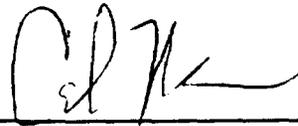
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March 30, 1998

CERTIFICATE OF SERVICE

I, Carl McFadgion, do certify that on March 30, 1998 copies of the Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.

A handwritten signature in black ink, appearing to read 'Carl McFadgion', written over a horizontal line.

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