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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

PETITION FOR RECONSIDERATION OR CLARIFICATION

Metrocall, Inc. ("Metrocall"), by its attorneys at pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (the "Act"), and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby respectfully requests that the Commission reconsider or clarify certain provisions of its Second Report and Order and Further Notice of Proposed Rule Making in the above referenced proceeding (the "CPNI Order").[1] In support hereof, the following is respectfully shown:

I. Statement of Interest

Metrocall is a publicly traded company (NASDAQ symbol: MCLL) which, through its wholly-owned licensing subsidiary, Metrocall USA, Inc., is the second largest provider of paging

[1] FCC 98-27 (released February 26, 1998). The CPNI Order was published in the Federal Register on April 24, 1998. See 63 Fed. Reg. 20326 (April 24, 1998). The thirtieth day from Federal Register publication is Sunday May 24, 1998; this Petition is being filed on the next business day. Consequently, this Petition is timely. See 47 C.F.R. § 1.4(b)(1); (e)(1); (j).

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services in the United. States. Metrocall provides Commercial Mobile Radio Service ("CMRS") paging to approximately 4.5 million subscribers throughout the nation.

Metrocall prides itself on being responsive to the demands of its customers. The rules adopted by the Commission governing telecommunications carriers' uses of customer proprietary network information ("CPNI") will likely have a profound effect on the manner in which Metrocall's personnel are permitted to communicate with its subscribers. Because the rules adopted in the CPNI Order may impair Metrocall's ability to fully service its subscribers, Metrocall has standing to file this Petition.

II. Background

New Section 222 of the Act, adopted by the Telecommunications Act of 1996 (the "Telecom Act"), permits a carrier to use CPNI with customer consent, and in other specified circumstances. See 47 U.S.C. § 222(c)(1); (d). The statute also defines two other types of information, "aggregate customer information" and "subscriber list information," the use of which by telephone exchange carriers is conditioned upon making that information available to competitors on just and reasonable terms and conditions, without unjust discrimination. 47 U.S.C. § 222(c)(3); (e). The CPNI Order adopted rules, *inter alia,* defining the information that constitutes CPNI; the types of services that fall within the statutory exemptions to the restrictions on use of CPNI; the notice and consent requirements for customer-approved use of CPNI.

In a subsequent order, the Common Carrier Bureau clarified certain aspects of the CPNI Order, including holding that customer names, addresses and telephone numbers do not constitute CPNI for purposes of the Act. Order in CC Docket No. 96-115, DA 98-971 (released May 21, 1998) (the "Clarification Order"). The Clarification Order also made provision for the use of

CPNI in marketing of telecommunications services bundled with information services and equipment.

Metrocall respectfully submits that additional reconsideration or clarification is necessary, to allow CMRS carriers to comply with the Commission's new restrictions on the use of CPNI, without sacrificing the responsiveness and convenience that customers have previously found in their CMRS providers.

III. Maintenance and Repair of Wireless Devices Should be Included in the Exemptions.

Section 222(c)(1)(B) of the Act permits a carrier to use or disclose CPNI in "the provision of services necessary to, or used in, the provision" of the telecommunications services to which a customer subscribes. 47 U.S.C. § 222(c)(1)(B). In interpreting the "necessary to, or used in" language of the Act, the FCC held that customer equipment and information services are *not* considered "services necessary to, or used in" the underlying telecommunications service. CPNI Order at ¶¶ 26, 45-46, 71-72. The CPNI Order used the term "customer premises equipment" or "CPE" - a term generally used in wireline services - but that Order's discussion indicates that the FCC intended its interpretation apply to CMRS providers as well as wireline carriers. Id. at ¶ 77.

The FCC found that installation, maintenance and repair services *related to inside wiring* fell within the statutory exemption for "necessary" services. CPNI Order at ¶¶ 78-79. The CPNI Order contained no discussion of CMRS repair and maintenance services, other than to note that CPNI obtained from CMRS services could not be used in the provision of inside wiring installation, maintenance and repair services. Id. at n.300. Similarly, in interpreting Section 222(d)(1) (which permits a carrier to use CPNI "to initiate, render, bill and collect for

telecommunications services"), the FCC merely stated that Section 222(d)(1) permits a carrier to use a customer's CPNI in connection with the installation, maintenance and repair of inside wiring. Id. at ¶ 82. As in its interpretation of Section 222(c)(1)(B), the FCC did not discuss the permissibility of using a customer's CPNI for the maintenance and repair of wireless devices.

The Clarification Order held that CPNI "independently derived" from a prior sale of "CPE"[2] to a customer could be used to market new "CPE." Clarification Order at ¶ 4. The Clarification Order, however, fails to take into account "non-marketing" circumstances, in which a wireless carrier would appear to be prohibited from using a customer's CPNI.

Metrocall respectfully submits that the FCC include the tuning (or re-tuning) of customer wireless devices, and repair and maintenance of those devices, within its interpretation of services for which a carrier may use CPNI pursuant to Sections 222(c)(1)(B) and (d)(1). The customer's receiving unit is a necessary component in the provision of a wireless service. The subscriber's "CPE" is a radio receiver tuned to receive only on a particular frequency, and only those transmissions coded with a subscriber-specific number; in the case of two-way CMRS, the subscriber's unit is also a radio transmitter, capable of transmitting on specific frequencies that can be received by the carrier's base station.

For example, a paging customer's pager must be programmed to receive on the carrier's base station frequency; it is impossible for a carrier to "initiate" or "render" service to the customer otherwise. Even though a growing number of paging customers have purchased their own pagers from retail outlets and the like, the carrier must still re-tune and assign a cap code to

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[2] The term "CPE" has generally not been used in discussing CMRS subscriber equipment -- that equipment is used so that the subscriber may receive a call or message without regard to the subscriber's presence at his/her "premises."

that customer-owned pager before the customer can receive pages from the carrier's base station.

Metrocall appreciates the flexibility that the Clarification Order tries to provide for bundled CMRS offerings; however, that Clarification Order does not provide complete relief. Technical compatibility between the customer's mobile unit and the carrier's base station is absolutely necessary if the customer is to obtain service. Restrictions on the carrier's ability to communicate freely with the customer at the time of initiating service simply makes the process more difficult for both parties, without countervailing public interest benefits. Restrictions on such carrier-customer discussions could actually encourage uneconomic or anticompetitive bundling -- a carrier need not obtain or use *any* customer "network" information if it insists that the customer lease or purchase a mobile unit directly from the carrier.

Similarly, access by the wireless carrier's personnel to CPNI for purposes of maintaining or repairing the customer's wireless unit is "necessary to" the provision of the wireless service, and an essential part of rendering service to the customer. Like inside wiring in the provision of wireline telephony, wireless subscriber units are needed for "physically connecting the [radio] transmission path." See CPNI Order at ¶ 79.

Moreover, the Commission has noted that the balance struck by Congress in Section 222(c)(1) was one between customer privacy and customer convenience, and that customers expect that their account information will be used by their carriers in certain instances. CPNI Order at ¶ 23-24. Metrocall respectfully submits that, when a customer is experiencing difficulties with his or her pager, or cellular or PCS phone, the customer expects the carrier's personnel to access whatever information necessary to resolve the problem. Under the CPNI Order, customer service personnel would need to make full disclosure of the requirements of Section 222 and ask

the customer for consent to use his/her CPNI, most likely after gaining the customer's consent to the audio taping or monitoring of the remainder of the call. CPNI Order at ¶¶ 112, 121.

In Metrocall's experience, customers want prompt remedial action when their paging units are not functioning properly. Many of Metrocall's customers are engaged in emergency medical services, law enforcement activities, and similar occupations where their paging carrier's swift response to any technical problems is not merely desired, but essential. Those customers are likely to be confused or angered by a cumbersome "disclosure and consent" procedure in response to their service calls. Restrictions on the use of CPNI for repair and maintenance of wireless subscriber units simply does not comport with the "principles of customer control and convenience" embodied in Section 222. Cf. CPNI Order at ¶¶ 53-56.

The Commission should therefore reconsider or clarify those portions of the CPNI Order that indicate that only inside wiring installation, maintenance and repair fall within the exemptions of Sections 222(c)(1)(B) and (d)(1). Instead, the FCC should clarify that the tuning or retuning of wireless subscriber units, and the repair and maintenance of those units are also "necessary to" the provision of wireless telecommunications services, and are required to "initiate [and] render" wireless telecommunications services.

IV. The Commission Should Clarify its Restrictions Concerning "Information Services"

The FCC further held that a carrier may not use, access or disclose CPNI to market "information services," defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). The FCC considered the following services to be

examples of "information services": call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services. CPNI Order at ¶ 72. On the other hand, the FCC relied on its prior determinations, in the *Computer II* and *Computer III* proceedings, that certain services are "adjunct-to-basic;" *i.e.*, that they are integral to the provision of a telecommunications service, and therefore fall within the statutory language covering "services necessary to, or used in, the provision" of the telecommunications services to which a customer subscribes. Id. at ¶ 73. Those services include "speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing, call tracking, and certain centrex services." Id.

The Clarification Order held that, where a carrier has previously provided equipment or information services to a customer, bundled with a telecommunications service, the carrier may use CPNI that is *independently derived* from the "CPE" and information service offerings to market additional bundled equipment and information services. Clarification Order at ¶ 4.

Metrocall respectfully submits that this policy is still difficult to apply in the context of many wireless services, and will inhibit the marketing and provision of existing and new services to wireless consumers. Competitive wireless carriers have long provided services without regard to the regulatory distinctions drawn in monopolistic wireline services. As CTIA notes in its "Petition for Reconsideration and Petition for Forbearance," cellular carriers have long provided messaging, call forwarding and similar services, as part of an integrated package. See Cellular Telecommunications Industry Association, Petition for Reconsideration and Petition for Forbearance (filed May 20, 1998) ("CTIA Petition"). Paging carriers have often integrated their one-way signaling services with voice mail or operator answering service features. Wireless

carriers have also provided interested subscribers with such services as news updates, stock quotes, sports scores and the like over the same wireless devices, as part of an integrated service package.

The CPNI Order would apparently prohibit carriers from continuing to market such integrated services packages to their customers. Although the Clarification Order attempts to provide some relief, it does not indicate how CMRS carriers are to determine whether specific CPNI was derived from the "information service" or "telecommunications service" portion of a seamlessly combined and marketed service.

Metrocall respectfully submits that neither wireless carriers or their customers have ever made such sharp distinctions in the components of integrated service packages, and the Commission should not require them to do so now. While a customer might distinguish "plain old telephone service" from enhanced services, that same customer is likely to regard all the interrelated services he or she receives from his/her paging or cellular carrier as part of the "service" to which he/she subscribes. A strict division between "information services" and "telecommunications services" may be appropriate in the local telephone exchange market, where entrenched monopolists could use their market power to gain leverage in related, competitive markets. In the wireless telecommunications market, however, that approach will lead to results that are contrary to the consumer interests and pro-competitive market that Section 222 seeks to foster.

Wireless consumers have an array of providers, services and pricing plans from which to choose. The level of subscriber "churn" experienced by CMRS carriers is ample evidence that subscribers are willing and able to exercise the freedom of choice provided to them by a

competitive marketplace. Wireless carriers therefore have strong incentives to provide customers with new service options, in conveniently-integrated and affordably-priced packages, and to keep customers informed of those expanded service options. Rules which prohibit wireless carriers from using information they already have about their subscribers, in order to let interested subscribers know about expanded, interrelated service offerings, do little more than limit a wireless carrier's ability to be responsive to the changing needs of its customers. And, because these carriers have never previously distinguished between the "information" and "telecommunications" portions of the services they provide, customer confusion is the likely result of an artificial attempt to impose wireline regulatory concepts onto wireless service packages.

Metrocall therefore suggest that, rather than artificially atomizing integrated wireless services into "telecommunications services" and non-telecommunications "information services" components, the Commission should consider wireless customers' "total service" package to include all related, integrated services to which that customer subscribes from a particular carrier.

Conclusion

For all the foregoing reasons, Metrocall respectfully requests that the Commission reconsider or clarify certain portions of its CPNI Order to the extent indicated herein.

Respectfully submitted,

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May 26, 1998

CERTIFICATE OF SERVICE

I, Rhonda M. Johnson, a secretary in the law offices of Joyce & Jacobs, Attorneys at Law, L.L.P., do hereby certify that the foregoing Petition for Reconsideration or Clarification, was served, on this 26th day of May, 1998, by first class U.S. mail, postage prepaid upon the following:

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