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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)
_____)

CC Docket No. 96-115

**PETITION FOR RECONSIDERATION OF THE
UNITED STATES TELEPHONE ASSOCIATION**

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May 26, 1998

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SUMMARY

By this petition for reconsideration, USTA asks the Commission to reconsider three decisions made in its Second Report and Order concerning CPNI. The Commission is asked to reconsider: 1) the limitation placed on the use of CPNI to market CPE; 2) the limitation placed on the use of CPNI for customer retention purposes or win-back; and 3) its imposition of a costly, inefficient and overly regulatory set of CPNI safeguards applicable to telecommunications carriers.

USTA demonstrates that the sale of CPE is a service necessary to, and used in, the provision of telecommunications service. USTA also shows that the use of CPNI for customer retention purposes is not prohibited by Section 222 of the Communications Act and would serve the public interest. Finally, USTA presents the case for why the adopted safeguards should be rescinded and the Commission should rely on ground rules that simply define permissible, required or prohibited conduct with respect to CPNI.

On the basis of the arguments presented in its petition for reconsideration, USTA asks that the Commission reconsider the Second Report and Order.

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**PETITION FOR RECONSIDERATION OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA),¹ through the undersigned, hereby requests reconsideration of the Commission's Second Report and Order² in the above-captioned proceeding. This petition for reconsideration directs itself to three areas addressed by the Second Report and Order: 1) the limitation placed on the use of CPNI³ to market customer premises

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. Approximately 1070 USTA members provide domestic local exchange services and are affected by the Federal Communications Commission's newly adopted customer proprietary network information (CPNI) rules.

² Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 98-27 (rel. Feb. 26, 1998) (Second Report and Order). The Second Report and Order was published in the Federal Register on April 24, 1998.

³ CPNI is defined at 47 U.S.C. § 222(f)(1) as "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service

equipment (CPE); 2) the limitation placed on the use of CPNI for customer retention purposes (also known as "win-back"); and 3) the imposition of a costly, inefficient and overly regulatory set of "safeguards" purportedly intended to prevent telecommunications carriers from violating the provisions of Section 222 of the Communications Act⁴ and the Commission's CPNI rules. As discussed below, the actions taken by the Commission in these three areas are not required by Section 222, are not necessary to protect CPNI, and are arbitrary and capricious. Accordingly, USTA requests that the Commission reconsider its decisions in the Second Report and Order concerning these matters.

DISCUSSION

I. The Sale Of CPE Is A Service Necessary To, And Used In, The Provision Of Telecommunications Service

In the Second Report and Order, the Commission concludes that "a carrier may use, disclose, or permit access to CPNI without customer approval for the provision of inside wiring installation, maintenance, and repair services because they are 'services necessary to, or used in, the provision of such telecommunications service' under Section 222(c)(1)(B)."⁵ "In contrast [concludes the Commission], CPE and information services are not 'services necessary to, or

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 customer-carrier 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."

⁴ 47 U.S.C. § 222.

⁵ Second Report and Order at ¶ 26.

used in, the provision of such telecommunications service' within the meaning of section 222(c)(1)(B)."⁶ USTA believes that the Commission is incorrect as to the latter conclusion. In the context of the application of subsection 222(c)(1)(B), no logical or legally sufficient distinction can be made between inside wire and CPE such that the provision of inside wiring installation, maintenance and repair service can be deemed to fall within the "services necessary to, or used in, the provision of such telecommunications service" language of subsection 222(c)(1)(B) for a wireline telecommunications service while the sale of CPE is found to be outside of its coverage. A person can no more place or receive communications over a telecommunications network without CPE than one can over a wireline telecommunications network without inside wiring.

The Commission's analysis with respect to the applicability of subsection 222(c)(1)(B) to inside wiring installation, maintenance and repair service also supports the conclusion that the sale of CPE (which is a service) is necessary to the provision of a telecommunications service, and the Commission's determination that the sale of CPE does not also fall within the scope of subsection 222(c)(1)(B) is arbitrary, capricious and inconsistent with its decision concerning inside wiring. In deciding that inside wiring installation, maintenance and repair service falls within the intended reach of subsection 222(c)(1)(B), the Commission supports its decision by

⁶ *Id.* Section 222(c)(1) provides for two exceptions to the general restriction on a telecommunications carrier's use of CPNI obtained by virtue of its provision of a telecommunications service, absent customer approval or as required by law. Those exceptions are in the carrier's 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."

stating: 1) that it agrees with U S WEST that "inside wire has little purpose beyond physically connecting the telephone transmission path[;]"⁷ 2) that it agrees with PacTel that the provision of a telecommunications service "includes keeping the telecommunications service in working order through installation, maintenance, and repair services[;]"⁸ 3) that its decision is consistent with customer expectations;⁹ and that inside wiring installation, maintenance, and repair services "constitute nontelecommunications services that carriers effectively need and use in order to provide wireline telecommunications services [even though such service can be purchased separately from telephone services]."¹⁰ USTA agrees with the Commission's analysis and decision with respect to the applicability of subsection 222(c)(1)(B) to inside wiring installation, repair and maintenance service.

With respect to CPE, though, the Commission summarily concludes that CPE is equipment, not a service, and that subsection 222(c)(1)(B) extends only to services.¹¹ It cannot be disputed that CPE is equipment, but the analysis as to the applicability of subsection 222(c)(1)(b) to the sale of CPE does not end there.

The wire/fiber, conduit, couplings and additional hardware that comprise "inside wiring" are no more a service than is CPE. Inside wiring is very much hardware or equipment just like

⁷ *Id.* at ¶ 79.

⁸ *Id.*

⁹ *Id.* at ¶ 80.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 71.

CPE. Still, it is essential for the provision of a wireline telecommunications service, and the installation, maintenance, and repair of inside wire is the provision of a service. Likewise, CPE is essential for the provision of wireline and wireless telecommunications services (customers must be able to convert the communications that are transported over telecommunications networks into a usable form), and the sale of CPE is a service. Customers can choose the service provider from whom they wish to purchase inside wiring installation, maintenance, and repair services. They can also select from among multiple providers for their CPE, as well as any additional repair or service arrangements that may be available with the CPE. Customers expect, as with inside wiring installation, maintenance and repair service, that they will be offered CPE by their telecommunications carrier even though they realize that their carrier is not their sole source for CPE.

As the Commission found to be the case with inside wiring installation, maintenance, and repair service,¹² the provision of CPE by a customer's telecommunications carrier is a core carrier offering that is both necessary to and used in the provision of an existing telecommunications service. Customers expect that their CPNI will be used by their telecommunications carrier to provide them with CPE. Including the provision of CPE within the coverage of subsection 222(c)(1)(B) does not shift the competitive balance in the CPE market and serves the public interest. For the reasons set forth above, the Commission should reconsider its decision to limit a carrier's use, disclosure or access to CPNI, without customer approval, for the provision of CPE.

Although USTA believes that reconsideration as requested above is the right action for

¹² *Id* at ¶ 80.

the Commission to take with respect to CPE, an alternative, should the Commission decline to reconsider its decision, would be for the Commission to immediately forbear from limiting a carrier's use of CPNI for the provision of CPE pursuant to its authority under Section 10 of the Communications Act.¹³ Enforcement of the limitation is not necessary to prevent the imposition of unjust, unreasonable or unreasonably discriminatory charges, practices, classifications or regulations in connection with the provision of the underlying telecommunications service. Enforcement is also not necessary in order to protect consumers generally or carriers' customers specifically. Forbearance, in the absence of reconsideration, is consistent with the public interest.

II. A Carrier's Right To Use CPNI In Its Provision Of The Telecommunications Service From Which It Is Derived Extends To The Use Of CPNI For Customer Retention

Without having raised the issue in the notice of proposed rulemaking (NPRM) in this proceeding and without the benefit of a record on which to predicate reasoned decision-making, the Commission decided that a "former (or soon-to-be former) carrier" may not "use the CPNI of its former customer (i.e., a customer that has placed an order for service from a competing provider) for 'customer retention' purposes."¹⁴ USTA believes that, in the context of customer retention efforts, a reasonable construction of subsection 222(c)(1)(A), that serves the public interest, allows for the use of a customer's CPNI for the purpose of: 1) attempting to retain a customer that has indicated an intention to switch to the service of another carrier but has yet to

¹³ 47 U.S.C. § 160.

¹⁴ Second Report and Order at ¶ 85.

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do so; and 2) to attempt to reacquire a customer that has switched to the service of another carrier if the effort to reacquire the customer is reasonably proximate in time to the switch. USTA believes that such an interpretation of Section 222(c)(1)(A) is reasonable and consistent with what a customer would expect from any customer-focused telecommunications carrier that is motivated to retain existing customers and recapture recently lost customers.

The use of CPNI for customer retention purposes is procompetitive. Allowing a former, or soon-to-be former, carrier to use CPNI to attempt to reacquire a former customer, or retain a soon-to-be former customer, invites competition (with respect to price, features or other elements of the service that are of value to customers) among service providers -- an outcome that is clearly beneficial to customers. Customers would like for carriers to be proactive in offering them the "best deal" even before a customer gives consideration to switching to another carrier. But once a customer makes a decision to switch to another carrier and advises the current carrier of that decision, that customer expects the current carrier to respond with an offer designed to induce the customer to remain. If the current carrier does not make such an effort, the customer will consider the carrier derelict or incompetent. A carrier that is so passive as to not pursue defecting customers is likely to see a significant erosion of its customer base over time.

The inability to pursue targeted customer retention and reacquisition efforts constrains a service provider's ability to secure valuable information. A carrier in pursuit of a soon-to-be former, or former, customer may obtain valuable information from the customer even if the effort is unsuccessful. The information can be used to improve service in the areas where the former customer found them to be deficient. This can lead to improvements in the service that benefit

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existing and future customers.

The limitation on customer retention efforts adopted by the Commission are unparalleled in other service industries. There is no benefit to consumers in prohibiting reasonable retention efforts by service providers. Consumers have the ability to protect themselves from unwanted solicitations. For example, they can request that their names and telephone numbers be removed from lists used to make telephone solicitations.

The limitation on the use of CPNI for reasonable and expected customer retention and reacquisition efforts unreasonably and arbitrarily restrains a carrier's ability to communicate with a category of persons that have an expectation of the free flow of information from the carrier. Absent the showing of a significant competing customer or governmental interest in limiting such communications, the Commission should seek to facilitate such communications rather than limit them. Further, the Commission should not impose such a limitation in the absence of a clear and irrefutable Congressional directive to restrict reasonable carrier retention efforts. No such clear and irrefutable directive can be found in Section 222.

Because the issue of customer retention efforts and the Commission's adopted limitation were not raised in the NPRM, the Commission must revisit the matter on reconsideration. Parties were denied the opportunity to comment on this matter during the rulemaking proceeding. The Commission adopted the limitation on the use of CPNI for customer retention efforts without a record to support its conclusion that the use of CPNI for customer retention efforts "is outside of the customer's existing service relationship within the meaning of section

222(c)(1)(A).¹⁵ Reconsideration on this matter is necessary and appropriate.

III. **The Adopted Safeguards Are Costly, Inefficient, Overly Regulatory, And Unfairly Burden Carriers That Would Comply With Reasonable CPNI Ground Rules Without Safeguards**

We have moved into a dynamic era in the communications industry that is marked by increased competition and technological innovation. New products and services are introduced into the market almost daily. Consumers have more options today than ever before with respect to the products and services they purchase, who they purchase them from, and the prices or pricing plans available to them. It is commonly accepted that we are in the midst of a communications industry revolution, and the amazing changes that have occurred in the industry during the last decade are in significant part responsible for the sustained growth in the U.S. economy.

Although the communications industry has changed demonstrably in the last decade, the way in which the Commission regulates the industry (particularly incumbent wireline carriers) has changed very little. The Commission has continued to use a regulatory model whose dominant attributes are its comprehensive, intrusive and burdensome nature. As competition drives telecommunications carriers to be more targeted and efficient with respect to service delivery, the Commission needs to move to a regulatory model that is responsive to the changed environment in which carriers operate. This can be done without compromising the public interest. The Commission needs to adopt a regulatory model that incorporates minimalist rules

¹⁵ Id.

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that simply define permissible, required or prohibited conduct and allow carriers to serve their customers without unnecessary regulatory impediments, while complying with the "ground rules."

The Commission has too often elected to augment the ground rules with costly, overly regulatory safeguards that produce marginal, if any, demonstrable benefits to customers, and that inject inefficiencies into carrier service processes. The safeguards can take the form of detailed reporting requirements, prior approval reviews, or systems and process requirements. The safeguards appear to presume that all subject carriers will attempt to violate the rules, and they seek to anticipate every conceivable act of noncompliance that might arise. Whatever benefit such safeguards may have produced in the past, they now need to give way to a streamlined regulatory model that is consonant with the realities of today's communications market.

In recent speeches, Commissioner Michael Powell has spoken of the need for regulatory agencies such as the Commission to make regulation more efficient by shifting resources from "prospective regulation to enforcement."¹⁶ Commissioner Powell very succinctly states the problem and identifies the needed solution:

Another way that we can make regulation more efficient is to shift our resources from prospective regulation to enforcement. Communications regulatory agencies like the FCC have historically allowed companies to operate in certain market segments and to take action, only by the grace of prior approval. This process has often been resource-intensive and time-consuming.¹⁷

¹⁶ New Regulatory Thinking, Speech of Commissioner Michael Powell (as prepared for delivery) before the 42nd Annual MSTV Membership Meeting, Las Vegas, Nevada, April 6, 1998.

¹⁷ Id.

Communications policymakers should look to enforcement as a means to protect the public against certain harms without hindering companies from entering new markets that lie outside their traditional regulatory boundaries. Also by doing so, we will cut down on the speculative predictions that characterize many of our deliberations presently. Rather than imagining all the dangers that might result if we let a company do what it has asked and then take equally speculative action to meet those speculative dangers, let's instead police conduct and make decisions based on real facts. If there are "teeth" in our enforcement efforts, companies will take heed or pay the price.¹⁸

The Commission's CPNI safeguards are an example of the kind of rules that needlessly impose costs, introduce inefficiencies in carrier processes and focus on "speculative dangers."

Commission Rule 64.2009 requires that carriers develop and implement an elaborate, costly and inefficient mix of systems capabilities and processes to protect against "unauthorized access to CPNI by their employees or agents, or by unaffiliated third parties."¹⁹ The Commission has required: 1) that carriers develop and deploy software that indicates in the first few lines of the first screen of a customer's record the CPNI status of the customer and his/her subscription status;²⁰ 2) that carriers train personnel as to when they are and are not authorized to use CPNI and implement a disciplinary process;²¹ 3) that carriers develop and deploy an electronic audit mechanism that tracks access to customers' accounts and identifies when a customer's record is

¹⁸ *Id.*

¹⁹ Second Report and Order at ¶ 191.

²⁰ 47 C.F.R. § 64.2009(a).

²¹ 47 C.F.R. § 64.2009(b).

accessed, by whom and for what purpose;²² 4) that carriers establish a supervisory review process for outbound marketing and maintain compliance records for a minimum of one year (sales personnel must obtain supervisory approval for any proposed outbound request);²³ and 5) that carriers have a corporate officer execute an annual compliance certificate that explains how the carrier is complying with the Commission's CPNI rules.

The Commission's safeguards present substantial financial burdens for those companies that will have to create systems and processes for the monitoring and tracking of CPNI for the first time, and for other companies that will have to modify CPNI systems and processes that were established many years ago. The development and deployment costs for all companies, as well as the demands on information and operating systems personnel, will compete with other commitments, including regulatory mandates, that require systems and process modifications.²⁴ The cost and personnel issues raised by the requirements to develop and deploy software flags and electronic audit capabilities are significant for all carriers even though the impacts will vary across the universe of carriers subject to the requirements. One of the inherent dangers of adopting comprehensive, detailed safeguards such as these is that they do not allow carriers the flexibility to comply with the ground rules (in this case the rules found at Sections 64.2005 and

²² 47 C.F.R. § 64.2009(c).

²³ 47 C.F.R. § 64.2009(d).

²⁴ For example, interconnection requirements and Year 2000 preparation.

64.2007)²⁵ in ways that are least costly and most efficient and effective for them and their customers. It is self-evident that compliance with the CPNI ground rules is a materially different undertaking for a carrier serving 5000 or fewer customers versus a carrier serving 5,000,000 or more customers, and those in between.²⁶

Even the seemingly straight forward can prove complicated when regulators impose operational requirements that take a one-size-fits-all approach. Section 64.2009(a) requires that carriers deploy software that flags customer service records in connection with CPNI and "that indicates within the first few lines of the first screen of a customer's service record the CPNI approval status and reference the customer's existing service subscription." The requirement appears to assume that there is a universal "first screen" on which such a flag would appear. As one carrier has reported, this is not like engaging a word processing program. In the system to which it is migrating (a decision that predates the Second Report and Order), it will have three "first screen" choices depending on the data to be accessed. Further, other carriers were in the process of migrating to new customer information systems before release of the Second Report and Order and are in queue for cutover by their vendors. The vendor's deployment schedule could result in costly modifications having to be made to both the old and new systems in order

²⁵ Acknowledgement that these are the current CPNI ground rules is not meant to imply that USTA accepts any particular rule as a just and reasonable exercise of the Commission's rulemaking authority in this proceeding.

²⁶ A number of carriers, particularly smaller ones, have the added complication of having to negotiate and coordinate systems modifications with service bureaus that handle certain billing and data functions for them. The service bureau costs for analysis and programming can be \$150,000 or more, which for many carriers is a significant unanticipated cost that does not include the additional costs that will be incurred for internal systems and process modifications.

to comply with the Second Report and Order.

Another systems-related compliance question that has been presented to USTA is what must a carrier do if it does not have an interactive billing system? Will it have to deploy an interactive system for electronic tracking and auditing purposes if it has heretofore handled customer inquiries by accessing paper copies of customer bills and service profiles?

Large carriers are not immune from cost and operational issues related to the electronic systems requirements of the Second Report and Order. For instance, CPNI may be found in a number of different systems, designed for discrete functions, that do not share a common platform. Carriers confronting this problem will have to commit significant financial and personnel resources to the task of bringing these systems into compliance in an efficient, cost effective and noncustomer impacting manner.

The electronic flagging and auditing requirements are not the only requirements among the CPNI safeguards that are unnecessary and place the focus on how carriers are complying the with CPNI ground rules as opposed to whether they are complying with the rules. The requirements that carriers have an express employee disciplinary process in place (Section 64.2009(b)) and that there be supervisory approval of any proposed outbound marketing request by sales personnel (Section 64.2009(d)) are also examples.

It is presumed that the Commission's prospective and overly regulatory safeguards will produce compliance with the CPNI ground rules that would otherwise not be forthcoming. That proposition has not and cannot be demonstrated unless the Commission first adopts minimalist

ground rules "rather than continuing to rely on prospective, prophylactic regulation."²⁷ If compliance is not forthcoming, there is then a basis for targeted, fact-based, tailored enforcement. Although subsection 222(a) of the Act imposes a general duty upon carriers to protect the confidentiality of the proprietary information of other telecommunications carriers, manufacturers and customers,²⁸ it in no way prescribes how carriers must go about fulfilling their duty; nor does it direct that the Commission prescribe how carriers should fulfill their statutory obligation to protect proprietary information.

The Commission has stated that it does not believe that its safeguards are unduly burdensome and that it will consider waivers and alternative safeguards if it can be demonstrated that they are overly burdensome.²⁹ The facts upon which the Commission relies in reaching the conclusion that the safeguards are not burdensome are not readily apparent. The nature of the burden will vary in scope and degree by carrier. Although the availability of waivers offers the prospect of some relief, the waiver process itself is inefficient, unpredictable, costly and time consuming. A better approach would be for the Commission to stay the rules concerning the safeguards until it acts upon this and other reconsideration petitions. Then, on reconsideration, the Commission should rescind Section 64.2009 of its rules.

²⁷ Working Toward Independents' Day: Mid-Size Carriers as the Special Forces of Deregulation, Speech of Commissioner Michael Powell (as prepared for delivery) before the Independent Telephone Pioneer Association (National Chapter), Washington, DC, May 7, 1998.

²⁸ 47 U.S.C. § 222(a).

²⁹ Second Report and Order at ¶ 194.

CONCLUSION

On the basis of the foregoing, USTA requests that the Commission reconsider its decisions in the Second Report and Order and: 1) extend the coverage of subsection 222(c)(1)(B) to permit carriers' use, disclosure and access to CPNI, without customer approval, for the provision of CPE; 2) allow for the use of CPNI, without customer approval, for customer retention purposes; and 3) forgo the imposition of the costly, inefficient and overly regulatory safeguards found in Section 64.2009 of its rules.

Respectfully submitted,

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May 26, 1998

CERTIFICATE OF SERVICE

I, Donna Young, do certify that on May 26, 1998, copies of the accompanying Petition for Reconsideration of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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