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Federal Communications Commission

DA 98-971

**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)	
)	
)	

ORDER

Adopted: May 21, 1998

Released: May 21, 1998

By Chief, Common Carrier Bureau

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I. INTRODUCTION

1. On February 26, 1998, the Commission released a *Second Report and Order and Further Notice of Proposed Rulemaking*¹ (*Second Report and Order*) interpreting and implementing, among other things, the portions of section 222 of the Communications Act of 1934, as amended, that govern the use and disclosure of, and access to, customer proprietary network information (CPNI) by telecommunications carriers. Since the release of the *Second Report and Order*, a number of parties have requested that the Commission clarify various issues pertaining to that order.² In response to these requests, the Common Carrier Bureau issues this order clarifying the *Second Report and Order* as follows:

(a) Independently-derived information regarding customer premises equipment (CPE) and information services is not CPNI and may be used to market CPE and information services to customers in conjunction with bundled offerings.³

(b) A customer's name, address, and telephone number are not CPNI.⁴

(c) A carrier has met the requirements for notice and approval under section 222 and the Commission's rules where it has both provided annual notification to, and obtained prior written authorization from, customers with more than 20 access lines in accordance with the Commission's former CPNI rules.⁵

¹ *In the Matter of 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 Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (rel. Feb. 26, 1998) (*Second Report and Order*).

² A number of telecommunications carriers have made *ex parte* presentations following the release of the *Second Report and Order* highlighting the need for clarification. See, e.g., AirTouch *ex parte* (filed April 24, 1998); AirTouch *ex parte* (filed April 29, 1998); AT&T Wireless Services, Inc. *ex parte* (filed May 1, 1998); Bell Atlantic Mobile *ex parte* (filed April 3, 1998); GTE Wireless and GTE Service Corporation *ex parte* (filed April 7, 1998); Sprint PCS *ex parte* (filed April 24, 1998). In addition, CTIA filed a request for deferral and clarification, and GTE filed a petition for temporary forbearance or, in the alternative, motion to stay. We note that the issues we clarify in this order overlap with some of the issues raised in these petitions. See CTIA *Request for Deferral and Clarification* (filed April 24, 1998); GTE *Petition for Temporary Forbearance, or in the Alternative, Motion to Stay* (filed April 29, 1998).

³ See discussion *infra* Part II.

⁴ See discussion *infra* Part III.

⁵ See discussion *infra* Part IV.

(d) Although a carrier must ensure that its certification of corporate compliance with the Commission's CPNI rules is made publicly available, it is not required to file this certification with the Commission.⁶

II. CLARIFICATION OF MARKETING USES OF CUSTOMER INFORMATION RELATED TO CPE OR INFORMATION SERVICES

2. Section 222(c)(1) establishes the limited circumstances in which carriers can use, disclose, or permit access to CPNI without first obtaining customer approval. In interpreting section 222(c)(1) in the *Second Report and Order*, the Commission adopted an approach that allows carriers to use CPNI, without first obtaining customer approval, to market improvements or enhancements to the package of telecommunications services the carrier already provides to a particular customer, which it referred to as the "total service approach." The Commission determined, however, that carriers may not use CPNI, without first obtaining customer approval, to market offerings that fall outside the scope of the customer's existing service relationship with the carrier. The Commission also concluded that, as required by section 222(c)(1), carriers may not use CPNI, without first obtaining customer approval, to market non-telecommunications offerings, including CPE and information services. More specifically, the Commission concluded that CPE and information services are not "telecommunications services," and thus do not fall within the scope of section 222(c)(1)(A).⁷ In addition, the Commission concluded that neither CPE nor most information services fall within the meaning of "services necessary to, or used in" the provision of telecommunications service under section 222(c)(1)(B).⁸

3. The Commission's discussion, however, did not specifically address a carrier's ability to use CPNI when its customers obtain their telecommunications service as part of a bundled package that includes non-telecommunications service offerings, such as CPE or certain information services. Although the Commission expressly recognized that commercial

⁶ See discussion *infra* Part V.

⁷ Section 222(c)(1)(A) provides that "[e]xcept 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 [CPNI] in its provision of (A) the telecommunications service from which such information is derived." 47 U.S.C. § 222(c)(1)(A). *Second Report and Order* at 35-36, ¶¶ 45-46.

⁸ Section 222(c)(1)(B) provides that "[e]xcept 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 [CPNI] in its provision of . . . (B) services necessary to, or used, in the provision of such telecommunications service, including the publishing of directories." 47 U.S.C. § 222(c)(1)(B). *Second Report and Order* at 56-62, ¶¶ 71-77.

mobile radio services (CMRS) providers are permitted to offer bundled service under the Commission's rules, including CPE and various information services, it rejected the argument that this historical treatment required the Commission to interpret either section 222(c)(1)(A) or (B) as permitting CMRS providers to use CMRS-derived CPNI, without first obtaining customer approval, to market these non-telecommunications service offerings solely because they are provided to customers bundled with CMRS.⁹ On the other hand, the Commission noted that its interpretation of section 222(c)(1) does not prohibit carriers from bundling services that they otherwise are able to bundle under the Communications Act and the Commission's rules, or from marketing integrated service offerings. Moreover, the Commission expressly noted that "customer information derived from the provision of any non-telecommunications service, such as CPE or information services, is not covered by section 222(c)(1), and thus may be used to provide or market any telecommunications service regardless of telecommunications service categories or customer approval."¹⁰

4. The Bureau believes that further clarification of carriers' obligations and rights in the context of bundled offerings will serve to minimize any potential confusion regarding a carrier's ability to use CPNI and other customer information to market new bundled offerings to existing customers. Accordingly, we make clear that, when a customer purchases CPE or information services from a carrier that are bundled with a telecommunications service, the carrier subsequently may use any customer information independently derived from the carrier's prior sale of CPE to the customer or the customer's subscription to a particular information service offered by the carrier in its marketing of new CPE or a similar information service that is bundled with a telecommunications service. Neither CPE nor information services constitute "telecommunications services" as defined in the Act.¹¹ Therefore, any customer information derived from the carrier's sale of CPE or from the customer's subscription to the carrier's information service would not be "CPNI" because section 222(f) defines CPNI in terms of information related to a "telecommunications service." As a result, in situations where the bundling of a telecommunications service with CPE, information services, or other non-telecommunications services is permissible, a carrier may use CPNI to target particular customers in a manner consistent with the *Second Report and Order*, and it also may use the customer information independently derived from the prior sale of the CPE, the customer's subscription to a particular information service, or the carrier's

⁹ *Second Report and Order* at 61-62, ¶¶ 77.

¹⁰ *Id.* at 61, n.291.

¹¹ Section 3(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153.

provision of other non-telecommunications offerings to market its bundled offering.¹²

5. In an effort to further explain a carrier's obligation in the context of bundled offerings, we provide an example of how the Commission's rules would apply in the CMRS context. A CMRS provider could use CMRS-derived CPNI to target its high usage analog wireless customers to offer them new digital wireless service plans. If such an analog customer also had purchased previously a CMRS handset, or an information service such as voice mail, as part of a bundled offering from the carrier, the carrier also would have access to information concerning the customer's purchase of the carrier's CPE and information service that is independent from the CPNI derived from the provision of the CMRS service. Consistent with the total service approach, the carrier could use such customer information to market new digitally-compatible CPE and new voice mail service in conjunction with the offering of new digital wireless service in a single contact with the customer, without first obtaining the customer's approval.

6. In contrast, where a particular customer has not purchased CPE or information services from the carrier that is providing its telecommunications services, the carrier would be subsequently prohibited from using CPNI, without first obtaining customer approval, to market a bundled offering of CPE or information services with telecommunications services to such a customer. In this situation, absent customer approval, the carrier would be using CPNI in violation of section 222(c)(1) to market CPE or information services to a customer with whom they had no existing relationship derived from the carrier's sale of CPE or the customer's subscription to the carrier's information service. Similarly, the general knowledge that all wireline customers have a telephone would not permit carriers to use CPNI derived from wireline service to select those individuals to whom to market the carrier's CPE offerings.

7. We also clarify that, only where CPE or an information service is part of a bundled offering, including a telecommunications service, and the carrier is the existing CPE or information service provider, could the carrier use CPNI to market a new bundled offering that includes new CPE or similar information services. For example, carriers cannot use CPNI to select certain high usage customers to whom they also sold telephones, and then market only new CPE that is not part of a new bundled plan.¹³ Section 222(c)(1)(A) permits

¹² We note that this concept also would apply to CPE or information services sold by the carrier's agent. Thus, for example, if a customer purchases a bundled offering, including CPE or information services and a telecommunications service, from the carrier's agent, the carrier may then use the CPE-related or information service-related customer information derived from the customer's relationship with the carrier's agent to market that customer new CPE or a similar information service offering as part of a new bundled offering that includes a telecommunications service.

¹³ We note that carriers could use information derived from the sale of CPE to target customers to market new CPE.

the use of CPNI, without first obtaining customer approval, only "in the provision of the telecommunications service from which such information is derived." Therefore, when a carrier has identified a customer through the use of CPNI, but is not offering a telecommunications service in conjunction with its marketing of CPE or information services, that carrier would be using CPNI outside the provision of the service from which it is derived, in violation of section 222 and the Commission's rules.¹⁴

III. CUSTOMER'S NAME, ADDRESS, AND TELEPHONE NUMBER

8. We clarify that a customer's name, address, and telephone number do not fall within the definition of CPNI, set forth in section 222(f)(1). Section 222(f)(1) defines CPNI as:

(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.¹⁵

Subscriber list information includes a customer's name, address, and telephone number so long as they have been published.¹⁶ Therefore, it is clear that the definition of CPNI does not

¹⁴ We note that this clarification does not alter the current Commission restrictions on carrier bundling of CPE or information services for wireline carriers. See *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, Final Decision, 77 FCC 2d 384, 475, 496 (1980) (*Computer II Final Decision*); Memorandum Opinion and Order on Reconsideration, 84 FCC 2d 50 (1980); Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512 (1981), *aff'd sub nom.*, *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); see also 47 C.F.R. § 64.702(e). We note that the Commission sought comment on modifying these restrictions in 1996. *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996) (*Interexchange Notice*); see also *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order*, 11 FCC Rcd 20,730 at ¶ 118 (1996) (*IXC Tariff Forbearance Order*), stayed *sub nom.* *MCI Telecommunications Corp. v. FCC*, Consolidated Cases 96-1459, 96-1477, 97-1009, Feb. 13, 1997; *Order on Reconsideration*, 12 FCC Rcd 15,014 (1997), *further recon. pending*.

¹⁵ 47 U.S.C. § 222(f)(1).

¹⁶ 47 U.S.C. § 222(f)(3) defines subscriber list information as 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

include a customer's name, address, and telephone number that have been published, in the manner described by section 222(f)(3)(B). The question remains, however, as to whether such information that has not been published should be considered CPNI.¹⁷

9. Although the definition of CPNI includes "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier," we do not interpret this language to include every item that appears on a customer's bill.¹⁸ Specifically, we do not consider a customer's name, address, and telephone number to be "information pertaining to telephone exchange service or telephone toll service."¹⁹ Rather, we consider this information to be part of a carrier's business record or customer list that identifies the customer and indicates how that customer can be contacted by the carrier. Although such information generally appears on a customer's billing statement, it does not pertain to the "telephone exchange service or toll service" received by the customer, as specified by the statutory definition in section 222(1)(1)(B). If the definition of CPNI included a customer's name, address, and telephone number, a carrier would be prohibited from using its business records to contact any of its customers to market any new service that falls outside the scope of its existing service relationship with those customers.²⁰ In fact, under such an interpretation, a carrier would not even be able to contact a single customer in an effort to obtain permission to use their CPNI for marketing purposes because the carrier's mere use of its customer list to initiate contact with its customers would constitute a violation of section 222. This anomalous result was clearly not intended by section 222. Therefore, we clarify that a carrier's use of its customers' name, address, and telephone number for marketing purposes would not be subject to the CPNI restrictions in section 222(c)(1) because

combination of such listed names, numbers, addresses, or clarification; and (B) that the carrier or affiliate has published, caused to be published, or accepted for publication in any directory format.

¹⁷ Most CMRS providers do not publish their subscribers' name, address, and telephone number in a directory. In addition, many wireline customers request that their name, address, and telephone number remain unpublished.

¹⁸ We limit the context of our discussion of this issue to the statutory language contained in section 222(f)(1)(B). We believe it is clear, and therefore does not require clarification, that section 222(f)(1)(A) would not be implicated by this issue because a customer's name, address, and telephone number does not constitute "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"

¹⁹ 47 U.S.C. § 222(f)(1)(B).

²⁰ We note that telecommunications carriers have additional obligations with respect to the disclosure of billing name and address, under the Commission's rules adopted in the *Billing Name and Address (BNA)* proceeding. 47 CFR § 64.1201; see also *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Second Report and Order, 8 FCC Rcd 4478 (1993).

such information is not CPNI. Thus, under section 222 and the Commission's rules, a carrier could contact all of its customers or all of its former customers, for marketing purposes, by using a customer list that contains each customer's name, address, and telephone number, so long as it does not use CPNI to select a subset of customers from that list.

IV. NOTICE AND WRITTEN APPROVAL UNDER THE *COMPUTER III* CPNI FRAMEWORK

10. Prior to the adoption of the Telecommunications Act of 1996,²¹ the framework established under the Commission's *Computer III* regime governed the use of CPNI by the BOCs, AT&T, and GTE to market CPE and enhanced services.²² Two important components of this *Computer III* framework were: (1) a carrier's obligation to provide an annual notification of CPNI rights to multi-line customers regarding enhanced services,²³ as well as a

²¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. §§ 151 *et seq.*). The 1996 Act amended the Communications Act of 1934.

²² *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), further recon., 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), second further recon., 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon. Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. demed. 115 S. Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, FCC 98-8 (rel. Jan. 29, 1998) (*Computer III Further Remand Further Notice*). See also *Filing and Review of Open Network Architecture Plans*, CC Docket 88-2, Phase I, 4 FCC Rcd 1, 209-10, ¶¶ 398-99 (1988) (*BOC ONA Order*); *In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order, 102 FCC 2d 655 (1985) (*AT&T Structural Relief Order*), recon., *Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 739, 768 (1986) (*AT&T Structural Relief Reconsideration Order*).

²³ Under *Computer III*, customers with two or more access lines are multi-line customers. *Computer III Phase II Order*, 2 FCC Rcd 3072 (1987) at 3093-97, ¶¶ 141-174 (AT&T, BOCs must notify multi-line business customers of CPNI rights on annual basis); *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45 (applied CPNI requirements to GTE).

similar notification requirement regarding CPE that applied only to the BOCs,²⁴ and (2) a carrier's obligation to obtain prior written authorization from business customers with more than 20 access lines to use CPNI to market enhanced services.²⁵ We clarify that in circumstances where a carrier has provided annual notification and received prior written authorization from customers with more than twenty access lines, the requirements for notice and approval under section 222, and the associated Commission rules, are satisfied for those customers.²⁶

11. In the *Second Report and Order*, the Commission concluded that the statutory framework of section 222 contemplated informed customer approval because such notification and affirmative approval would maximize customers' control over their CPNI when carriers use CPNI for purposes beyond those specified in sections 222(c)(1)(A) and (B), thus furthering the objectives of section 222.²⁷ As elements of informed customer approval, the Commission established the following requirements in the *Second Report and Order*: (1) a one-time notice to customers, prior and proximate to any solicitation for approval, informing them of their right to restrict carrier use of CPNI, the precise steps necessary to grant or deny access to CPNI, the scope and duration of a carrier's use of CPNI in the event of a grant, and the carrier's duty to protect the confidentiality of such information and ensure the continuance of service despite a denial of carrier access to CPNI; and (2) express, affirmative oral, written, or electronic customer approval.

12. Similarly, the notification obligation established by the *Computer III* framework required, among other things, that carriers provide customers with illustrative examples of enhanced services and CPE, expanded definitions of CPNI and CPE, information about a customer's right to restrict CPNI use at any time, information about the effective duration of requests to restrict CPNI, and background information to enable customers to understand why they were being asked to make decisions about their CPNI.²⁸ We determine that these written annual notifications materially comply with the form and content of the notices required in the

²⁴ *AT&T Structural Relief Recon. Order*, 104 FCC 2d at 764-68, ¶¶ 45-53; *BOC CPE Relief Order*, 2 FCC Rcd at 151-53, ¶¶ 55-70.

²⁵ This requirement applied only to the BOCs and GTE. *BOC Safeguards Order*, 6 FCC Rcd at 7605-14, ¶¶ 76-89; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45.

²⁶ *Second Report and Order* at Part V.

²⁷ *Id.*

²⁸ *BOC ONA Order*, 4 FCC Rcd at 228-30, ¶¶ 438-440; *In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, CC Docket No. 86-79, DA 88-705 (rel. May 11, 1998) (*Second BOC CPE Plans Order*).

Second Report and Order.²⁹ In addition, the *Computer III* requirement to obtain prior written authorization constitutes a form of express, affirmative approval, as required by section 222. Therefore, we find that carriers that have complied with the *Computer III* notification and prior written approval requirement in order to market enhanced services to business customers with more than 20 access lines are also in compliance with section 222 and the Commission's rules. Such carriers may rely on their previous compliance with the *Computer III* notification and approval requirements to market enhanced services to business customers with more than 20 access lines without taking any additional steps to notify such customers of their CPNI rights or to obtain customer approval to use CPNI to market enhanced services to such customers.³⁰

V. SAFEGUARDS

13. As one of several CPNI safeguards, the Commission required in the *Second Report and Order* each carrier to certify that it is in compliance with the Commission's CPNI rules. In describing a carrier's duty, the Commission stated that each carrier must "submit a certification" and that the certification "must be made publicly available."³¹ We clarify that the Commission's use of the word "submit" in the order was not intended to require carriers to file such certifications with the Commission. Rather, the order directs carriers to ensure only that these corporate certifications be made publicly available.

²⁹ *Second Report and Order* at Part V.G.

³⁰ We note that such carriers still will need to give notification and obtain customer approval to use CPNI to market to these customers new telecommunications services that fall outside the scope of their existing service relationship, in accordance with the Commission's rules promulgated in the *Second Report and Order*.

³¹ *Second Report and Order* at ¶ 201.

VI. ORDERING CLAUSES

14. IT IS ORDERED that, pursuant to sections 1, 4(i), 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 222 and 303(r), and authority delegated thereunder pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. § § 0.91, 0.291, this Order is hereby adopted.

FEDERAL COMMUNICATIONS COMMISSION



A. Richard Metzger, Jr.
Chief
Common Carrier Bureau