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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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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	)	

SUPPORT AND OPPOSITION OF U S WEST, INC. TO VARIOUS PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. U S WEST SUPPORTS CERTAIN PETITIONS FOR RECONSIDERATION/CLARIFICATION 2

III. U S WEST OPPOSES CERTAIN PETITIONS FOR RECONSIDERATION/CLARIFICATION 6

A. The Commission Should Not Reverse Its Position On The Interplay Between Section 222 And Section 272 6

B. The Remainder Of MCI's Petition Should Be Denied Since It Is Internally Inconsistent And Logically Infirm 10

1. Third-Party Carrier CPNI Approvals 10

2. Customer Lists Should Not Be Considered "Information" Under Section 272(c) 13

C. The Only Section 222 Customer Approvals That Should Be Grandfathered Are Those In Writing, Which Approximate A Customer Designation Similar to Section 222(c)(2) 15

D. The Commission Should Not Differentiate Between Carriers For Purposes Of Section 222 Implementation 18

E. The Commission Should Not Get Into Defining Discrete Elements Of CPNI Or Further Determining Bucket/Service Allocations 20

1. The Definition of CPNI 20

2. Use of CPNI for Fraud Prevention Purposes 21

3. Information Known by Employees 21

4. Use of CPNI Among Customer "Lines" 22

5. PIC Information 23

6. CPNI Consent 24

7. Non-Telecommunications Services Billing 24

IV. CONCLUSION 25

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I. INTRODUCTION AND SUMMARY

Below, U S WEST, Inc. ("U S WEST") supports those petitioners who seek relief from the Federal Communications Commission's ("FCC" or "Commission") Customer Proprietary Network Information ("CPNI") rules, both with respect to the scope and interpretation of those rules as well as implementation obligations.[1] U S WEST opposes those petitioners that seek to impose "special" CPNI requirements only on incumbent local exchange carriers ("ILEC") or Regional Bell Operating Companies ("RBOC") and who seek to re-introduce Section 272(c)(1) nondiscrimination obligations onto the CPNI analysis. U S WEST also opposes

[1] 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 Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27, rel. Feb. 26, 1998 ("CPNI Order"), appeal pending sub nom. U S WEST, Inc. v. FCC, No. 98-9518 (10th Cir. Pet. for rev. filed May 4, 1998).

those Petitions that seek clarification or reconsideration on matters that neither warrant nor require such action.

II. U S WEST SUPPORTS CERTAIN PETITIONS FOR RECONSIDERATION/CLARIFICATION

U S WEST supports those petitioners urging the following:

- The Commission should permit carriers to use CPNI with respect to the targeting of customers associated with the marketing of customer premises equipment ("CPE") and information services associated with telecommunications offerings. The statutory language readily permits such use and the customer expectations built up over years of carrier marketing and sales activities (undertaken and promoted by Commission regulatory policy) demand such use with respect to total customer care.[2]

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[2] U S WEST supports this position with respect to both landline and Commercial Mobile Radio Services ("CMRS") telecommunications services. See, e.g., generally with respect to wireline offerings, ALLTEL at 6-7; Ameritech at 1-6; Bell Atlantic at 1-2, 3-9; BellSouth 1-3, 5-11, 14-16; GTE at 6-12, 15-18, 21-24 (wireline and wireless); SBC at 8; USTA at 2-6 (focusing on CPE); LCI at 7-11 (arguing that the FCC's rule makes no sense for "competitive carriers" only for ILECs) CompTel at 1, Part III (same as LCI); NTCA at 4-7. And with respect to CMRS offerings, BellSouth at 11-16; Frontier at 10-11; PageNet at 4-6; PrimeCo at 3-9; Vanguard at 9-12; PCIA at 7-9, 11-14; RAM at 7-9 (focusing on information services); Metrocall at 6-9 (focusing on information services); CommNet at 2-3, 4-9 (focusing on CPE and "accessories" such as cigarette lighter power adapters and batteries); 360° at 2-3, 6-10; Omnipoint at 2, 4-13; Comcast at 12-15; CTIA at passim.

As U S WEST previously stated, there is not so significant a difference between the service offerings of CMRS providers and wireline providers -- when significance is measured by carrier practices and customer expectations -- such that a permissive rule is warranted for CMRS providers but not landline carriers. Comments of U S WEST Communications, Inc., CC Docket Nos. 96-115 and 96-149, filed May 8, 1998 at 6-11 and Reply Comments of U S WEST Communications, Inc., CC Docket Nos. 96-115 and 96-149, filed May 13, 1998 at 1-8. The fact that CMRS providers must technically interact with CPE in order for a customer to receive the CMRS service from the provider, while relevant to a Commission ruling regarding the sale of the CPE in the context of the service, does not change the fact that carrier practices -- both landline and CMRS -- regarding the sale of CPE for years have been the same *vis-à-vis* the customer. Not only is the customer's expectation with respect to both providers the same, but the customer's expectation in both contexts has been promoted and advanced by the Commission, independent of the technical aspect of the CMRS service offering. And see Ameritech at 3-4 (demonstrating

- The Commission should determine that customers purchasing "packages" expect changes to those packages over time and expect to be informed of those changes, even if a "new" or different telecommunications or non-telecommunications service is added to the package. Approval to use CPNI in this context should be inferred.[3]

- The Commission should reverse its rule on use of CPNI in "win back" contexts. The petitioners demonstrate that reconsideration is required since, variously, the rule was promulgated based on an inadequate record and is contrary to the statutory language, general commercial and carrier practices, customer expectations and consumer welfare.[4]

- The Commission should forbear from enforcing its rules with respect to the above matters, even if it deems its statutory interpretation regarding them to be correct. All elements for forbearance can be demonstrated and the public interest would not only **not** be harmed but promoted from such action.[5]

- The Commission should clarify that short-term transactional customer approval does not require full blown "notification" of rights, as is contemplated with respect to (c)(1) approval, nor the recording of the

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through focus group research that the expectations of wireline and wireless customers are very much the same).

[3] See Ameritech at 6-8; GTE at 26-30.

[4] See, e.g., generally as to wireline offerings, ALLTEL at 7; Bell Atlantic at 16-17; BellSouth at 4, 16-18; Frontier at 2, 7-10 (wireline and wireless); GTE at 32-36 (wireless and wireline); SBC at 8-10; USTA at 6-9. And with respect to CMRS offerings, Frontier at 3 (wireless CPE); PageNet at 2-4; PrimeCo at 9-11; Vanguard at 12-15; PCIA at 9-11; 360° at 10-11; Comcast 16-19; CTIA 10-13, 31-33; Omnipoint at 2, 17-19. With respect to this issue, U S WEST adds the *caveat* that the Commission does need to differentiate between CPNI and carrier information, contrary to Frontier's argument (Frontier at 9), since carriers are permitted to use CPNI under either inferred or express approval. To the extent the CPNI used is that related to the prior carrier-customer relationship and a carrier does not violate either Section 222(a) or (b) with respect to carrier information, it should not matter whether the customer retention effort is attempted before or after the customer switches carriers. See BellSouth at 17 and n.40.

[5] See, e.g., generally as to wireline offerings, Ameritech at 5-6, 7-8; Bell Atlantic at 2-3, 9-16, 17-22; BellSouth, generally; NTCA at 7-8, 10-11; GTE at 2-6, 12-15, 18-21, 24-26, 31-32, 37-39 (wireless and wireline); USTA at 6. And see as to CMRS offerings, PageNet at 5 n.3; PrimeCo at 11-16; CommNet at 4, 9-10; 360° at 2, 3-6; CTIA at 34-42.

approval secured on the inbound call.[6] If the Commission meant to impose such an obligation (despite the fact that the Order references such full-blown notification only with reference to (c)(1) approvals), the Commission should reconsider its position.

- The Commission should reaffirm its decision not to dictate the communication between carrier and customer with respect to Section 222(c)(1) approvals, and should not require detailed "names" of affiliates or detailed identification of services.[7] Such a communication would only be confusing to customers and interfere with comfortable, effective carrier-customer communications.

- The Commission should reverse its position on system "flagging" requirements and electronic audit controls. The imposition of such controls was imposed based on an inadequate record of costs to industry participants. Furthermore, the controls themselves are overly-regulatory with respect to the implementation of a de-regulatory statute and are contrary to the notion of any relaxed regulatory model focusing on enforcement.[8] Indeed, a number of petitioning parties persuasively argue

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[6] GTE at 40-41; TDS at 10-11.

[7] GTE at 42-43. This "clarification" is sought, U S WEST believes, because of the reference in Rule 64.2007(2)(ii) to "the specific entities." Given that the Commission has advised that carriers need not submit customer communications to it for approval, any factual, lawful speech that is designed to communicate the necessary information in language calculated to be understood by the customer should be sufficient to "comply" with the Commission's rule. With respect to a consumer's understanding, references to "long distance, wireless, cable" etc. is likely to be more meaningful than the name of the specific corporate entities.

[8] See, e.g., generally as to wireline offerings, ALLTEL at 8-11; Ameritech at 8-11; AT&T at 8-15 (implementing audit controls would cost hundreds of millions of dollars); Bell Atlantic at 22-23; BellSouth at 18-23 (focusing on the audit requirements); Frontier at 2 (wireline and wireless), 3-5 (focusing on electronic auditing requirements); LCI at 2-7 (arguing for relief only for CLECs); MCI at 34-43; Sprint at 2-6; USTA at 10-15 (referencing the highly-regulatory approach taken by the Commission in the CPNI Order with Commissioner Powell's ongoing advocacy that regulation needs to be made more efficient by shifting resources from prospective regulation to enforcement); LCI at 6 (noting various other "compliance" methods carriers might use other than flagging and electronic audit functionality); Alliance, generally (seeking a reexamination on behalf of small carriers of the auditing and flagging requirements); NTCA (same as Alliance with respect to its member companies). And with respect to CMRS offerings, Omnipoint at 2, 13-14 (arguing that such requirements might be appropriate for incumbent or large carriers but not for competitive carriers); Vanguard at 7-9.

that the **best** safeguard is training -- not electronic controls.[9] And, certainly training combined with supervisory review and officer certification is more than sufficient.

⇒ In the absence of a total reversal on this matter, the Commission should restrict its requirements to those primary systems generally accessed by carrier personnel for marketing and sales,[10] and eliminate its "first screen" flag requirement, requiring only that customer approval be noted in a manner that allows for communication to a sales representative in a manner that supports compliance with the Commission's rules.[11]

- The Commission should allow the use of CPNI in the context of CMRS service and equipment maintenance and repair activities.[12]

See also BellSouth at 4, 19; USTA at 10-11, 14-15 (both arguing that the Commission's approach is one assuming guilty intentions which must be overcome through detailed federal intervention). Further see Bell Atlantic at 22; USTA at 12; Alliance at 7-8; Sprint at 2; MCI at 38 (all noting the extreme drain on resources available with respect to systems and processes due to other regulatory and commercial imperatives such as long term number portability, Year 2000 initiatives, etc.) and ALLTEL at 5, 8; LCI at 3, 6; Sprint at 2; AT&T at 13; MCI at 36 (all stating that it is highly unlikely and most probably will prove impossible to implement the controls the Commission imposes in eight months).

[9] See, e.g., BellSouth at 23; AT&T at 15-16.

[10] See, e.g., MCI at 39-41; GTE at 41-42. And see Ameritech at 9-11 (noting that CPNI can be found in approximately 400 of Ameritech's approximately 700 databases and supporting a narrower scope (i.e., one confined to systems routinely accessed by sales and marketing personnel) to any mandated electronic audit requirement); USTA at 14 (noting that CPNI may be found in various systems, designed for discrete functions, which do not share common platforms); LCI at 3 (noting that virtually every internal system used by it could contain CPNI and it would cost millions of dollars to comply with the Commission's broad rule requirements).

[11] See, e.g., AT&T at 13-15; 360° at 2, 12; USTA at 13 (all noting the problem with "first screen" language with respect to systems that do not order the manner in which screens appear).

[12] See RAM at 3-6; Metrocall at 3-6.

III. U S WEST OPPOSES CERTAIN PETITIONS FOR RECONSIDERATION/CLARIFICATION

A. The Commission Should Not Reverse Its Position On The Interplay Between Section 222 And Section 272

Sprint,[13] AT&T[14] and MCI,[15] accompanied by "new entrant" LECs,[16] all ask the Commission to reconsider its position with respect to the relationship between Sections 222 and 272. No such reconsideration is necessary. Certainly, none of the petitioners raise any significantly new issues or present new facts that warrant "reconsideration" of the matters they address in this area.

There are any number of ways to reconcile the two provisions addressed by petitioners. Thus, even if the Commission were to "reconsider" the precise rationale it espoused with respect to the matter, the fundamental holding remains appropriate. Should the Commission change its rationale, it must fully address the other arguments submitted by commentors that would support the same result as that already reached by the Commission.[17]

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[13] Sprint at 6-8.

[14] AT&T at 23-25.

[15] MCI at 24-33.

[16] See, e.g., LCI at Part III; CompTel at Parts I and II.

[17] See CPNI Order note 564 (noting that the Commission did not address the joint marketing authorization under Section 272(g)(3) or the constitutional arguments raised by various commentors). Should the Commission be inclined to reconsider this matter, the need to address these additional arguments is obvious. For example, MCI advocates that the Commission should "require, pursuant to Section 272, that where a BOC uses CPNI for **marketing** on behalf of its Section 272 affiliate . . . it must disclose CPNI to any other entity demonstrating customer approval" (MCI at 10; bold added), totally ignoring the "joint marketing" exception found in Section 272(g).

Petitioners such as Sprint, for example, cite to the "operate independently" provisions of Section 272(b)(1) to buttress their case that the sharing of CPNI within a "total service relationship" **once** a customer qualifies for service in both the local and interexchange bucket is improper. However, that Section has not been construed by the Commission to apply in the manner suggested by Sprint.[18] And, certainly before a construction such as that which Sprint advocates could be imposed, the Commission should have to come to grips with the express joint marketing authority provided in Section 272(g).

Furthermore, no petitioner seeking reconsideration of this matter under the theory that "customer approval" requirements are a barrier to access to local carrier CPNI presents a compelling case. The record simply does not support a finding that securing access to BOC local service CPNI where a carrier is not a BOC-affiliate is unduly burdensome. While it is clear that some carriers impose written consent requirements on non-affiliated carriers seeking CPNI,[19] it is equally clear that

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[18] The Commission has determined the "operate independently" provision to include not simply the statutorily-identified items but also to preclude the joint ownership of transmission and switching facilities (as well as the land and buildings that house them) and the installation, operation and maintenance of the equipment by either carrier in a situation where the equipment is not their own. In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21976-978 ¶¶ 146-51, 21981-987 ¶¶ 156-70 ("Non-Accounting Safeguards Order").

[19] See AT&T at 24 (stating that non-affiliated carriers would have to get "affirmative written consent to gain access to BOC CPNI" creating a discrepancy between BOC-affiliated and non-affiliated access "even if the BOC affiliate and the third party were both reselling the BOC's local service."). And see MCI Telecommunications Corporation v. Pacific Bell, File No. E-97-18 (challenging, under Section 251,

others allow such access where carriers represent they have customer approval to access CPNI, short of a customer writing.[20] Indeed both AT&T and Sprint fail even to cite to the Commission discussion on this matter, where the Commission observed the likelihood that carriers -- at least incumbent LECs -- might have other statutory obligations to provide CPNI to non-affiliated carriers where those carriers have less than written customer consent to access and use CPNI.[21]

Finally, it seems clear from MCI's advocacy that its primary motivation for wanting Section 272 to apply to CPNI access and use, in addition to Section 222, is so that it can secure carriers' customer lists (addressed below) and potentially electronic access to CPNI. Apparently, MCI believes that through the former

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Pacific's practice of requiring a written Letter of Agency be in the possession of a carrier before Pacific will release CPNI to the requesting carrier).

[20] Comments to this effect were filed during the course of the underlying proceeding.

[21] CPNI Order ¶¶ 84, 169, citing to the obligations outlined in Sections 251(c)(3) and (4). The Commission cited to other statutory provisions that might also be relevant if a carrier unreasonably refused access to CPNI, such as Section 201(b), which applies not just to LECs but to all carriers. MCI does reference this type of analysis in its Petition. MCI at 2-3, 18-20, 21-23.

However, rather than just accepting the fact that this was a "win" for MCI and fellow advocates, MCI argues that "If a BOC were required to disclose CPNI to a third party demonstrating customer oral approval, none of the implementation problems raised by the approval solicitation approach would be presented." MCI at 9. And, later it argues that CPNI disclosures should be made "whether or not the BOC has disclosed that customer's CPNI to the affiliate." Id. at 10. Additionally, MCI seeks reconsideration of the Commission's determination regarding the scope of Section 222(d) to third-party CPNI access and use.

The need for this advocacy and the petition that contains it is illusory since the Commission essentially granted to non-LEC carriers the relief that MCI claims it seeks. Why MCI believes the Commission need go further in "spell[ing] out the implications" of its language (id. at 22) or why the Commission should regulate from a basepoint of assuming that "BOCs might ignore its finding[s]" (id.) is never explained, let alone defended. For this reason, MCI's petition on this matter should be denied.

provision it will be able to secure electronic or database access to CPNI,[22] something which it might not otherwise be able to secure.[23] However, MCI already has electronic access to CPNI through many ILEC OSSs, when it has complied with carrier-imposed approval requirements and it has secured the requisite customer approval to access the information.

The Commission should reject the arguments proffered by these petitioners because the arguments are neither compelled by the statutory language of the relevant sections, their legislative history nor fair competition. While these interexchange carrier ("IXC") petitioners have no quarrel with their ability to merge **national** interexchange CPNI with local CPNI once they win a customer in the local market, they facilely argue that allowing a BOC to merge **regional** CPNI in the local and interexchange bucket when individuals appropriately qualify as customers in the respective buckets is anti-competitive. Such is certainly not the case.

Rather, it is the arguments of petitioners that are patently anti-competitive and anti-consumer. Furthermore, those arguments ignore and conflict with the

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[22] Id. at 11. And see id. at 23 (arguing for similar electronic database access with respect to ILECs generally on the grounds that CPNI is an unbundled network element ("UNE")), 30.

[23] ILECs, of which BOCs are included, are required to provide certain customer information *via* Operations Support Systems ("OSS") in those cases where other carriers seek to resell their service or purchase UNEs. Access to CPNI in this context, however, is transactional rather than wholesale. Absent this access obligation or one crafted under Section 201(b), it is clear that the primary obligation a carrier has to provide CPNI to third parties is found in Section 222(c)(2). That Section allows the holder of the CPNI to choose the manner in which the CPNI is

FCC's own missive that, upon compliance with the Section 271 checklist, a BOC Section 272 affiliate should be permitted to "engage in the same kind of marketing activities as other service providers."[24] For these reasons, the arguments of those seeking to hamstring their competition through compromising the expectations of their competitor's customers should be rejected.

The Commission should not reconsider its current position in such a way that Section 272 gets insinuated back into the CPNI arena. A contrary conclusion will simply extend the debate around CPNI access and use in a manner that is distracting from a regulatory and commercial perspective and ultimately diverts focus from the primary goal around CPNI -- the protection of individual privacy.

B. The Remainder Of MCI's Petition Should Be Denied Since It Is Internally Inconsistent And Logically Infirm

1. Third-Party Carrier CPNI Approvals

In a somewhat schizophrenic fashion, MCI asserts that the Commission should reconcile and harmonize Sections 272 and 222 by allowing non-BOC-affiliate access to CPNI only when the non-affiliated carrier can demonstrate customer approval (including oral approval) has been secured.[25] Then, some 15 pages later, MCI argues that non-affiliated-**LEC** carriers should not be required to have

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released. See AT&T Communications, et al. v. Pacific Bell, No. C96-01691, Order, Northern District of Calif., Apr. 6, 1998 ("Pacific Section 222 Case").

[24] Non-Accounting Safeguards Order, 11 FCC Rcd. at 22046 ¶ 291.

[25] MCI at 2-5, 7-10. Indeed, MCI repeatedly states that the Commission neglected to appreciate the approval nuances of its advocacy when the Commission rejected the position in the original CPNI Order. Id. at 5 (Commission applied one line of reasoning "to the significantly different approach that MCI advocated"), 8 (the Commission failed to analyze MCI's proposal "on its own terms").

customer approval at all to access the individual's CPNI and that the Commission should reconsider its decision that Section 222(d)(1) applies only to carriers within an existing customer relationship and not to carriers seeking to establish a new relationship.[26]

Given the duality of the MCI advocacy, a respondent is hard-pressed to know where to begin. However, it is clear that no matter what the foundation of MCI's arguments with respect to this issue, MCI's positions must be rejected unless the Commission is willing to hold that New Carrier is entitled to CPNI in the possession of Existing-Relationship Carrier without any customer approval whatsoever. Such would be a holding totally at odds with customer privacy expectations and long-standing carrier practices.

Essentially, MCI asks the Commission to create a third-party approval "inference" for CPNI access and use whenever a customer decides to switch carriers. The Commission should decline to do so. Existing-Relationship Carrier should always be able to advise a customer disgruntled either with the switch in carriers or the access to CPNI that New Carrier represented that it had the customer's approval to access and use the information and authority to change the service provider. Indeed, even if the Commission accepted MCI's Section 222(d) advocacy, Existing-Relationship Carrier would not be required to provide the CPNI in the

[26] Id. at 23-32. MCI also asks, should the Commission reject its Petition, for a declaration that Section 222(c)(1) would support its position in any event. Id. at 28-29.

absence of such approval.[27]

Nor do the facts of MCI's argument require a different result. The "facts" proffered by MCI in support of its position (i.e., that the Commission's holdings are burdensome on New Carrier since the approval requirement is "disquieting," "extremely offputting" and "chills competitive marketing efforts")[28] are generally true with respect to the entire "express approval" CPNI regime that the Commission has put into place. They are certainly not confined to carriers seeking to migrate customers from Existing-Relationship Carrier to themselves. And, if the existing rules required any relaxation, that relaxation would be most warranted with respect to the existing carrier-customer relationship (which the record demonstrates is imbued with a substantial level of customer trust), not the "new" one.

MCI's advocacy would be contrary to customer privacy expectations. Those carriers with the existing customer relationship are entitled to require customer approval before CPNI is released and permitted to advise customers that customer approval to access the CPNI was, in fact, represented to them. For these reasons, the Commission should not disturb its current holdings with regard to the scope of Section 222(d) or the express approval requirements to "access" CPNI imposed on third parties under Section 222(c)(1).

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[27] Section 222(d) permits use of CPNI without customer approval in certain specified instances. It does not require that customer approval not be secured, or that information be shared with non-affiliated carriers attempting to initiate or render service.

[28] MCI at 26.

2. Customer Lists Should Not Be Considered "Information" Under Section 272(c)

While the Bureau has determined that customer name, address and telephone number is not CPNI, the Commission should reject MCI's petition that the Commission mandate BOCs to provide customer lists to non-affiliated carriers,[29] other than as those lists are generally made available through Subscriber List Information ("SLI") offerings.[30]

While SLI is not CPNI, the fact that the Bureau reached its name, address and telephone number conclusion in the context of the Commission's CPNI Order means that the analysis must occur under that Order, as well. Had the Commission allowed easy "approval" to use individually-identifiable CPNI, it would not have had to "exempt" out name, address and telephone number information. Quite clearly, the need to exempt out such information stems from the fact -- acknowledged by the Bureau -- that a carrier could not do "out of bucket marketing" with respect to its corporate enterprise customer base if name, address and telephone number information were treated as individually-identifiable CPNI.

Having made the decision that a customer's name, address and telephone

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[29] Id. at 11-13.

[30] MCI is **incorrect** in its assertion that a BOC customer list is not proprietary information. See id. at 12, n. 20. U S WEST considers our customer list proprietary and believe we could sustain such a showing. While SLI information has traditionally been made available by some carriers to commercial enterprises interested in publishing directories (and has been made generally available after that initial compilation in some circumstances), prior to the passage of Section 222 a number of carriers refused to provide the information on proprietary grounds. Clearly, the customer list information that does not correspond with SLI remains proprietary to the holding carrier.

cannot be CPNI because, if it were, "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,"[31] the Commission cannot now deprive the BOC corporate enterprise of access to this fundamental information or condition its utilization on the provision of the information to others. Such would raise serious constitutional issues, such as those already presented by U S WEST.

Furthermore, as the Bureau has noted, even though the customer name, address and telephone number information are not CPNI, where the information is also not SLI it is billing, name and address ("BNA").[32] The Commission has previously determined to restrict the use that non-affiliated carriers can make of BNA in a marketing context, a decision upheld on appeal.[33] Thus, while MCI frames its need for such information around the subject of soliciting approvals, such clearly overstates the case. SLI would be sufficient (and, at least in U S WEST's territory, is available to IXCs in addition to directory publishers) to craft an approval-solicitation campaign.

In order to bring some finality to this ongoing proceeding which revolves

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[31] 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, DA 98-971, rel. May 21, 1998 ¶ 9 ("Bureau Clarification Order").

[32] Id. n.20.

[33] See In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Third Order on Reconsideration, 11 FCC Rcd. 6835, 6846-52 ¶¶ 19-28 (1996), aff'd, AT&T Corp. v. FCC, 113 F.3d 225 (D.C. Cir. 1997).

around a short, self-effectuating statute, the Commission must flat-out hold that Section 222 controls all issues involving customer information, be it CPNI, BNA, SLI or whatever and that Section 272 has no applicability to such information (i.e., that name, address and telephone number information is not "all other information" as that phrase was used in the CPNI Order).[34]

C. The Only Section 222 Customer Approvals That Should Be Grandfathered Are Those In Writing, Which Approximate A Customer Designation Similar to Section 222(c)(2)

AT&T argues that those Section 222(c)(1) approvals secured before the release of the FCC's CPNI Order should be "grandfathered."[35] AT&T seeks this relief with respect to both wireline and wireless customers, both residential and business.[36] AT&T's request should be denied except for those customer "approvals" secured by AT&T in writing.

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[34] CPNI Order n.573.

[35] AT&T at 18-22.

[36] AT&T's commentary with respect to its securing of approvals is oblique. With respect to wireline customers, it appears that AT&T relies on what it describes as express verbal approval. Id. at 18-19. With respect to wireless customers, however, the **express** nature of the approval is less clear. For example, AT&T references language in its service contracts which describes its CPNI uses, including the "sharing of service usage information with other divisions of AT&T, unless the customer notifies AT&T Wireless Services in writing." Id. at 21. This reads very much like a "notice and opt out" approval mechanism. Similarly, while AT&T references a "written agreement" between itself and its business customers, it nowhere explicitly states that the agreement must be signed by the customer (i.e., written approval). Rather, AT&T indicates that the contract can be "executed" either "by signing the contract or using the service." Id. at 22. While the former action would result in an express written consent (acceptable under the Commission's existing rules if preceded by the prescribed notifications), the latter would not, since it -- like the prior example -- would be in the nature of a notice and opt-out approach.

As AT&T itself recognizes, citing to the Commission's own correct observation, Section 222(c)(1) is capable of varying interpretations. One of those interpretations is that customers have tacitly (via implying) approved of carrier use of CPNI with respect to all basic telecommunications services (Section 222(c)(1)(A)), and those CPE and information services necessary to or used in connection with such basic services (Section 222(c)(1)(B)). **Indeed, this was AT&T's advocacy throughout this proceeding.** And, such an interpretation would not require the seeking or securing of express approvals at all.

Only as a result of the FCC's CPNI Order is implied approval insufficient as permissible approval under the statute. Similarly, only as a result of the FCC's CPNI Order is express approval not preceded by prescribed "notifications" insufficient as permissible approval under the statute.

Either the Commission should "grandfather" all approval theories and efforts, requiring carriers to seek its prescribed "express" approval only with respect to new customers, or the Commission should refuse to "grandfather" carrier approvals, with one exception. In those cases where a customer actually signed a document designating the use of CPNI by a carrier, the approval should be grandfathered, even though the approval might not have contained the full panoply of Miranda-type[37] notifications the FCC now requires.

Confirming the propriety of such approach is the Bureau's recent "clarification" of the Commission's CPNI Order addressing those BOC customers

[37] GTE at 40 n.69.

who have already provided written customer approval for use of CPNI with respect to enhanced services and CPE.[38] The Bureau determined that such customers need not be re-approached for additional express approval to use CPNI with respect to those services regarding which the customers already provided written consent.

This is clearly the right result since a "written designation" from a customer is substantial proof of a customer desire to have CPNI be used. Indeed, Section 222(c)(2) requires carriers to comply with such customer designations regardless of whether there was any predicate notification. At least two courts have held that such written designation constitutes the "law" with respect to providing CPNI to the customer's designee.[39]

While U S WEST does not here advocate that Section 222(c)(2) controls the sharing of information among affiliates,[40] it provides a sound comparison for analysis. The lesson is that a customer written document, proffered even in the absence of detailed notifications, should absolutely be sufficient consent under the

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[38] Bureau Clarification Order ¶ 10. Such customers would be those with over 20 lines.

[39] See Pacific Section 222 Case (cited in note 23, supra) and AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company, No. A96-CA-397 SS, Order, Oct. 4, 1996 (W.D. Texas). And see CPNI Order ¶ 165 (Section 222(c)(2) means that carriers "must provide [CPNI] access when the customer says so".) By this advocacy, U S WEST is not conceding that Section 222(c)(2) is applicable to the transfer of CPNI within a single corporate enterprise, even though the Courts discuss the statutory subsection as if it does. See note 40 immediately below.

[40] The Commission's CPNI Order repeatedly uses the phrase "disclose" and "disseminate" with regard to intra-corporate enterprise sharing. See, e.g., CPNI Order ¶¶ 35, 51, 94, 144, 161, 189. This linguistic gloss compromises the generally-understood language of commercial information practices. Disclosures and disseminations are generally made to third parties; sharing generally occurs between or among affiliates.

statute to warrant a finding of (c)(1) approval, regardless of the Commission's newly-prescribed notification obligations.

D. The Commission Should Not Differentiate Between Carriers For Purposes Of Section 222 Implementation

A number of carriers, both LECs and other carriers, seek to create exemptions for themselves from the burdensome CPNI rules. At the same time they seek "special" treatment, they leave large ILECs potentially subject to the Commission's rules, either on the grounds that such ILECs have sufficient resources to accommodate the rules or under a theory that the putative "dominance" of those carriers requires they be burdened by more onerous CPNI rules than "competitive carriers." The Commission should reject these entreaties.[41] They are found neither in law (i.e., the statutory language of Section 222) nor public interest (i.e., privacy protection).

For example, the Commission should reject the advocacy of those who seek to imposed electronic audit controls only on "large" carriers or only on "incumbent" carriers.[42] Certainly, the statute is silent on the need for such controls at all. But,

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[41] By this, U S WEST does not mean to say that the Commission should not, in appropriate circumstances, forbear from application of its rules or grant waivers of its rules where the facts warrant. We merely mean that neither size nor market penetration *per se* warrant "exemptions" from the Commission's CPNI rules. This is particularly the case where the "costs" of compliance are large (and will undoubtedly impact the cost/pricing structure of those on whom the obligations are imposed) and the sensitivity to price is increasingly a market driver.

[42] LCI at 6-7 n.14 (arguing that electronic audit controls should be required of ILECs but not competitive carriers). See also Omnipoint at 13-15 (arguing that the electronic auditing/flagging safeguards might be warranted for larger or incumbent carriers but not competitive carriers, without ever explicitly arguing that such requirements should be imposed on large or incumbent carriers).

once having deemed such controls necessary for "privacy" protection, the Commission cannot, in any principled fashion, deem the controls less necessary for "competitive carriers" (who have less than a long-standing relationship with customers) than for incumbent carriers (which enjoy, according to statistically valid record evidence, a special position of trust with respect to their customers -- thus, hardly implicating privacy-violating conduct). Either audit controls are imposed or they are not. But, as a general matter, no carrier or class of carriers should be automatically "exempt" from such requirements.

Similarly, the Commission should reject MCI's advocacy that seeks to impose win-back rules only on ILECs.[43] Like the auditing/safeguards rules addressed above, the statutory language of Section 222 not only fails to address win-back contacts, but as a number of petitioners point out, the language itself is at odds with the Commission's promulgated rule. Furthermore, the anti-competitive, anti-consumer effect of the prohibition on the use of CPNI in a customer retention context applies equally to ILECs and their customer relationships as to other carriers and their customer relationships.

Fundamentally, either the FCC's CPNI rules make sense as a legitimate articulation of Congressional intent, required to protect the privacy interests of customers within their relationships with their carriers or they do not. The application of those rules should be more on the order of ubiquity *vis-à-vis* telecommunications carriers than of exception. For that reason, FCC mandates in

[43] MCI at 49-52.

this area should not be carrier-specific. Nor should any grants of forbearance be confined to wireless carriers or small carriers or competitive carriers or carriers previously not affected by CPNI rules.[44] In the final analysis, the burden of the FCC's CPNI rules should be "enjoyed" by all or all should be relieved of their burden.

E. The Commission Should Not Get Into Defining Discrete Elements Of CPNI Or Further Determining Bucket/Service Allocations

Below, U S WEST addresses requests by various petitioners for "clarification" or further action by the Commission with respect to the current configuration of the Commission's CPNI rules. The Commission should decline to take any of the requested action. Either the clarification is unnecessary or it would insinuate the Commission into implementation minutiae. Rather, the Commission should simply reaffirm that carriers have broad flexibility in implementing the promulgated CPNI rules.

1. The Definition of CPNI

CommNet asks the Commission to incorporate its "total service" notions into its rules by making explicit the three service categories the FCC has devised upon; and to amend the definition section of the rules to incorporate a definition of "total service relationship."[45] The Commission should decline to take this action.

The Commission's definition of CPNI is currently taken verbatim from the statute. Contrary to the advocacy of CommNet, the definition need not be amplified

[44] ALLTEL suggests this latter exception, along with forbearance for CMRS. ALLTEL at 4, 8.

by specific reference to the "traditional service categories," especially as those categories will blur over time and may potentially disappear as customers migrate to single-source suppliers.

2. Use of CPNI for Fraud Prevention Purposes

Similarly, no rule amendment is needed with respect to the use of CPNI for fraud prevention, as suggested by Comcast and MCI.[46] While the Commission did not formally adopt a rule on this matter, the clarity of the statute (Section 222(d)(2)) renders unnecessary any FCC rule in this area. Since the Commission would not be in a position to "clarify" the straight-forward statutory language, there is no need to address this request for relief.[47]

3. Information Known by Employees

Comcast asks the Commission to "clarify" that its adopted definition of CPNI does not include information employees inherently know as a result of their job responsibilities (such as "identity of large clients and the attributes of these significant accounts").[48] Such clarification is unnecessary.

Particularly with respect to customers who have assigned "account partners" or "account managers," carrier employees know certain things about the customers from their commercial communications with the customer and their (sometimes) long-term service provider arrangement. Generally, such employees know that the

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[45] CommNet at 10-11.

[46] Comcast at 19; MCI at 52-54.

[47] And see CPNI Order ¶ 83, where the Commission observes that it agrees that the statute says what it says about fraud prevention.

[48] Comcast at 18.

account is "large" (maybe ranging in line size from 20-50 or 20 to 200), that the customer is a heavy purchaser of features and enhanced services, etc. To the extent that the employee does not use the customer record containing the specific CPNI to target sales to a customer, no CPNI rule violation occurs. No clarification regarding this matter is necessary.

4. Use of CPNI Among Customer "Lines"

MCI argues that the Commission should clarify whether customer CPNI is to be assessed based on "services overall" or "line-by-line".[49] The example provided by MCI, however, does not call for the Commission to render the opinion MCI requests and the Commission should decline to do so.

MCI provides an example of an IXC/PIC ("Preferred Interexchange Carrier"), which is always done line-by-line. MCI then poses the "issue" that a restrictive reading of the Commission's rules might render each IXC capable of marketing interexchange services to the customer only for the PIC'd line, while a broader reading would allow each PIC'd IXC to market services for all the customer's lines.

No clarification is necessary regarding MCI's example. In the example, each PIC'd carrier only has CPNI with respect to the line it serves. Any marketing with respect to other lines necessarily does not involve use of CPNI. For this reason "both carriers [are already] allowed to . . . market long distance service"[50] with respect to other lines.

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[49] MCI at 45.

[50] Id.

In short, the Commission should refrain from micromanaging carriers' implementation of CPNI rules. Nor need the Commission "clarify" application of CPNI rules to customer accounts generally.

5. PIC Information

In the middle of MCI's Petition, it goes on at length regarding the matter of PIC/PIC Freeze information and whether or not such constitutes CPNI.[51] MCI's argument is that such information is not CPNI and thus, like customer name, address and telephone number information (addressed above), PIC/PIC Freeze information should not be able to be shared by a BOC with a Section 272 affiliate without triggering the nondiscrimination obligations in Section 272(c).

The Commission should decline to provide "clarification" regarding this matter given the ongoing industry activity involving sharing PIC/PIC Freeze information[52] and the number of other venues in which MCI has raised this particular issue.[53] In any event, on the merits of the argument itself, MCI is incorrect.

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[51] Id. at 14-18.

[52] The Commission should not opine on the matter/status of PIC/PIC Freeze information absent a further proceeding to investigate all the facts and arguments around this information. This matter is being worked in the Operations and Billing Forum ("OBF") where most ILECs take the position that, once the serving carrier migration has taken place, the new carrier is responsible for all PIC/PIC Freeze activity. Given this ongoing industry activity, the Commission would be best served by not rendering a declaration on this matter absent a full record. See Reply of U S WEST, File No. CCB/CPD 97-19, RM-9085, filed June 19, 1997 at 4-5.

[53] See, e.g., Comments of MCI, CC Docket No. 96-115, filed Mar. 30, 1998 at 11; MCI Petition for Rulemaking, filed Mar. 18, 1997, File No. CCB/CPD 97-19, RM-9085. MCI Informal Complaint, IC96-09734, filed July 24, 1996.