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

JUN 25 1998

Federal Communications Commission
Office of 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

**COMMENTS ON PETITIONS FOR RECONSIDERATION,
CLARIFICATION, AND FORBEARANCE**

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**COMMENTS ON PETITIONS FOR RECONSIDERATION,
CLARIFICATION, AND FORBEARANCE**

Ameritech submits these comments on petitions for clarification, reconsideration, and forbearance that have been filed with respect to the Commission's Second Report and Order in the above-captioned docket.¹

I. INTRODUCTION AND SUMMARY.

Over two dozen parties filed petitions regarding the Order. For the most part, except as otherwise noted in these comments, Ameritech supports those petitions -- especially with respect to 1) the ban on the use of CPNI to market of CPE and enhanced services reasonably related to the customer's telecommunications service, which is contrary to the concept of implied consent at the very heart of the Commission's "total service" approach; 2) the particularly disruptive effect of that ban on commercial mobile radio service ("CMRS") providers and their customers

¹ *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (released February 26, 1998) ("Order").

because of the way in which integrated packages have developed in that industry segment² and because of the particular technological interdependence between the service and related CPE; 3) the restrictions on the use of CPNI for win-back purposes which deprive customers of better service, more price competition, and the opportunity to assist carriers in being more responsive to customers' needs; and 4) the electronic audit requirements which, if literally construed, are extremely complex and costly in light of the somewhat speculative benefits they might provide. Those aspects of the Commission's Order all impose burdens on carriers that are not necessary for the protection of consumer privacy interests under §222 of the Communications Act of 1934 as amended.

In these comments, Ameritech asks that the Commission act expeditiously to grant petitions concerning the Commission's electronic audit requirements because of the potentially massive costs involved, or, in the alternative, to grant a stay of those requirements until it has ruled on those petitions.

In addition, Ameritech points out that the Commission's win-back restrictions are not supported by the language of the statute and that there is no statutory support for certain parties' requests for the Commission to apply win-back restrictions, or any other CPNI related restrictions, to incumbent local exchange carriers ("ILECs") alone.

Ameritech further shows that the Commission's conclusion that §272 imposes no additional obligations on BOCs with respect to CPNI is sound and that parties were given adequate notice and opportunity to comment on that issue prior to the Commission's decision.

² The Common Carrier Bureau has made it clear that CPNI may not be used to market integrated packages, without customer consent, unless the customer is already purchasing the package elements from the carrier. *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, Order, DA 98-971 (released May 21, 1998) ("Clarification Order") at ¶¶4-7.

Ameritech also expresses its concern that the Commission keep customers' privacy interests in mind when ruling on requests to eliminate the need for customer approval prior to transfer of CPNI to third-party carriers.

Finally, Ameritech shows that the Common Carrier Bureau acted reasonably when it concluded that affirmative written consents obtained in compliance with the Commission's *Computer III* rules are still valid.

II. THE COMMISSION SHOULD EXPEDITIOUSLY GRANT THE PETITIONS CONCERNING THE COMMISSION'S ELECTRONIC AUDIT REQUIREMENTS, OR GRANT A STAY.

More than a dozen parties have asked the Commission to reconsider its electronic audit requirements, pointing out the complexity and cost of implementation. The record now is replete with evidence of the burden that those requirements would place on all carriers -- not just rural local exchange carriers or CMRS providers. In light of the fact that implementation of the Commission's requirements must begin virtually immediately and given the significant cost associated with compliance, Ameritech respectfully requests that the Commission act expeditiously to grant the petitions for reconsideration. In the alternative, Ameritech would ask that the Commission, at a minimum, stay its electronic audit requirements until at least 8 months after it rules on the petitions. In that way, the Commission can help assure that massive expenditures are not incurred in a potentially needless effort.

III. THE COMMISSION SHOULD RECONSIDER ITS WIN-BACK RESTRICTIONS AND NOT APPLY THEM EXCLUSIVELY TO INCUMBENT LOCAL EXCHANGE CARRIERS.

Numerous parties have asked the Commission to reconsider its decision to prohibit the use of CPNI for win-back purposes.³ In addition to the virtually unanimous point made by the

³ E.g., 360 Communications, ALLTEL, AT&T, Bell Atlantic, BellSouth, Frontier, GTE, PageNet, Personal

petitioners -- that the Commission's anti-win-back rule is, in fact, anti-competitive -- it is perhaps more important to note that the use of CPNI for win-back purposes is completely consistent with the statute. Assuming that CPNI in a win-back context is used to attempt to regain the customer's business for service that is in the same category from which the CPNI was derived, then CPNI is being used "in-category" and no customer consent -- implied or otherwise -- is required. It must be remembered that the Commission's concept of implied or inferred consent permits the use of CPNI derived from one category of service to market a service in a completely different category if the customer-carrier relationship extends to that other category of service.⁴ However, the case of win-back efforts within a given category, implied or inferred consent is unnecessary because the CPNI would be used to market services from which the CPNI itself was derived. Thus, the issue of whether there may be any implied or inferred consent for use of CPNI for win-back purposes -- because the customer-carrier relationship has been terminated -- is irrelevant.

Nonetheless, MCI seeks to have the Commission apply its win-back prohibition to ILECs alone,⁵ incorrectly maintaining that ILECs have a monopoly advantage by obtaining "advanced" notice if a customer switches to another carrier.⁶ In the case of Ameritech, its retail operations receive notice that they have "lost" a retail customer in the same manner that a reseller of Ameritech's local exchange services would be notified if another reseller submitted an order for the end user's line. Moreover, there is nothing "advanced" about the notice ILECs get in any event. In most cases, ILECs receive the notification from the new carrier after the customer has

Communications Industry Association ("PCIA"), PrimeCo, SBC, USTA, Vanguard.

⁴ Order at ¶¶23-24.

⁵ MCI at 51.

⁶ *Id.* at 49.

already made his or her decision to change. As has been pointed out in the many petitions dealing with the win-back rule, there is nothing anti-competitive about conducting win-back efforts. In fact, those efforts are pro-competitive and tend to result in increased consumer benefit.⁷

It is significant that the Commission's rules currently do not prohibit any carrier from attempting to regain the business of all customers that have left it. While, as noted above, the statutory language does not support an interpretation that Congress intended that any carrier should be prohibited from using CPNI to market the services that a former customer has just terminated, there is absolutely no evidence that Congress intended that a win-back restriction should apply only to ILECs. Where Congress thought carrier segment-specific restrictions were necessary, it so indicated. Section 222 contains such specific provisions in the form of the aggregate customer information requirements for local exchange carriers contained in paragraph (c)(2) and the subscriber list information requirements applicable to telecommunications carriers providing telephone exchange service contained in subsection (e). Since Congress spoke comprehensively in §222 on both the privacy and competitive aspects of CPNI, the Commission should decline MCI's invitation to impose an additional differential set of win-back restrictions on ILECs only.

Further, the Commission should deny MCI's request for clarification that non-CPNI -- such as the fact that a customer has chosen another carrier -- not be permitted to be used by ILECs for win-back purposes.⁸ Ameritech would agree that a list of a carrier's PIC'ed customers would be proprietary information to that particular carrier and that it would be inappropriate for another carrier to use that information to target marketing to customers of other particular

⁷ See, e.g., AT&T at 2-5.

⁸ MCI at 51.

carriers. However, there is nothing inherently wrong with an ILEC marketing its services to those of its customers who have chosen any other carrier for a portion of their service. For example, while it would be inappropriate for an ILEC to target market its own intraLATA toll services to those of its customers who have selected AT&T as their intraLATA toll PIC, it would not be inappropriate for that same ILEC to market its intraLATA toll services to all of its customers who have chosen any carrier other than the ILEC itself as their intraLATA toll PIC. The fact that a customer is not presubscribed to the ILEC for intraLATA toll services is simply information that the customer has “left” the ILEC for another intraLATA toll service provider. While the identity of the chosen carrier may be proprietary to that carrier, the fact that the customer has left its former carrier is not, and win-back activity should be permitted.

Again, win-back efforts are, in fact, pro-competitive. They stimulate better customer service and more price competition, and provide carriers with valuable feedback on how to be more responsive to customer needs.

IV. THE COMMISSION SHOULD DECLINE TO APPLY ITS CPNI RULES ONLY TO INCUMBENT LOCAL EXCHANGE CARRIERS.

Several parties have requested that the Commission forbear from applying the CPNI requirements to their particular group of carriers -- *e.g.*, CMRS providers⁹, rural and small carriers¹⁰ -- because of perceived unique burdens. Several other parties, however, have specifically requested that the Commission apply its rules only to ILECs.¹¹ In fact, these parties want a new set of more restrictive rules applicable to ILECs alone. For example, Comcast asks the Commission to narrow the “total service” approach so that it doesn’t extend to CPNI gained

⁹ 360 Communications, Vanguard.

¹⁰ Independent Alliance, National Telephone Cooperative Association (“NTCA”).

¹¹ CompTel, Comcast, and LCI.

by an ILEC.¹² CompTel and LCI want the Commission to prohibit dominant carriers from sharing CPNI with non-dominant affiliates unless customer consents in writing, to require written consent for ILECs to use CPNI outside the “total service” relationship, and to require ILECs to provide more frequent notification of CPNI rights.¹³ The Commission should reject these requests.

As the Commission noted specifically in the Order:

With section 222, Congress expressly directs a balance of “both competitive and consumer privacy interests with respect to CPNI.” Congress’ new balance, and privacy concern, are evidence by the comprehensive statutory design, which expressly recognizes the duty of *all* carriers to protect customer information, and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers. . . Thus, although privacy and competitive concerns can be at odds, the balance struck by Congress aligns these interests for the benefit of the consumer. This is so because, where customer information is not sensitive, the customer’s interest rests more in choosing service with respect to a variety of competitors, thus necessitating competitive access to information, than in prohibiting the sharing of information. (Footnotes omitted; emphasis original.)¹⁴

Thus, the Commission found that, in §222, Congress spoke comprehensively on the issue of CPNI -- from both a privacy perspective and a competitive perspective. In that regard, it is clear that, where Congress had competitive concerns about CPNI, it addressed those concerns within the scope of §222 itself. Paragraph (c)(2) requires carriers to disclose CPNI to any person -- even a competitor -- designated by the customer. Paragraph (c)(3) requires LECs to disclose aggregate customer information if that is used for an out-of-category purpose. Subsection (e) requires telecommunications carriers providing telephone exchange service to provide subscriber list information on nondiscriminatory and reasonable terms and conditions. Thus, the Commission correctly concluded:

¹² Comcast at 24.

¹³ CompTel at 13 (pages numbers omitted from CompTel’s comments), LCI at 13.

¹⁴ Order at ¶3.

that Congress did not intend to, and we should not at this time, distinguish among carriers for the purpose of applying section 222(c)(1). Based on the statutory language, it is clear that section 222 applies to all carriers and, with few exceptions, does not distinguish between classes of carriers.¹⁵

This decision is well founded and should not be reversed.

For that same reason, there is no basis for creating a separate set of requirements applicable to ILECs only by, as MCI requests, characterizing CPNI as a “network element” under the Act. As MCI points out, §3(29) of the Act defines a network element to include “information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunication service.” MCI claims that the Commission has already concluded that CPNI is a network element and should confirm that conclusion.¹⁶ However, that is not the case. The provision of the Order cited by MCI involves the Commission’s observation simply that:

Although an incumbent carrier is not required to disclose CPNI pursuant to section 222(d)(1) or section 222(c)(2) absent an affirmative written request, local exchange carriers may need to disclose a customer’s service record upon the oral approval of the customer to a competing carrier prior to its commencement of service as part of the LEC’s obligations under sections 251(c)(3) and (c)(4).¹⁷

The Commission was only stating that a particular customer’s CPNI may need to be disclosed in the ordering phase upon oral approval of the customer in order to facilitate a competitive local exchange carrier’s (“CLEC’s”) ability to serve that particular customer via unbundled network elements (§251(c)(3)) or resale (§251(c)(4)).

CPNI is clearly different from the technical type of information, such as routing and network interface information, that is obviously within the scope of the definition of network

¹⁵ *Id.* at ¶49.

¹⁶ MCI at 22.

¹⁷ Order at ¶¶84, 166.

element. By its very nature, CPNI raises this issue of the protection of customers' privacy interests -- a consideration that is not present in the case of technical information "used in transmission, routing, or other provision of a telecommunications service" and, for that reason, should not be considered a statutory "network element."

V. THE COMMISSION'S DECISION WITH RESPECT TO §272 IS A SOUND ONE.

Several parties¹⁸ have requested that the Commission reverse its conclusion that §272 imposes no additional CPNI requirements on BOCs' sharing CPNI with their §272 (interLATA/manufacturing) affiliates.¹⁹ These parties argue that the Commission made a mistake and that failure to apply separate §272 nondiscrimination requirements to CPNI weakens the structural safeguards contemplated by the Act. That is simply not the case.

In the Order, the Commission correctly found that applying the §272 nondiscrimination requirement literally to the BOC transfer of CPNI to its §272 affiliate could actually defeat customers' privacy interests or lead to other nonsensical results. For example, such would be the case if BOCs were prohibited from transferring CPNI to their §272 affiliates -- even with customer consent -- unless that information is also transferred to third-parties. Further, requiring BOCs to solicit consent to transfer CPNI to third-parties when they also solicit consent to transfer information to their §272 affiliates would be an extremely cumbersome and confusing process. As the Commission noted, soliciting approval for unspecified "all other" entities would involve neither effective notice nor informed approval.²⁰ And a solicitation that listed the name of every carrier would likely be too intimidating for many customers to even attempt to deal

¹⁸ See, AT&T, Sprint, CompTel, MCI.

¹⁹ Order at ¶169.

²⁰ *Id.* at ¶163.

with.

Moreover, as the Commission noted, any potential for anti-competitive use of CPNI -- even under the Commission's "total service" approach -- is mitigated by the fact that, since the BOCs are not currently engaged in the long distance business, they would have to obtain customer approval prior to transferring any CPNI to their §272 affiliates.²¹

In addition, the claim that finding that §272 does not apply to CPNI "affords the interLATA of the affiliate of the BOCs an unwarranted advantage"²² ignores the fact that §272 itself creates an exception from subsection (c)'s nondiscrimination requirement for something that many parties might characterize as providing BOCs such an advantage -- *i.e.*, joint marketing.²³ Thus, even if §222 did not remove CPNI from the embrace of §272, the nondiscrimination provisions of §272(c) would not apply to the use by a BOC of CPNI to market or sell the interLATA services of its §272 affiliate under §272(g)(2) -- arguably the situation in which the BOC has the most "leverage." In this case, Congress expressly found that customer interests in one-stop shopping clearly trump any nondiscrimination aspects of the structural safeguards imposed by §272.

Finally, MCI's contention that there was lack of adequate notice for the Commission to reconsider its original decision on the application of §272 to CPNI articulated in the Non-Accounting Safeguards Order is without merit.²⁴ The case cited by MCI -- *McElroy Electronics Inc., v. FCC*, 990 F.2d 1351(D.C.C. Cir. 1993) -- is inapposite. That case dealt with whether a Commission order adequately informed license applicants of the Commission's own

²¹ *Id.* at ¶164.

²² Sprint at 7.

²³ *See*, §272(g)(3).

²⁴ MCI at 6-7.

requirements. The issue raised by MCI is whether there was adequate notice for the Commission to change its ruling; and in this case, there was. As MCI noted, the Common Carrier Bureau sought specific additional comments on the issue of the interaction of §272 and §274 with the CPNI requirements of §222.²⁵ In response to that request, parties filing comments and reply comments discussed all aspects of that interaction. Thus, all parties were on notice that the entirety of the interplay between the sections was being discussed and, therefore, was an appropriate subject for the Commission's ruling. It is clear that that ruling is a logical outgrowth of the notice in this proceeding and the comments submitted -- especially in light of the Common Carrier Bureau's request for additional comment on the §272 issue. Moreover, given the Bureau's notice, all parties were apprised of the potential issue and had a fair opportunity to comment.²⁶

**VI. THE COMMISSION SHOULD ACT DELIBERATELY ON
MCI'S REQUEST NOT TO REQUIRE CUSTOMER APPROVAL
FOR THE TRANSFER OF CPNI TO A CLEC.**

MCI has asked the Commission to reconsider, especially in the case of CLECs, its determination that §222 contains no exception to the requirement of customer approval for transfer of CPNI to third-parties.²⁷ However, Ameritech would caution that, in certain cases, unscrupulous carriers could use such a "loophole" -- especially in a pre-ordering context -- to "data mine" without customer authorization to search for good marketing prospects. Although slamming and cramming may continue to be big problems, if a CLEC is placing an order for service, the end user will realize, sooner or later, that inappropriate action was taken if the

²⁵ DA 97-385 (released February 20, 1997).

²⁶ See, *American Iron & Steel Institute v. Environmental Protection Agency*, 568 F2d 284 (3d Cir. 1977).

²⁷ MCI at 23-28.

customer never authorized the change. However, in a pre-ordering context and especially if the CLEC never gets around to placing an order for a particular end user, the customer may never know that his or her privacy rights were invaded -- that the carrier obtained access to CPNI without authorization.

While Ameritech acknowledges CLECs' legitimate interests in interconnection and the establishment of competitive local exchange services on a streamlined and efficient basis, adequate consideration must also be given to customers' reasonable privacy expectations.

VII. AFFIRMATIVE COMPUTER III CONSENTS ARE STILL VALID.

In its Clarification Order in this docket, the Common Carrier Bureau noted that any affirmative written consents obtained by BOCs under the Commission's *Computer III* rules from customers with more than twenty access lines to use their CPNI to market enhanced services are still valid.²⁸ The Commission's rules required appropriate notification and affirmative written consent. The Bureau simply concluded that compliance with those rules would have resulted in both "effective notice" and "informed approval" sufficient for any out-of-category use under §222(c)(1).

The challenge to the Bureau's findings made by CompTel and LCI in virtually identical texts is completely misplaced.²⁹ They claim there is no reason to presume that such approvals were "informed approvals." However, the Bureau simply clarified that, if the approvals were obtained in a manner compliant with the Commission's *Computer III* rules, then the approval would have been appropriately "informed" since the customer would have been notified of its rights.

²⁸ Clarification Order at ¶¶10-12.

²⁹ CompTel at 20-22, LCI at 16-19.

LCI's claim that the environment is fundamentally different today -- presumably because of the pervasiveness of competitive pressures on ILECs' provision of local exchange service -- does nothing to alter the fact that the consent was informed. Even the Commission's current rules do not require that consents obtained under those rules "evaporate" if the environment changes.

CompTel complains that, in the context of obtaining *Computer III* consents, "BOCs had frequently told customers they might have to change account representatives if they did not grant the waiver."³⁰ Where that occurred, it was probably the result of the Commission's "mechanical blocking" requirements for personnel that were involved with the marketing of enhanced services -- a system that the Commission found to be impracticable in the context of the broader scope of §222.³¹ This did not amount to, as CompTel implies, improper pressure on customers to grant consent.

There is simply no reason, therefore, for the Commission to reverse the Bureau's finding that properly obtained, affirmative written *Computer III* consents are still valid.

Respectfully submitted,



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³⁰ CompTel at 22.

³¹ Order at ¶¶195-197.

CERTIFICATE OF SERVICE

I, Todd H. Bond, do hereby certify that a copy of the foregoing Comments on Petitions for Reconsideration, Clarification, and Forbearance has been served on all parties listed on the attached service list, via first class mail, postage prepaid, on this 25th day of June, 1998.

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