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JUN 25 1998

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

OPPOSITION AND RESPONSE TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION

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Dated: June 25, 1998

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SUMMARY

Cable & Wireless, Inc. ("CWI") files this Opposition and Response in order to demonstrate to the Commission that while the Commission is well intentioned in protecting consumer privacy, the CPNI Order does not properly balance the competitive interests of carriers as envisioned by Congress. CWI requests the Commission institute the following changes to the Order on reconsideration:

- Narrowly tailor the anti-win back rule to prohibit only incumbent local exchange carriers from using CPNI for customer retention or win back.
- Grandfather existing CPNI approvals obtained by carriers prior to the release of the CPNI Order.
- Reconsider the CPNI safeguards in a manner which provides flexibility and priority to the Year 2000 problem.
- Permit the use of CPNI to market information services which are reasonably related to the underlying telecommunications service offering.

By instituting CWI's recommendations, the Commission will further the interests of both consumers and carriers by proscribing rules which protect consumer information without imposing burdensome, unnecessary rules and restrictions on carriers.

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OPPOSITION AND RESPONSE TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.4(b)(1) of the Commission's rules, 47 C.F.R. §1.4(b)(1), Cable & Wireless, Inc. ("CWI") hereby submits this Opposition and Response to the Petitions for Reconsideration and Clarification of the Commission's February 26, 1998 Second Report and Order governing carriers' use of Customer Proprietary Network Information ("CPNI Order" or "Order").[1] CWI fully appreciates the Commission's efforts to provide guidance to Section 222 of the Act and to further customer privacy efforts. However, many of the rules and regulations established in the CPNI Order are burdensome and unnecessary to effectuate the purpose of Section 222 of the Communications Act. The twenty seven carriers and associations which filed Petitions

[1] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115,

for Reconsideration and Clarification to the CPNI Order represent a wide variety of carriers, including BOCs, long distance providers, CLECs, CMRS providers, and rural telephone companies. Each of these petitioners consistently stated the CPNI Order is not narrowly tailored to address the issue of customer privacy and the Order would have an adverse and costly impact on the petitioners by, *inter alia*, increasing costs to comply with the safeguards mandated by the Order, by diverting precious resources needed to address the Year 2000 problem, and by prohibiting long practiced marketing procedures.

CWI files the following Opposition and Response to the arguments and issues raised by the Petitioners. Specifically, CWI requests the Commission reconsider the rules which prohibit competitive carriers from using CPNI to "win back" customers who have or are preparing to switch carriers, the rules which do not grandfather previous CPNI authorizations, the rules which establish burdensome safeguards and mandate specific computer systems, and the rule which prohibits carriers from marketing enhanced services, such as voice mail, with underlying telecommunications services absent customer approval.

I. THE ANTI-WIN BACK RULES SHOULD BE NARROWLY TAILORED.

CWI requests the Commission reconsider and narrowly tailor its rule which prohibits the use of CPNI, absent customer approval, for customer retention or to "win back" a customer who has switched to a competing carrier.[2] In the Order, the Commission held that the use of CPNI in customer win-back or retention was not

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Second report and Order, and Further Notice of Proposed Rulemaking, FCC 98-27, released February 26, 1998 ("CPNI Order" or "Order"), published in 63 Fed. Reg. 20326 (April 24, 1998).

[2] See Section 64.2005(b)(3).

permitted under the statute.[3] The purpose of the Communications Act of 1996 was to increase competition among carriers, and one effect of competition is a significant amount of turnover or "churn" between competing carriers.

In the Petitions, the Petitioners request the anti-win back prohibition be repealed since it was not required by and is an unreasonable interpretation of the statute,[4] the rule was not adequately discussed on the record,[5] its application harms competition,[6] it violates a carrier's 5th Amendment property right to just compensation for property which has been taken,[7] win back falls within the total service relationship,[8] and there is no time limit imposed on the usage of CPNI to provide, or to seek to provide, service from which the information was derived.[9] Alternatively, if the Commission believes its anti-win back rule is a reasonable interpretation of Section 222, the Petitioners argue it should exercise its power under Section 10 of the Act and forbear from enforcing this provision since its anti-competitive effects significantly outweigh its ability to protect customer privacy.[10]

CWI supports those Petitioners which state win back is a pro-competitive marketing strategy resulting in increased choices for consumers at lower costs. However, CWI opposes those petitions filed by incumbent local exchange carries which request the

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[3] Order at 85.

[4] Alltel Communications Inc., Petition for Reconsideration, ("Alltel") at 7; Bell Atlantic, Petition of Bell Atlantic for Partial Reconsideration and Forbearance, ("Bell Atlantic") at 16; GTE, GTE Petition for Forbearance, Reconsideration, and/or Clarification, ("GTE") at 34; USTA, Petition for Reconsideration of the United States Telephone Association, ("USTA") at 8; 360 Communications Company, Petition for Reconsideration and Clarification or Forbearance, ("360") at 11.

[5] PrimeCo Personal Communications L.P., Petition for Limited Reconsideration and/or Forbearance of PrimeCo Personal Communications, L.P., ("PrimeCo") at 9; SBC Communications, Inc., Petition for Reconsideration of SBC Communications Inc., ("SBC") at 8; USTA at 6;

[6] AllTel at 7; BellSouth Corporation, BellSouth Petition for Reconsideration, ("BellSouth") at 16; GTE at 35; USTA at 7; 360 at 10.

[7] BellSouth at 18; GTE at 36;

[8] Frontier, Petition for Reconsideration, ("Frontier") at 8;

[9] Bell Atlantic at 17; GTE at 35;

[10] Bell Atlantic at 17;

anti-win back rules be repealed for their customer retention and win back operations.[11] The Order narrowly interprets the terms "initiate" and "in (the) provision" in a manner which cannot be reasonably interpreted from the statute and which will have a seriously negative impact on a carrier's ability to compete. It is reasonable to infer that a customer would expect, even invite, its former carrier to use the CPNI gathered to "provide" service to tailor a service which benefits the consumer and which wins back or retains that consumer.[12] For the competitive IXC, internet, and CMRS markets, the Commission should reconsider its imposition of the anti-win back rule or, in the alternative, forbear from enforcing this rule since its serious anti-competitive effects significantly outweigh any customer privacy benefits it can offer.

However, in the yet to be competitive local exchange markets, the Commission should reject the Petitions for anti-win back relief filed by and for incumbent local exchange carriers. Due to the market power of these companies and the inherent nature of the local exchange market, these carriers presently enjoy an unfair advantage over any competitive local exchange carrier. CWI argued in its comments to the Commission's Subscriber Carrier Selection Changes proceeding,[13] and reiterates in this proceeding, that incumbent local exchange carriers in a competitive local exchange market must act as both an essential market element as well as a market participant. These dual roles are not mutually exclusive, and the ILECs will have a disincentive to act in a fair and objective manner when instituting preferred carrier changes, placing PIC freezes on lines, or attempting to retain or win back customers. CWI is concerned ILECs could use CPNI

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[11] SBC at 8; USTA at 6.
[12] Order at 85.

gathered in preferred carrier changes and competitive local exchange carrier interaction to win back and/or retain their customers with information which is unavailable to their competitors. A narrowly tailored anti-win back rule will prohibit these carriers from using CPNI to maintain their dominant positions in the local exchange market in an anti-competitive manner, while allowing competitive carriers to maintain the use of long established win back procedures.

II. THE COMMISSION SHOULD GRANDFATHER EXISTING CPNI APPROVALS OBTAINED BY CARRIERS IN GOOD FAITH PRIOR TO THE RELEASE OF THE ORDER.

In the Order, the Commission held that the carriers must give customers explicit notice of their CPNI rights prior to any solicitation for approval, and carriers must obtain express written, oral, or electronic approval for CPNI uses beyond those set forth in sections 222(c)(1)(A) and (B).[14] Although the Commission concluded that the term "approval" in section 222(c)(1) is ambiguous since the legislative history is not determinative[15] and the term itself could permit a variety of interpretations,[16] the Commission rejected a notice and opt-out option for future and existing customers.[17] The Commission reasoned that since the legislative history of Section 222 strives to "balance both competitive and consumer privacy interests with regard to CPNI" express approval is the better reading of the statutory language.[18]

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[13] Cable and Wireless, Inc., Comments of Cable and Wireless, Inc., In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, filed Sept. 15, 1998.
[14] Id. at 87.
[15] Id. at 94.
[16] Id.
[17] Id. at 92.
[18] Id. at 94.

In its Petition for Reconsideration and/or Clarification, AT&T requests the Commission grandfather existing approvals obtained by carriers in good faith prior to release of the CPNI Order.[19] Prior to the release of the Order, AT&T had relied on the statutory language and the term "approval" to request permission for CPNI use from more that 27 million customers. In its Petition, AT&T requests the Commission allow wireline carriers to exercise a notice and opt-out CPNI approval method for existing customers who have already provided the carrier with permission to use their CPNI. These customers would be provided with full written notice of their rights and with the option to withdraw their approval should they wish to do so.[20] Revisiting these customers to obtain express permission on this issue when they have previously provided such CPNI permission will be confusing, annoying, and unnecessary.[21]

CWI strongly supports AT&T on the issue of reconsidering a notice and opt-out approval method for existing customers. The Order itself provides ample evidence that the Commission was unclear as to how to best interpret "approval" and eventually settled on the "better," rather than the best, reading of the statute. CWI also relied on the statute when it requested CPNI use approval from consumers who became customers after the 1996 Communications Act was enacted. In relying on a statute which does not expressly direct the Commission to initiate a rulemaking,[22] CWI amended its Order forms to include a CPNI notice and approval section in its terms and conditions. CWI agrees with AT&T that these customers could be confused and annoyed if contacted again for their

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[19] AT&T, AT&T Petition for Reconsideration and/or Clarification, ("AT&T") at 18.
[20] AT&T at 21.
[21] AT&T at 21.
[22] Section 222 of the Communications Act is self-executing and was effective the date the 1996 Act became effective. No rulemaking was required to implement Section 222; rather, the instant proceeding was initiated by requests for guidance. See ALLTEL at 2.

express permission but these customers should be provided with a notification of rights and opt-out which conforms with the Order. CWI requests the Commission seriously consider this proposal since it will best effectuate the intent of Congress and will "balance both competitive and consumer privacy interests with regard to CPNI."[23]

III. THE COMMISSION SHOULD RECONSIDER ITS SAFEGUARDS

In the Order, the Commission interpreted the mandate in section 222(a) stating "every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers" as the authority to proscribe rules which micromanage a carrier's computer networks and to make the assumption that these networks work together. The Commission imposed five specific CPNI safeguards on carriers regardless of their CPNI use, including requirements that carriers develop and implement software systems that "flag" records[24] and an electronic audit mechanism that tracks access to customer accounts.[25]

In the Petitions, the Petitioners consistently stated the flag and audit trail requirements are overly burdensome and the Commission should not be involved dictating how carriers ensure CPNI security. Several Petitioners voluntarily disclosed proprietary cost information to illustrate the burden these safeguards will impose on their operations. Ameritech stated the electronic audit rule would require 20 person-years of

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[23] Order at 94. Quoting Joint Statement of Managers, S. Conf. rep. No. 104-230, 104th Cong., 2d Sess. (1996) at 2.
[24] Order at 198
[25] Id. at 199.

programming work to comply;[26] AT&T estimated initial compliance costs could exceed $270 million;[27] an alliance of small carriers stated compliance could cost between $42 and $56 per customer;[28] and MCI stated literal compliance, regardless of cost, could be "impossible."[29] As with all costs imposed by regulatory mandate, regardless of policy, public benefit, or good intentions, these costs will eventually be passed on to the consumers.[30] Further, these costs are now being imposed at a time when carriers are attempting to rectify the computer problems associated with the Year 2000 problem and while instituting local number portability.

While CWI agrees with the Commission that customer privacy must be protected, it urges the Commission to seriously reconsider the impact the flag and audit trail requirements will have on the computer systems of carriers. Similar to the carriers filing petitions, CWI has multiple computer systems which do not necessarily work in unison. When an employee is accessing CPNI, the employee does not always access the same initial screen. In order to comply with the first screen and audit trail requirements as explained in the Order, CWI would have to dedicate substantial resources to reconfigure these networks. A cost which eventually may have to be recovered from consumers.

Rather than impose specific compliance methods, the Commission should provide carriers with the flexibility of how to comply with CPNI security. As suggested in the Petitions, the Commission could narrow its requirements and adopt a centralized flag

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[26] Ameritech, Petition for Reconsideration or, in the Alternative, for Forbearance or Clarification, ("Ameritech") at 8.
[27] AT&T at 11.
[28] The Independent Alliance, Petition for Reconsideration of The Independent Alliance, ("The Independent Alliance") at 7, ftnt. 16.
[29] MCI Telecommunications Corporation, Petition of MCI Telecommunications Corporation for Reconsideration and Clarification, ("MCI") at 36.

screen for marketing,[31] limit the audit trail to include only access for marketing purposes,[32] or place more of an emphasis on employee training and corporate certification.[33] CWI opposes those petitioners who request safeguard enforcement be delayed for a few months or for the same period for all carriers. Rather, the Commission should either delay the adoption of the safeguards until after January 1, 2000 to prioritize Year 2000 compliance[34] or provide an extended compliance period for those carriers not previously subject to the safeguards in Computer III proceeding.[35] The Commission can demand CPNI security without micromanaging the compliance methods. A system which allows the carrier to develop its own compliance methods in a reasonable time period will undoubtedly be more effective and beneficial since carriers will have an incentive to comply in the most efficient manner possible.

IV. CARRIERS SHOULD BE PERMITTED TO USE CPNI TO MARKET INFORMATION SERVICES THAT ARE REASONABLY RELATED TO THEIR TELECOMMUNICATIONS SERVICE OFFERINGS.

In the Order, the Commission held that CPNI cannot be used, without customer

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[30] See In the Matter of Federal-State Joint Board on Universal Service, Fifth Order on Reconsideration and Fourth Report and Order, CC Docket 96-45 (June 26, 1998) (freezing USF funding for schools and libraries due, in part, to the reactions to the USF surcharge imposed by many long distance providers).

[31] 360 at 12.

[32] Ameritech at 9.

[33] AT&T at 14.

[34] Telecommunications providers are especially vulnerable to computer malfunctions due to this problem. Nationwide cost estimates for correcting the problem in the United States alone are between $50 and $75 billion. The Year 2000 Software Conversion: Issues and Observations, The Information Technology Association of America (1998). The U.S. government is particularly concerned how this problem will affect government operations, particularly services which rely on telecommunications. House Government Panel Moves to Next Phase in Y2K Probe, Telecommunications Reports Daily (June 22, 1998). Also, CWI has formally responded to the Commission and 11 state regulatory agency demands explaining how it is preparing to address the problem.

[35] AT&T, GTE, and the BOCs are the only carriers subject to the Computer III requirements. Order at 176. Compliance with the CPNI safeguards for these carriers would be less burdensome that for those carriers not subject to Computer III.

consent, for the provision of CPE or information services under §222(c)(1)(A) since they are not a "telecommunications service."[36] Under the "total service approach" adopted by the Commission, carriers could use CPNI from one service to market telecommunications services in another category of services in which the customer and the carrier have an existing relationship. However, the Commission did not allow carriers to market CPE and information services without customer approval even if the CPE or information service is reasonably related to the underlying telecommunications service, i.e. caller ID service and the caller ID CPE which is necessary to use the service.

The Petitioners made it unmistakably clear in the Petitions that this prohibition is unreasonable and an unnecessary burden in providing service to a customer. Ameritech requested the Commission allow carriers to use CPNI, without affirmative consent, to market bundles or packages that include products and services that are outside the category but that *otherwise relate to* the in-category service that is being marketed.[37] GTE also requests the Commission forbear from applying this rule to voice mail, store-and-forward, and short message services since these products are often an integral part of the underlying telecommunications service.[38]

CWI supports the Petitions which make these and similar arguments and requests the Commission allow CPNI use for information services, but only when the information service is an *integral part of* or *otherwise related to* the underlying telecommunications service. For example, CWI offers many of its long distance customers a calling card which has voice mail, conference calling, and store-and-forward fax services integrated into the standard card billing service. These features are integrated to offer the customer

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[36] Order at 46.
[37] Ameritech at 7.

the telecommunications and information services which may be needed when away from home or the office. This service is either offered when the business or person becomes a customer or is marketed to the customer to enhance their existing long distance service. Under the Commission's CPNI rules, CWI would have to segregate its information services from this product when it markets to customers based on their CPNI, or receive prior approval to offer a long distance subscriber a calling card service. This will result in a needless expense to create a separate product when the customer has a reasonable expectation that certain other services, regardless of regulatory classification, are an option to or included in the product.

V. CONCLUSION

CWI hereby files this Opposition and Response to the Petitions for Reconsideration and/or Clarification of the Order. CWI fully appreciates the Commission's efforts to provide guidance to Section 222 of the Act and to further customer privacy interests. However, CWI filed these comments because it believes the Commission did not fully appreciate the effect its actions would have on the ability of carriers to provide services to their customers or the cost impact this rule would have on the carriers and eventually consumers. CWI respectfully requests the Commission reconsider its rules on the anti-win back rule, the express approval requirement for present customers, the scope and specificity of the CPNI safeguards, and the prohibition on marketing information services with the underlying telecommunications service. The arguments made by the Petitioners do not attack the underlying purpose to this rule, rather they provide the Commission with guidance as to how best to effectuate this goal.

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[38] GTE at 22-24.

The Commission should seriously consider each of the arguments contained herein and the issues they address.

Respectfully Submitted,

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June 25, 1998

CERTIFICATE OF SERVICE

I, June Luff, a secretary with Cable & Wireless, Inc. do hereby certify that the foregoing Opposition and Response to Petitions for Reconsideration or Clarification was served on this 25th day of June, 1998, by first class U.S. mail postage prepaid upon the following:

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