



EX PARTE OR LATE FILED

June 9, 1999

Mr. Ari Fitzgerald  
Legal Advisor  
Federal Communications Commission  
Office of the Chairman  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 8-B201  
Washington, DC 20554

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JUN 9 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Ex Parte Presentation  
CC Dkt. No. 96-115**

Dear Mr. Fitzgerald:

You will soon be considering recommendations to resolve various petitions for reconsideration and/or forbearance of the Commission's rules regarding carrier use of Customer Proprietary Network Information (CPNI) for marketing purposes. On behalf of our paging and messaging carriers, who serve over 90 percent of the 50 million paging subscribers in the United States, the Personal Communications Industry Association ("PCIA") is filing this *ex parte* to assist you and your colleagues in your efforts to resolve the outstanding petitions and to answer questions posed by Commission staff, including yourself, during recent meetings regarding the CPNI rules.

As you are aware, approximately three years ago, Congress passed the Telecommunications Act of 1996 ("the Act"), which was intended to promote vigorous competition and encourage one-stop shopping for communications by breaking down artificial, regulatory barriers between services. To Congress' delight, wireless consumers, particularly consumers of wireless messaging services, have historically purchased integrated offerings from carriers in a fiercely competitive market. This competition has decreased the price and increased the range of wireless services available to consumers. However, application of the pending CPNI rules to wireless providers would reverse this trend and impede, rather than promote, the deployment of wireless offerings to consumers. In addition, despite the Act's clear deregulatory focus, the Commission's CPNI rules significantly hurt consumers by hindering the ability of wireless carriers to continue their tradition as full service providers by erecting high barriers to the marketing of integrated service offerings.

In order to achieve the pro-competitive balance intended by Congress, PCIA urges the Commission to broaden the wireless "basket," to include adjunct-to-basic

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services, information services, and customer premises equipment (“CPE”) that are provided as an integrated or seamless package to end users, or that, due to historical experience or the degree of integration of the service, customers view as a part of their total service relationship with the carrier. Such an expansion of the wireless basket is consistent with wireless marketplace realities, consumer expectations, and the intent of Congress in drafting Section 222. Alternatively, the Commission should forbear from applying the cross-marketing restrictions to wireless providers.

To help expand on these concepts, attached is an outline that effectively sets forth the rationale for our request. It is necessarily comprehensive and, in light of your recent questions, I encourage you to review it in its entirety.

Pursuant to Section 1.1206 of the Commission’s Rules, an original and one copy of this letter are being filed with your office. Should you have any questions concerning this filing, please feel free to contact me at (703) 535-7482.

Sincerely,



Robert L. Hoggarth  
Senior Vice President – Paging and Messaging  
Personal Communications Industry Association

Cc: Kathryn C. Brown, Chief of Staff, Office of the Chairman  
Thomas Power, Legal Advisor, Office of the Chairman  
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**INTERPRETING SECTION 222 TO PERMIT THE CROSS MARKETING OF  
WIRELESS SERVICES, CPE, AND INFORMATION SERVICES BASED ON THE  
SAME CPNI IS CONSISTENT WITH CONGRESSIONAL INTENT AND THE  
INTERESTS OF CONSUMERS**

- Section 222(c)(1) reads in pertinent part, “Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of the telecommunications service from which such information is derived, or *services necessary to, or used in, the provision of such telecommunications service ....*”
  - For CMRS, under its “total service approach,” the Commission focused narrowly on wireless telecommunications services and excluded closely related services that are necessary to and used in the provision of wireless telecommunications, even though the customer sees these services as “wireless.”
  - Although the Commission clarified that integrated marketing of bundled services would be permitted, its rules severely restrict the utility of CPNI derived from wireless telecommunications services in marketing related services such as wireless information services and CPE.
- As part of its “total service approach,” the Commission should broaden its definition of “*services necessary to, or used in, the provision of a telecommunications service*” within the context of Section 222 to the following:
  - “‘Services necessary to, or used in, the provision of a telecommunications service’ are adjunct-to-basic services, information services, and CPE that are provided as an integrated or seamless package to end users, or that, due to historical experience or the degree of integration of the service, customers view as a part of their total service relationship with the carrier.”
  - This definition is consistent with the marketplace reality and consumer expectations in the wireless arena. For example, it is impractical for a paging provider to offer its new customers advanced messaging products (*e.g.*, two-way paging) without also offering them new CPE (*i.e.*, a two-way pager).
  - Similarly, when paging is combined with information services such as personalized news or stock quotes, all the customer perceives is an integrated bundle. A customer does not distinguish between messages which are information services and those which are a traditional paging message.

- Such a revised definition is also consistent with the intent of Congress in drafting Section 222.

- As noted by the Commission, the legislative history makes clear that “section 222 strives to balance *both* competitive and consumer privacy interests with respect to CPNI.” H.R. Rep. No. 104-58, at 205 (1996) (“Conference Report”) (emphasis added); *CPNI Order*, ¶ 37. Congress intended to promote marketing beneficial to consumers while protecting that which is truly “personal” such as destination or content information.
- Further, as noted by the Commission, customers want their service to be provided in a convenient manner, and “expect that carriers with which they maintain an established relationship will use information derived through the course of the relationship to improve the customer’s existing service.” *CPNI Order*, ¶ 54.
- Thus, the aim of Section 222 is to prevent the release of CPNI to third parties with which customers have no pre-existing relationship, and to prevent an existing service provider from marketing entirely unrelated services to an existing customer.
- Finally, while the House version of Section 222 included a direct prohibition on the use of CPNI derived from a telecommunications service to market CPE, H.R. Rep. No. 104-204, at 22 (1995), this categorical prohibition was deleted from the final legislation. Thus, Congress intended to give the Commission a degree of flexibility in defining the phrase “services necessary to, or used in, the provision of a telecommunications service.”
- In sum, redefining this phrase in the manner requested by the paging industry is entirely consistent with Section 222.

**ALTERNATIVELY, FORBEARANCE FROM APPLYING THE CROSS-MARKETING RESTRICTIONS TO WIRELESS PROVIDERS IS CONSISTENT WITH SECTION 10 AND THE INTERESTS OF CONSUMERS**

- Section 10 orders the Commission to forbear from applying any FCC regulation or any provision of the Communications Act—except Section 251(c) (interconnection duties of ILECs) and Section 271 (conditions under which BOCs may offer interLATA services)—if three conditions are satisfied:
  - Enforcement of the regulation or provision is not necessary for the protection of consumers;
  - Enforcement of the regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; and

- Forbearance from applying the provision or regulation is consistent with the public interest.
- The language and legislative history of Section 10 make it clear that if the three aforementioned conditions are met, the Commission *must* forbear from enforcing the provision at issue. No additional showing is required.
  - By its terms, Section 10 applies to *all* statutory sections (except Sections 251(c) and 271) and rules, including Section 222 and the CPNI rules.
  - “[S]ection 10 *requires* the Commission to forbear from applying *any* provision of the Communications Act or from applying *any* of its regulations to a telecommunications carrier ... ” if the three-part test is met. Conference Report at 184 (emphasis added).
  - Forbearance necessarily means that the Commission finds that the statute in question is not necessary in circumstances where the requisite three-part showing is made.
- Allowing wireless providers to use CMRS-derived CPNI to cross-market wireless information services and wireless CPE advances the interests of consumers.
  - Consumers view wireless information services and wireless CPE as part of wireless service offerings because such information services and CPE have traditionally been intertwined with CMRS.
  - An unimpeded flow of information allows consumers to make more intelligent choices regarding their telecommunications needs, including wireless electronic mail, wireless Internet access, and wireless voicemail. Thus, consumers *cannot* be well served by a rule that prevents carriers from using CPNI to target these services to the customers that can best use them.
  - Having already made a voluntary decision to enter into a business relationship with a wireless carrier, that carrier’s customers do not object to being approached by their existing provider regarding new and improved products and services that the customer views are closely associated with the services they already receive.
  - Carriers have every incentive *not* to annoy their current customers by badgering them about new services because such customers might react by terminating their service contract. For the same reason, carriers also have every incentive *not* to cross over into areas which are truly personal, such as destination or content information. This is especially true in the highly competitive wireless industry.

- What consumers do not want—and what the wireless industry is *not* proposing—is the sale of their CPNI to third parties that do not have a business relationship with the customer or the use of destination or content information to market additional services.
- Prohibiting wireless providers from using CMRS-derived CPNI to cross-market wireless information services and wireless CPE is not necessary to ensure reasonable and non-discriminatory rates and practices.
  - This prohibition will actually lead to higher prices by effectively undermining both the customers’ opportunities to purchase mobile services, equipment, and information services in a cost-saving package and one carrier’s ability to compete for the customer’s business.
  - The FCC’s complaint process—as made even more effective by the new website for consumer complaints and by reforms to the Section 208 process—is available to disgruntled customers if market mechanisms ultimately fail.
- Allowing wireless providers to use CMRS-derived CPNI to cross-market wireless information services and wireless CPE is in the public interest.
  - In the context of cellular service and cellular CPE, the FCC has already found that jointly marketed products benefit both the consumer and the carrier. Consumers benefit because a wider variety of products and services are made available to them. Carriers benefit because they are able to narrowly tailor their marketing efforts, which reduces costs and promotes efficiency.
  - Given the fact that carriers have every incentive not to use CPNI for improper purposes and there is little evidence demonstrating that CPNI has ever been used improperly by wireless carriers, it is appropriate for the FCC to forbear from applying these rules to the wireless industry. *See e.g.*, Truth-in-Billing First Report and Order and Further Notice of Proposed Rulemaking, ¶ 16.