Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

BELLSOUTH REPLY COMMENTS

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively "BellSouth"), submits the following reply comments in response to the Common Carrier Bureau's recent *Notice* in the above referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

The parties filing comments were almost unanimous in supporting an opt-out approach for obtaining customer approval for use of CPNI. The comments recognized that an opt-in approach was an unlawful restraint on commercial free speech and that an opt-out approach

[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket Nos. 96-115 and 96-149, *Clarification Order and Second Further Notice of Proposed Rulemaking*, FCC 01-247 (rel. Sept. 7, 2001) ("*Notice*" or "*Clarification Order*").

adequately protected customer privacy concerns. BellSouth believes the comments fully support the retention of the Commission's current opt-out approach.

Some of the parties filing comments, however, ask the Commission to change its position on issues that have been properly decided. The most significant of these issues is the interplay between sections 222 and 272 of the Telecommunications Act of 1996 ("Act"). As BellSouth stated in its comments, whether the Commission uses an opt-in or opt-out approach does not change the statutory construction of section 222 and 272 as interpreted by the Commission in the *CPNI Order*[2] and the *CPNI Reconsideration Order*.[3] AT&T and WorldCom contend that changing from an unlawful notice approach to a lawful approach should affect the statutory interpretation the Commission made regarding the section 222 and 272 interplay. As discussed below, these arguments are without merit.

WorldCom and Mpower reach outside the Notice and raise issues that have been either decided by the Commission in this proceeding, other proceedings, or are being addressed by state commissions. Therefore action by the Commission is unnecessary and unwarranted.

A. Interplay Between Sections 222 and 272

AT&T argues that the Commission should reverse its conclusion that CPNI is not information within the context of § 272(c)(1). AT&T states, "[t]he only way to conclude that

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[2] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket Nos. 96-115 and 96-149, *Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998) ("*CPNI Order*").

[3] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14485 ¶ 142 (1999) ("*CPNI Reconsideration Order*").

section 272...does not apply to CPNI...is to assign different meanings to the same word in the same statute."[4] The Commission, however, must interpret the meaning of any word from a statute within the context of how that word is used.[5] That is precisely what the Commission did when it performed its statutory analysis of the sections 222 and 272 in the *CPNI Order* and the *CPNI Reconsideration Order*. Viewed in the proper statutory context, the Commission determined that Congress did not intend for information, as used in § 272(c)(1), to include CPNI. Indeed, the Commission explained its position clearly in the *CPNI Reconsideration Order* when other carriers raised essentially the same argument that AT&T raises in its comments. In reaching its decision on the proper statutory interpretation the Commission stated:

> While the legislative history is silent about the meaning of "information" in section 272(c)(1), the structure of the Act indicates strongly that the provision is susceptible to differing meanings. Indeed, as the courts have cautioned, the Commission is bound to move beyond dictionary meanings of terms and to consider other possible interpretations, assess statutory objectives, weigh congressional policy, and apply our expertise in telecommunications in determining the meaning of provisions. In this instance, we believe that the structure of the Act belies petitioners' contention that the term "information" has a plain meaning that encompasses CPNI. In enacting section 222, Congress carved out very specific restrictions governing consumer privacy in CPNI and consolidated those restrictions in a single, comprehensive provision. We believe that the specific requirements governing CPNI use are contained in that section and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating those constraints. As a practical matter, the interpretation proffered by petitioners would bar BOCs from sharing CPNI with their affiliates: the burden imposed by the nondiscrimination requirements would, in this context, pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other

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4 AT&T Comments at 14.

5 "The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). *See also*, *In the Matter of AT&T Corp., et al v. Ameritech, et al.*, File No. E-98-41, et al., *Memorandum Opinion and Order*, 13 FCC Rcd 21438 (1998). Commission determined that the word "provide" had different meanings depending on the statutory context.

> carriers as well, known or unknown. We do not believe that is what Congress envisioned when it enacted sections 222 and 272. Rather, as we concluded in the CPNI Order, we find it a more reasonable interpretation of the statute to conclude that section 222 contemplates a sharing of CPNI among all affiliates (whether BOCs or others), consistent with customer expectations that related entities will share information so as to offer services best tailored to customers' needs. For these reasons, we find that the "plain meaning" argument raised by Comptel and Intermedia is not persuasive, and further that their meaning is not the one Congress most likely intended. Therefore, we affirm our previous conclusion.[6]

As Verizon discussed in its comments, this is a statutory interpretation not a policy determination. Changing from an unlawful to a lawful customer notice cannot change the Commission's statutory interpretation. Therefore, AT&T's claims have no merit.

AT&T also argues that the BOC/§272 affiliate relationship prescribed by section 272(b)(1) of the Act requires the sharing of CPNI with third party affiliates. Section 272(b)(1) requires that a BOC "operate independently" from its §272 affiliates. AT&T argues that this means the BOC must treat the §272 affiliate as an "independent third party" and for that "reason, § 272 must apply to CPNI." AT&T attempts to expand this section beyond Congress' intent, as interpreted by the Commission.

In the *Non-Accounting Safeguards Order*[7] the Commission adopted its interpretation of "operate independently." The Commission found that the section was intended to ensure that the BOC did not integrate its local exchange and exchange access with the § 272 affiliate. The Commission stated, "we seek to ensure that a section 272 affiliate and its competitors enjoy the

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[6] CPNI Reconsideration Order, ¶ 142.

[7] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*").

same level of access to the BOC's transmission and switching facilities."[8] The Commission then concluded that operational independence related to preclusion of the BOC and the § 272 affiliate's joint ownership of transmission and switching facilities and the operation, maintenance, and installation of such facilities.

AT&T contends that "operate independently" goes beyond the definition reached by the Commission in the *Non-Accounting Safeguards Order* and requires the BOC to treat the § 272 affiliate as an independent third party, which would include the sharing of CPNI. AT&T argues that allowing the BOC to share CPNI with the § 272 affiliate without also requiring the BOC to share CPNI with other carriers would mean that "far from 'operating independently' the section 272 affiliate would owe much of its success to its relationship with the BOC."[9] This interpretation, of course, would read the joint marketing provision of section 272(g) right out of the Act. While Congress required structural separation, it also realized that BOCs and their § 272 Affiliates should be able of take advantage of certain economies of scale and scope in marketing services to customers. Clearly, much of the § 272 affiliate's success will be owed to the joint marketing relationship with the BOC. Under AT&T's suggested definition, joint marketing would therefore violate the "operate independently" standard. Accordingly, applying that definition would violate the intent of the Act.

B. WorldCom's Comments

WorldCom raises stale arguments from its Petition for Reconsideration to the *CPNI Order* that the Commission denied in the *CPNI Reconsideration Order*. First, WorldCom resurfaces its request that ILECs must transfer CPNI to potential new carriers that have acquired

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8 *Id.* ¶ 158.

9 AT&T Comments at 14.

a new local customer from the ILEC. WorldCom repeats this argument in its comments, however, this time with a slight twist. In the original argument, WorldCom requested that this CPNI be transferred to the new carriers without customer consent. The Commission soundly rejected this request.[10] Presently, WorldCom argues that if the Commission allows carriers, including ILECs, to use an opt-out approach for customer consent, then the Commission should require ILECs to obtain consent on behalf of other carriers to transfer CPNI to such carriers in the event the customer selects another carrier as its local exchange carrier. This argument is offensive on several fronts.

First, WorldCom's argument must be put in its proper context. It is not asking the Commission to interpret any section of the Act differently or expand when a new carrier can use the customer's CPNI. Indeed, the Commission found that the ILEC must transfer CPNI to the new carrier, if the new carrier has the customer's consent. WorldCom is simply asking the Commission to force the ILECs to obtain such consent on behalf of the new carrier – the ILEC's competition. WorldCom can and should obtain the customer's consent itself. It has contact with the customer, either orally or in writing, or both, at the point of sale. WorldCom can obtain consent from the customer through this contact. The ILECs should not be forced to do this work on WorldCom's behalf.

Second, the Commission has already determined that having ILECs attempt to obtain customers' consent for use of CPNI for unknown carriers would be inappropriate because it would not "constitute effective notice [to] or informed approval"[11] by the customer. Moreover, it would be outrageous to compel an ILEC to obtain consent from its customers to transfer CPNI to

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10 *CPNI Reconsideration Order,* ¶¶ 87-92.

11 *CPNI Order*, 13 FCC Rcd at 8176-77, ¶163.

the ILEC's competitors in the event the customer chooses one of those competitors as a local carrier. This is especially true considering that these competitors have equal opportunity to gain such consent themselves.

Finally, WorldCom uses protection of the customer as a pretense to force the ILECs to perform as its agent. It paints customers as dupes that cannot remember what services they have with their present local carrier. Because of this, WorldCom argues that having the CPNI passed to the new local carrier would protect customers. This is a farfetched non-supported characterization of the subscribing public. Customers typically know the service they have through their local carrier. Indeed, BellSouth contends that customers are much less likely to know what long distance calling plan they have with their long distance carrier as opposed to the services they obtain from their local carriers. Moreover, instead of simply duplicating the services that the customer had with its prior carrier, WorldCom should attempt to determine the services the customer desires to purchase. This will better protect customers because it will ensure they only get the services they order from the new carrier instead of simply having all the services they had with their prior carrier transferred.

WorldCom next attempts to have preferred carrier freezes declared public information that ILECs must make available to all carriers. The Commission addressed this issue in the *Section 258 Order* and reaffirmed its position in the *Slamming Reconsideration Order*.[12] In the *Slamming Reconsideration Order* the Commission stated:

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[12] *See In the Matter of Implementation of the Subscriber Carrier Selection Charges Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508 (1998) ("*Section 258 Order*") and *Third Report and Order and Second Order on Reconsideration*, 15 FCC Rcd 15996 (2000) ("*Slamming Reconsideration Order*").

> Furthermore, for the same reasons articulated in the *Section 258 Order,* we will not require LECs administering preferred carrier freeze programs to make subscriber freeze information available to other carriers. We continue to believe that, in light of our preferred carrier freeze solicitation requirements, subscribers should know whether there are preferred carrier freezes in place on their carrier selections. As we noted in the *Section 258 Order,* if a subscriber is uncertain about whether a preferred carrier freeze has been imposed, the submitting carrier may use the three-way calling mechanism to confirm the presence of a freeze. Carriers therefore would not need to rely on a LEC-prepared list identifying those subscribers who have freezes in place.[13]

The Commission has determined this issue. It is not a matter for comment in the *Notice*. The Commission should ignore WorldCom's request.

C. Mpower's Comments

Although not in the *Notice*, Mpower commented on win-back activities. Mpower alleged that BellSouth "very quickly 'allows' wholesale requests by CLECs to transfer to customer service to migrate to the retail side of the business." Mpower claims that BellSouth attempts "to retain customers before the transfer of the line to the CLEC is even completed."

Mpower's allegations of win-back improprieties are not new. As Mpower indicated in its comments, several state commissions in BellSouth's region have opened proceedings to address these issues. When BellSouth received such allegations, either from a CLEC or through the state commissions, BellSouth took immediate action to investigate them and suspended its outbound win-back efforts pending completion of an internal review into those processes and programs. That review addressed CLECs' concerns possible misuse of wholesale information by BellSouth's retail units. Moreover, BellSouth has adopted a uniform approach to training, managing, and monitoring all third-party sales representatives involved in telesales and

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13 *Slamming Reconsideration Order*, 15 FCC Rcd at 16031-16032, ¶ 76 (footnotes omitted).

telemarketing activity on behalf of BellSouth to ensure that they are informed of these rules and are contractually bound to conform their sales practices to BellSouth's policy.

With respect to the more general issue of win-backs, it is important to stress that, as this Commission itself has acknowledged, there is nothing inherently anticompetitive about BellSouth's attempts to win back customers that have chosen other telecommunications providers. On the contrary, that is the essence of competition. As this Commission has explained, restrictions on win-back activities "may deprive customers of the benefits of a competitive market."[14] The Commission further stated that "winback facilitates direct competition on price and other terms, for example, by encouraging carriers to 'out bid' each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs," and that, "once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice."[15]

Moreover, as Mpower stated in its comments, where win-back issues have been raised the state commissions have created reasonable rules of the road for win-back activities to ensure that they are not anticompetitive. The relevant state commissions have thus shown themselves to be committed to resolving any legitimate CLEC complaints on this issue, and there is no reason for this Commission to intercede.

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14 *CPNI Reconsideration Order,* ¶ 69.

15 *Id.,* ¶¶ 69-70.

II. CONCLUSION

The Commission should maintain its position relating to the opt-out approach for obtaining customer approval for use of CPNI. Meanwhile, the Commission should not revisit its statutory interpretation of the interplay between sections 222 and 272 Act. All other issues raised by commenters have already been addressed by this Commission or state commissions and need not be addressed here.

Respectfully submitted,

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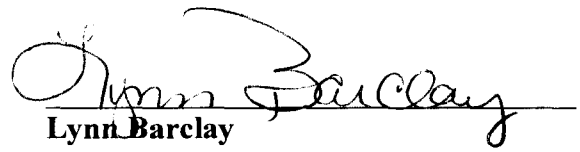
CERTIFICATE OF SERVICE

I do hereby certify that I have this 16th day of November 2001 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S REPLY COMMENTS** by Electronic Mail and U.S. Mail addressed to the parties listed on the attached service list.



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