

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

WORLDCOM REPLY COMMENTS

WorldCom, Inc. (“WorldCom”) respectfully submits these comments in response to the initial comments filed pursuant to the Federal Communications Commission’s (“Commission”) Second Further Notice of Proposed Rulemaking¹ (*Clarification Order and Notice*) in the above-captioned docket.

I. Summary and Introduction

As the vast majority of comments in this proceeding demonstrate, the Commission should allow carriers to implement an opt-out approach to obtain customer approval to use, disclose or permit access to individually identifiable customer proprietary network information (“CPNI”) beyond the purposes of the

¹ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication’s Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended,*

telecommunications service from which it was derived. The parties supporting a mandatory opt-in approach failed to present sufficient evidence to meet the standard of *Central Hudson*² as articulated by the United States Court of Appeal, Tenth Circuit (“Tenth Circuit”). Additionally, the Commission must reconsider its decision in the *CPNI Order*³ regarding the interplay between section 222 and section 272 of the Telecommunications Act of 1996 (“Act”).

II. A Notice and Opt-Out Approach Protects Customer Privacy Interests.

For the Commission to reinstate a mandatory opt-in regime, it must meet the four-part test of *Central Hudson*.⁴ In particular, the Commission may not require carriers to implement an opt-in approach without adequately considering an opt-out strategy (which the Tenth Circuit viewed as an obvious and substantially less restrictive alternative) and determining that such a strategy is insufficient to protect the government’s interests.⁵ Since an opt-out approach will protect consumer privacy, as well as enable carriers to more easily meet their obligations under the competitive provisions of the Act, the Commission should allow carriers to implement an opt-out approach.

Clarification Order and Second Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 and 96-149 (rel. Sept. 7, 2001)(*Clarification Order and Notice*).

² *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

³ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication’s Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, Second Report and Order, CC Docket Nos. 96-115 and 96-149 (rel. Feb. 26, 1998)(*CPNI Order*).

⁴ *See US West v. FCC*, 182 F.3d 1224, 1233 (Aug. 18, 1999). [The four-part framework established by *Central Hudson* is “a threshold inquiry regarding whether commercial speech concerns lawful activity and is not misleading... If this threshold requirement is met, the government may restrict speech only if it proves: (1) it has a substantial state interest in regulating speech, (2) the regulation directly and materially advances that interest, and (3) *the regulation is no more extensive than necessary to serve the interest.*” *Emphasis added.*]

⁵ *Id.*, pp. 1238-39. *See also*, Comments of The Electronic Privacy Information Center, *et al.*, p. 2 (“Privacy Groups Comments”).

The parties requesting that the Commission adopt a mandatory opt-in regime in order to protect consumer privacy failed to sufficiently demonstrate the necessity of such an approach. Their arguments center on the fact that under an opt-out approach consumers are required take action to protect CPNI. It is true that the opt-out approach places the burden to act on those who want to protect their CPNI rather than those who wish it to be shared. But that burden is not unreasonable so long as carriers provide clear and easy methods for consumers to protect their individually identifiable CPNI. The interim rules established by the *Clarification Order and Notice* address this concern by requiring carriers to provide “a reasonable and convenient means of opting out, such as a detachable reply card, toll-free telephone number or electronic mail address.”⁶ By requiring carriers to protect the information if the customer chooses, but not mandating a presumption that the customer will want the information to be protected, the opt-out approach more narrowly tailors the regulation to accomplish the privacy goals of section 222, as is required by *Central Hudson*.

Those advocating for a mandatory opt-in approach are concerned that notification will be insufficient to ensure that customers realize and understand the need and method to protect their CPNI. The coherency and sufficiency of customer notification are important regardless of the chosen method of obtaining consent. It is important to ensure consumers understand the information, how it may be used, and any action that is required of them to either allow or restrict the use of CPNI. This concern can be addressed through an opt-out mechanism that includes appropriate notification to the consumer. The Commission’s current rules already outline specific requirements on customer notifications, including the provision of sufficient information that is

⁶ Clarification Order and Notice, para. 9.

comprehensible and not misleading.⁷ The parties supporting an opt-in regime have neither provided evidence of complaints regarding the notices sent out by the telecommunications industry nor demonstrated their insufficiency. Proper notification rules, and enforcement of those rules, will ensure that the opt-out mechanism protects consumer's privacy interests.

The Competitive Policy Institute ("CPI") refers to a survey conducted by the American Bankers Association regarding the notices mailed out by financial institutions in compliance with the Gramm-Leach-Bliley Act as demonstrating the ineffectiveness of an opt-out approach in ascertaining a customer's choice regarding the release of sensitive information.⁸ The results showed that 36% of banking customers read the notice, 22% had received but did not read the notice and 41% don't recall receiving the notice.⁹ As CPI acknowledged, it is debatable whether this indicates a lack of concern regarding the privacy of financial information or an expectation that a financial institution is unable to release such information without affirmative approval.¹⁰ Although CPI feels strongly that it reflects the latter, it has not shown why that conclusion is compelled by its data. Logic does not require us to assume that a customer concerned with privacy would neglect to read a privacy notification. In fact, an article submitted by CPI includes support for the opposite conclusion. One person cited, knowing the importance of the information, said he still cast aside the notices, stating "I am not afraid of personal information seeping out . . . I know companies share information."¹¹

⁷ 47 CFR §64.2007(f).

⁸ CPI Comments, p. 5.

⁹ *Id.*, att. A.

¹⁰ *Id.*, p. 5.

¹¹ "Privacy notices generate little consumer response", *The Arizona Republic*, July 24, 2001. Additionally, the fact that the survey indicates 36% have read the notice and the press reports indicate less than 2% responded further supports the notion that customers are unconcern with the sharing of this information.

III. Reconsideration of the Commission’s Decision Regarding the Interplay Between Section 222 and Section 272 of the Act is Warranted.

The Bell Operating Companies (BOCs) argue that the Commission should maintain its decision in the *CPNI Order* allowing a BOC to share CPNI from its local service with its 272 affiliates with no regard for the nondiscrimination requirements in section 272. They argue that there is no reason for the Commission to reconsider its previous decision, even if it were to allow an opt-out regime, because, they claim, the Commission’s decision was not based on the form of consent required. The Commission, however, specifically stated that a bases of its interpretation was that there were mechanisms to address competitive concerns, one being that “. . . BOCs cannot share CPNI with their section 272 affiliates unless they [] obtain *express* customer approval . . . ”¹² The allowance for an opt-out approach for obtaining consent eliminates this particular safeguard on anti-competitive effects.

An additional factor in the Commission’s analysis was the concern that the burden on the BOCs in soliciting express consent on behalf of all other entities would be so great as to preclude them from soliciting consent for use by its affiliate.¹³ The opt-out approach reduces the burden on the BOC’s solicitation of approval for other entities because they would be able to send a single notification that addressed the sharing of the CPNI with affiliated and unaffiliated entities, versus the continued oral solicitation that is often needed for express approval.

The Commission also questioned whether procedures could be implemented to provide customers sufficient notice of use by other entities when some of those entities

¹² CPNI Order, para. 164, *emphasis added*.

may be unknown.¹⁴ But as noted by the Association of Communications Enterprises (“ASCENT”), the concern that customers cannot make informed decision on approval without the identity of all parties that may receive the information is addressed by descriptive references to categories of potential recipients, similar to the Federal Trade Commission’s recent opt-out regulations for financial information.¹⁵ This issue is also pending under WorldCom’s, then MCI WorldCom, petition for further reconsideration in this docket. WorldCom’s petition demonstrates that this issue is not isolated to the BOC section 272 obligations to unaffiliated entities. Naming each individual entity for sharing with affiliates is not only burdensome but is virtually impossible as corporations routinely reorganize their structure in ways that are of no interest to their customers.¹⁶

Basically, the Commission’s decision that section 222 alone governs the sharing of CPNI was based on a conclusion that there was an apparent conflict between section 222 and section 272.¹⁷ Under an opt-out approach the Commission is able to read the two provision consistently.¹⁸ This is important since proper statutory construction gives consideration to all provisions of a statute, and reads them as consistent. As the United States Supreme Court recently reiterated, statutes should be interpreted “as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.”¹⁹ It is “. . . fundamental that a section of a statute should not be read in

¹³ *Id.*, paras. 159 and 161.

¹⁴ *Id.*, para. 163.

¹⁵ *See*, ASCENT Comments, p. 7.

¹⁶ *See* MCI WorldCom Petition for Further Reconsideration, CC Dockets 96-115 & 96-149, pp. 13-14 (filed Nov. 1, 1999).

¹⁷ CPNI Order, para. 160; Order on Reconsideration, para. 135.

¹⁸ Although the Commission claimed to consider the policies behind both provisions, its decision discounted the BOC’s section 272 obligations.

¹⁹ *FDA et al v. Brown & Williamson Tobacco Corp. et al*, 120 S.Ct. 1291, 1301(2000) *citing Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) and *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

isolation from the context of the whole Act . . .”²⁰ Section 222 and section 272 can be read consistently with each other with regard to the BOC provision of CPNI to its section 272 affiliate and unaffiliated entities, particularly if an opt-out approach for consent is permitted. Section 272 requires a BOC to act in a nondiscriminatory manner in the provision of information. Provision not only means the act or process of providing, but also includes any preparatory measures, such as the solicitation of necessary approvals.²¹ Section 222 requires customer approval to use, disclose or permit access to CPNI outside of purposes of the telecommunications service from which it was obtained. Thus, the harmonizing of section 222 and section 272 is achieved by ensuring that customer approval is obtained (when use is beyond the service from which the CPNI was derived), and requiring that the BOCs act in a nondiscriminatory manner toward their affiliates and unaffiliated entities in soliciting customer approval and that they subsequently provide the information in a nondiscriminatory manner.

Contrary to the claims of Verizon, section 222 does not prohibit disclosure to third parties except upon affirmative written request by the customer.²² Requiring disclosure upon affirmative written request of the customer is not the same as barring disclosure without it. In fact, section 222 makes no distinction between affiliates of the carrier and unaffiliated third parties, or even the carrier itself, regarding the need or form of customer approval for use of CPNI beyond the service from which it was derived. Consequently, there is no statutory basis for the claim that the sharing of CPNI with a

²⁰ *Richards v. U.S.*, 82 S.Ct. 585, 592 (1962).

²¹ See The Merriam Webster Dictionary, Home and Office Edition, (1995)[“provision: the act or process of providing; also: a measure taken beforehand.”] See also, Webster’s II New College Dictionary (1995)[provision: . . . 3. A preparatory action or measure.”]. See also, CPNI Order, para. 163 and Order on Reconsideration, para. 138.

²² See Verizon Comments, p. 10.

third party requires a higher form of consent.²³ As Qwest states, there is no evidence such disclosure constitutes an invasion of privacy, and instances of misuse should be regulated through the complaint process rather than a rule mandating an opt-in regime for the sharing of CPNI with unaffiliated third parties.²⁴ Although section 222 does not require disclosure except upon written request by the customer,²⁵ as Qwest acknowledges, citing to the ILEC's section 251 obligations, some disclosures to third parties are required by other sections of the Act.²⁶

SBC tries to find a loophole with regard to its nondiscrimination obligations under section 272(c)(1). It claims that the provision does not apply to a BOC's use of CPNI to market its section 272 affiliate's services because, in such situations, it does not actually provide the information to the affiliate.²⁷ This interpretation contravenes both the letter and spirit of the provision. It would be a subversion of Congress's intent to permit BOCs to evade the nondiscrimination safeguards simply by stepping into the shoes of its affiliate rather than transferring the information to the affiliate. When the BOC acts on behalf of its affiliate, it inherently acts as its agent. Therefore the provisioning of CPNI to its own marketing representatives must be viewed as equivalent to the provisioning of the information to the affiliate itself. Moreover, section 272 states that with matters concerning its relationship with its 272 affiliate, a BOC "may not discriminate between *that company or affiliate* and any other entity in the provision of . . . information." Since

²³ See S. Conf. Rep. No. 104-230 at 203, 104th Cong., 2d Sess. (1996)[“BOC may not share *with anyone* customer-specific proprietary information without the consent of the person to whom it relates.” *Emphasis added.*]

²⁴ Qwests Comments, p. 16.

²⁵ See 47 U.S.C. 222(c)(2). Therefore, where the carrier is not required to provide the information under another section of the Act, it does not *have* to provide it to a third party without a written request to do so from the customer.

²⁶ Qwest Comments, p. 15, n. 51.

²⁷ SBC Comments, pp. 23-24.

the BOC and the section 272 company are affiliates,²⁸ the BOC can not discriminate between *itself* and other entities in the provision of information to advantage its 272 affiliate.

The BOCs argue that this conflicts with regulatory symmetry and the treatment of BOC affiliates as nondominant carriers. In adopting section 272, Congress decided the BOC relationship with its affiliate must be governed by certain safeguards that other carriers, in relating with their affiliates, are not subject. Congress found this to be necessary to ensure the competitiveness of the long distance market given the BOC's dominance in the local market. The Commission has found these safeguards to be more stringent than the bar on unjust and unreasonable discrimination contained in section 202 of the Act.²⁹ Moreover, it is because of these safeguards that the Commission has decided to treat the BOC affiliates as nondominant.

The BOCs also argue that use of CPNI is exempt from the nondiscrimination safeguards by section 272(g)(3). This provision states that “the joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).”³⁰ Therefore a BOC may market and sell its affiliate's services without having to market and sell the services of unaffiliated entities. This does not mean a BOC can discriminate in the provision of information or services that it uses in the marketing of its affiliate's service. Such an interpretation would mean the BOC could simply include in its marketing campaign for its affiliate any piece or type of information it did not want to have to provide to other entities on

²⁸ For purposes of the Act, the term ‘affiliate’ “means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.” 47 U.S.C. 153(1).

nondiscriminatory terms, completely circumventing the safeguards Congress enacted with regard to information.

Furthermore, section 272(g)(3) only applies to permissible marketing. The prohibition on marketing described in section 272(g)(1)³¹ was intended to prevent the use of BOC local exchange service in a way other carriers are denied in order to obtain an unfair advantage in the marketing of BOC affiliate services. Assuming, as the BOCs claim, CPNI is the “essence of marketing,”³² use of CPNI from the BOC’s local service to market the affiliates services, without offering the same or similar ability to unaffiliated entities, violates 272(g)(1), and therefore is not permissible joint marketing permitted under 272(g).

IV. Conclusion

The Commission should allow a notice and opt-out approach for carriers to obtain consent to use, disclose, or permit access to CPNI, and ensure that carriers comply with their other statutory obligations with regard to the information.

Respectfully submitted,

WORLDCOM, Inc.

/s/ Karen Reidy
1133 19th Street, NW
Washington, DC 20036
(202) 736-6489

November 16, 2001

Its Attorney

²⁹ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order, CC Docket 96-149, para. 16 (1996).

³⁰ 47 U.S.C. 272(g)(3).

³¹ “A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same of similar service to market and sell its telephone exchange services.” 47 U.S.C. § 272(g)(1).

³² See SBC Comments, p. 24.

CERTIFICATE OF SERVICE

I, Vivian Lee, do hereby certify that copies of the Reply Comments of WorldCom, Inc. , were sent via first class mail, postage paid, to the following on this 16th day of November, 2001.

Janice Myles*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Michael F. Altschul
Cellular Telecommunications & Internet
Assn.
1250 Connecticut Avenue, NW
Suite 800
Washington, DC 20036

Glenn S. Rabin
ALLTEL Corporation
601 Pennsylvania Avenue, NW
Suite 720
Washington, DC 20004

Michael G. Hoffman
Patricia Zacharie
VarTec Telecom, Inc.
1600 Viceroy Drive
Dallas, TX 75235

Ian D. Volner
Rita L. Brickman
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, NW
Suite 1000
Washington, DC 20005

Karen Brinkmann
Tonya Rutherford
Latham & Watkins
555 11th Street, NW, Suite 1000
Washington, DC 20004

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
USTA
1401 H Street, NW, Suite 600
Washington, DC 20005

Stuart Polikoff
Stephen Pastorkovich
OPASTCO
21 Dupont Circle, NW, Suite 700
Washington, DC 20036

L. Marie Guillory
Jill Canfield
NTCA
4121 Wilson Blvd, 10th Floor
Arlington, VA 22203

James Bradford Ramsay
NARUC
1101 Vermont Avenue, NW, Suite 200
Washington, DC 20005

John T. Scott, III
Charon J. Harris
Stephen J. Berman
Verizon Wireless
1300 I Street, NW, Suite 400 W
Washington, DC 20005

David I. Brandon
David Wye
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Mark C. Rosenblum
Judy Sello
AT&T Corp.
295 North Maple Avenue
Room 1135L2
Basking Ridge, NJ 07920

Ronald J. Binz
Debra R. Berlyn
Competition Policy Institute
888 17th Street, NW, Suite 908
Washington, DC 20006

Stephen L. Earnest
Richard M. Sharatta
BellSouth Corporation
675 W. Peachtree St, NE, Suite 4300
Atlanta, GA 30375

Marc Rotenberg
Mikai Condon
Electronic Privacy Information Center
1718 Connecticut Ave, NW, Suite 200
Washington, DC 20008

Charles Hunter
Catherine Hannan
Hunter Communications Law Group
1424 16th St, NW, Suite 105
Washington, DC 20036

Laura H. Phillips
To-Quyen Truong
Dow Lohnes & Albertson
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036

Lawrence Katz
Verizon
1515 North Court House Road
Suite 500
Arlington, VA 22201

David Grant
Gary Phillips
Paul K. Mancini
SBC Communications, Inc.
1401 I Street, NW, Suite 100
Washington, DC 20005

Sharon J. Devine
Kathryn Marie Krause
Qwest Services Corporation
1020 19th Street, NW, Suite 700
Washington, DC 20036

Michael Fingerhut
Sprint Corporation
401 9th Street, NW, Suite 400
Washington, DC 20004

*VIA EMAIL

Vivian Lee