ORIGINAL EX PARTE OR LATE FILED

RECEIVED
JAN 28 2002
FCC MAIL ROOM

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
	)	
Telecommunications Carriers'	)	CC Docket No. 96-115
Use of Customer	)	CC Docket No. 96-149
Proprietary Network Information	)	

To: The Commission

EX PARTE COMMENTS OF
THE ATTORNEY GENERAL OF ARIZONA

January 25, 2002

The Attorney General of Arizona ("Arizona"), along with thirty-seven other Attorneys General, previously submitted *ex parte* comments in this matter[1] in which she urged the Federal Communications Commission ("Commission") to "protect the privacy rights of consumers by implementing an opt-in approach towards telecommunications carriers' use of Customer Proprietary Network Information ('CPNI') pursuant to § 222 of the Telecommunications Act of 1996 ('the Act')." Comments at 1. These additional *ex parte* comments are intended to inform the Commission of the real life problems that are unleashed when carriers are allowed to adopt an opt-out approach. Arizona once again strongly urges the Commission to adopt an opt-in

[1]The Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the Territory of the U.S. Virgin Islands, the District of Columbia's Corporation Counsel, and the Administrator of the Georgia Governor's Office of Consumer Affairs filed *ex parte* comments dated December 21, 2001 ("Comments").

approach to dealing with CPNI.

In their Comments, the States noted that the Tenth Circuit Court of Appeals in *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999), held that the record developed by the Commission in adopting its opt-in rule, 47 C.F.R. § 64.2007(a) & (b), failed to demonstrate both that the CPNI regulations directly and materially advance the Commission's interest in protecting consumers' privacy, and that the opt-in mechanism for ensuring consumer approval of use of CPNI was narrowly tailored. Comments at 3-4. The States urged the Commission, in reconsidering its CPNI rule, to focus on whether the regulation of CPNI directly and materially advances the Commission's interest in protecting consumers' privacy, and whether there is ample evidence to demonstrate that an opt-in approach is narrowly tailored. Comments at 4. Finally, the States encouraged the Commission to answer those inquiries in the affirmative. *Id.* Events that have occurred since the Comments were filed have unfortunately shown the concerns expressed by the States to be well-founded, and bolster the record in support of adopting an opt-in approach.

I The Requirement of Customer Approval Prior to Use of CPNI Directly and Materially Advances the Commission's Interest in Privacy.

At or near the time the Comments were filed, Qwest Communications International, Inc. ("Qwest"), which provides local exchange service in Arizona and other states, began implementing an opt-out procedure for dealing with CPNI. A copy of the insert included by Qwest in its December bills is attached as Exhibit A. Qwest's actions and statements in implementing its opt-out approach bring to life the States' concerns. Arizona consumers have also loudly expressed their outrage at Qwest's intent to share customer account information

without first asking permission.

The States in their Comments stated that CPNI information "is precisely the type of information that is among the most sensitive and worthy of protection." Comments at 4 (citation omitted). Arizona consumers have confirmed the truth of that statement in testimony before the Arizona Corporation Commission ("ACC") in its recent hearings concerning Qwest's policies on dissemination of CPNI. For example, the president of the Arizona Consumers Council, a non-profit statewide organization that has been in existence for thirty-five years, testified that consumers are "afraid of identify theft. They're really worried about privacy issues." (Transcript of Proceedings Before the Arizona Corporation Commission, Jan. 16, 2002, p. 83, hereinafter cited as "Tr."; attached hereto as Exhibit B.) These concerns were echoed by other consumer organizations such as the Arizona Community Action Alliance,[2] and the Hispanic Community Alliance,[3] as well as numerous individuals who also expressed concern about their account information being shared with others.[4]

A recent poll of Arizona residents also shows that the protection of personal account information is a matter of great importance to consumers. According to the results of that poll, ninety-four percent of Arizona telephone customers believe Qwest should be required to get their permission before selling their customer records to third parties. Exhibit C. The pollsters stated

---

[2]Mary Ellen Kane of the Arizona Community Action Alliance expressed the concern that Qwest's low-income customers would be the "unwitting victims of target marketing" and that those customers would be "least likely to participate in an opt-out procedure." Tr. at 79.

[3]Cristina Santiago, director of the Hispanic Community Alliance, testified that "this is our right. It's our privacy. Why should you have this opportunity to give out the phone numbers to whomever." Tr. at 112.

[4]See generally, Tr. at 85-115.

that "this is the most lopsided poll result we have registered in more than three decades and underscores growing consumer concerns about information privacy in today's modern telecommunications environment." *Id.* Two of Arizona's leading newspapers, the Arizona Republic and the Arizona Daily Star, have also recently published editorials recognizing consumers' concerns about Qwest's use of their account information. Exhibits D and E.

Clearly, Arizona consumers have great privacy concerns about their customer account information. Regulation of CPNI by the Commission will directly and materially advance the Commission's interest in protecting consumers' privacy. Arizona consumers have overwhelmingly expressed their desire for an opt-in approach to this issue.

III Use of An Opt-In As The Mechanism to Obtain Customer Approval is Sufficiently Narrowly Tailored

The States' Comments highlighted the problems experienced with opt-out notices under the Gramm-Leach-Bliley Act, which requires banks, insurance agencies, and brokerage firms to send notice and opportunity to opt-out to consumers before sharing their non-public information with certain entities.[5] Comments at 10-11. Recent surveys demonstrate that a majority of consumers either did not recall receiving the notice, or at most glanced at them. *Id.* Those consumers who did read the notices would have had great difficulty in understanding what was being said, as one group of sixty such notices reviewed by a readability expert were found to have been written at a 3rd or 4th year college reading level. *Id.*

The concern of the States was that the experience under Gramm-Leach-Bliley would be repeated with CPNI. Sadly, Qwest's actions have proven those concerns well-founded.

---

[5]*See* 15 U.S.C. §§ 6801-6809 (1999).

The only notice that Qwest has given its customers to date about their right was a dense and confusing bill insert which read: "Qwest Account Information -- The Following Does Not Impact Your Qwest Billing." Exhibit A. This is the equivalent of telling customers, "Do Not Read This." Based on the numerous complaints received by this Office, many customers, in fact, did not read the billing insert or, after glancing at it, thought it was just another sales pitch from Qwest and discarded it.

Even more troubling, Qwest's notice gave customers only thirty days to object. To compound this limited time window, Qwest provided only one phone number for customers to call and then proceeded to staff the phone line with too few operators to handle customer calls. Many customers who tried calling the telephone number provided by Qwest were unable to get through, were put on hold for long periods or were connected with uninformed, unhelpful representatives. The phone center was not available on nights or weekends, leaving working people with no time to call. To add insult to injury, many of those who did manage to get through were solicited with offers for wireless or other services. See generally Tr. at 16-23. Although a web site which customers can use to opt-out is provided on the notice, the web site did not provide verification, nor has anyone determined how to navigate to that web site from Qwest's internet home page. Tr. at 73-74, 90-91.

It was not until there was a loud public outcry that Qwest began to change its implementation of opt-in. More telephone staff was added, hours of operation were extended, confirmation was provided through the web site, and the deadline was extended. Tr. at 33-34, 50.

Nevertheless, Qwest refuses to reconsider its decision to use opt-out, rather than opt-in, to

deal with sharing and selling CPNI. Tr. at 68-69.

The Comments also expressed a concern that the notices provided by carriers would "not be sufficient to give customers the knowledge they need about the nature of the information being shared or sold, and the effect or result of the sharing or selling of the information." Comments at 7. Without such knowledge, consumers would not be able to give true consent to the sharing or selling of the information. *Id.*

Once again, Qwest's actions have proven the validity of these concerns. Qwest's notice tells the customer that Qwest "expect[s] to share account information with Qwest companies." In addition, customers are informed that Qwest "sometimes disclose[s] account information to third parties who are not part of the Qwest family of companies . . . when it is commercially reasonable to do so." This open-ended statement provides a customer with absolutely no guidance about when and to whom and for what purposes account information may be shared or sold. In fact, Qwest itself acknowledges that its notice "raised some questions about Qwest's use of account information by not making clear what we meant by the term commercially reasonable and, more precisely, what we did not mean by the term in connection with third party disclosures." Tr. at 28.

Even if a customer is somehow able to discern useful information about Qwest's intentions for the customer's CPNI, the information cannot be relied upon. Qwest includes the following disclaimer in its notice: "we may make changes in the future to the way in which we share account information internally or disclose it outside our company." Qwest does not promise to provide additional notice, nor an additional opt-out period, should it decide to make changes in the way it shares account information. Customers will be at the mercy of any change

in Qwest policy, without any advance notice or the opportunity to do anything about it.

It has been reported in the press that Qwest intends to provide a second notice in its customers' February bills. Assuming this occurs, and even assuming that the notices are clear and unambiguous, the fact that a second, revised notice is required only underscores the problems that can be created by an opt-out procedure. There is also no assurance that Qwest will not continue to place broad caveats on its statements, thereby continuing to leave consumers uncertain as to how their account information may be used.

Not only is there a very rational concern by customers about how their account information will be used by Qwest, there is also the very real likelihood that Qwest will use this information to its competitive advantage assuming that Qwest receives authority to provide interstate long distance service. Qwest has stated as much in its notice, where it says that "We expect to share account information with Qwest companies . . . . In the future we may . . . enter new lines of business (for example, we hope to offer interexchange long distance services in our states over the next year or two). As such changes happen, we will also share account information when it helps to provide you quality services, packages and promotions." Qwest could not be more bold. It will share customer account information with its long distance arm, and will use it to market new long distance services to its customers. This will provide Qwest a huge advantage over its competitors. In light of this competitive effect, the Commission should be particularly cautious in how it allows carriers to obtain customer authorization for sharing of CPNI to ensure that any authorization is knowing and informed.

Arizona's experience with Qwest shows that the assumption that consumers who do not opt-out have given consent is no more than a legal fiction. An opt-in approach is the most

narrowly-tailored approach to address these issues. In fact, an opt-out approach would required even more regulation by the Commission in order to ensure that the notices issued by providers were sufficiently clear and informative, and that procedures were in place to allow consumers to effectively exercise their right to opt-out. Opt-in avoids the necessity of reviewing, or perhaps even approving, notices. Opt-in actually provides greater freedom to carriers by allowing them to make the case directly to the customer as to why that customer should allow sharing of her or his account information.

III Conclusion

The concerns expressed by the States in their Comments, about what might happen if opt-out were adopted, have proven to be valid. Qwest has provided its customers with a dense and confusing notice which does not adequately explain under what circumstances and for what purposes CPNI will be shared, and undercuts what information is provided by the use of a broad disclaimer. Qwest then places roadblocks in the path of customers who attempt to exercise their right to opt-out.

Arizona consumers have shown that the concern about the use of customer account information is real and concrete. They are concerned about the privacy of their information, and are concerned about how that information may be shared. In fact, ninety-four percent of Arizona consumers want Qwest to adopt an opt-in approach so that consumers can protect the privacy of their account information.

The record is clear: CPNI regulations directly and materially advance the Commission's interest in protecting consumers' privacy, and the opt-in mechanism for ensuring consumer "approval" of the use of CPNI is narrowly tailored. The Commission should therefore require

carriers to use an opt-in approach to obtain customer approval for the sharing or sale of customer account information.

RESPECTFULLY SUBMITTED this 25th day of January, 2002.

JANET NAPOLITANO
Attorney General
1275 West Washington
Phoenix, Arizona 85007
Phone: (602) 542-4266

EXHIBIT A

Internet access), so that the service you receive works despite there being two companies involved. There are other examples, also. We may provide account information to companies that provide support services to us (such as billing or account management) and to firms that have marketing agreements with us. We also may disclose account information if we decide to sell a line of business to another company, so that you can continue to receive service with as little disruption as possible.

We believe our information practices promote your interests and ours. We are better able to understand the kinds of services you have and might like to receive in the future. And we can limit our contacts with you to those times when we have products you may be interested in hearing about.

Please note: *Not all of Qwest's information practices are included in this short notice about account information. Also, we may make changes in the future to the way in which we share account information internally or disclose it outside our company. You can learn more about Qwest's privacy policies and information practices by visiting Qwest's web site at www.qwest.com.*

IMPORTANT NOTICE REGARDING YOUR QWEST ACCOUNT INFORMATION

The following information does not impact your Qwest billing.

Qwest has a long history of treating customer account information confidentially. We think that's one reason you trust us. As we develop new services, we want to maintain your trust while continuing to meet your service needs with innovative products. By sharing account information among Qwest's family of companies, and by aggregating information to learn more about trends and purchasing patterns, we can serve you better.

All telecommunications carriers have a duty to treat customer account information confidentially, by law. If you don't currently subscribe to a particular telecommunications service, you have a right to prohibit us from sharing account information for marketing purposes with other Qwest business divisions. For example, if you have local service with Qwest but not wireless service, you can ask us not to share the local service information with the wireless part of our business.

Account information includes details about your service, such as how many lines you have; features you may subscribe to or use (such as Caller ID, Call Waiting, and Last Call Return); information about wireless services, if you have them; as well as calling and billing records. For toll calls that you are billed for, the information includes the number the call comes from, the number it goes to and how many minutes the call takes.

We expect to share account information with Qwest companies, many of which you probably already know. These include Qwest Corporation (your local telephone company), Qwest Wireless, Qwest DEX (our directories division), Qwest Communications Corporation (our long distance division), and our Internet operations. In the future we may change our structure or enter new lines of business (for example, we hope to offer interexchange long distance services in our states over the next year or two). As such changes happen, we will also share account information when it helps to provide you quality services, packages and promotions.

You don't have to do anything to permit us to use your information. If you do not want us to share account information within the Qwest family of companies, let us know within the next 30 days. Residential customers should call toll free 1-877-628-3732. For business customers, contact your Qwest representative or call the business office telephone number on your Qwest bill. Both business and residential customers may also let us know their preference by using the following web site: www.qwest.com/cpni. If we do not hear from you within 30 days, we'll use the account information in the ways described here. Of course, if you change your mind in the future, you can *always* contact us to change your decision. Whatever you decide will not affect the quality of the Qwest products and services you use now or your ability to order new products from us in the future. But, it may mean you are not informed of special offers or new products or services, packaged offerings, or promotions.

Even if you notify us not to use account information for marketing purposes, by law we can and do use such information for reasons you might expect – billing, collection, and protecting ourselves and others against unlawful acts such as fraud or theft of service. And your name, address and telephone number are not generally considered confidential account information. We also mingle information together about groups or categories of services or customers so that specific customers are not identified.

We will, of course, provide your account information to anyone you want us to – such as other carriers or service providers – so long as the request comes from you personally and is in writing.

We also sometimes disclose account information to third parties who are not part of the Qwest family of companies when required by law, when it furthers prompt and accurate delivery of your service, or when it is commercially reasonable to do so. So, we provide account information when presented with lawful demands by regulatory agencies, subpoenas, or law enforcement. Qwest is also required to provide account information to other carriers when they tell us you have consented and they need the information to offer you their services. We may provide account information to companies where the "service package" involves part of a Qwest service (a DSL line, for example) and part of another company's service (like