

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Telecommunications Act	)	CC Docket No. 96-115
of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network Information	)	
and Other Customer Information;	)	
	)	
Implementation of	)	CC Docket No. 96-149
the Non-Accounting Safeguards of Sections 271	)	
and 272 of the Communications Act of 1934, As	)	
Amended;	)	
	)	
2000 Biennial Regulatory Review—Review of	)	CC Docket No. 00-257
Policies and Rules Concerning Unauthorized	)	
Changes of Consumers' Long Distance Carriers	)	
	)	

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**COMMENTS OF AT&T CORP. ON PETITIONS FOR RECONSIDERATION**

Daniel Meron  
Jonathan F. Cohn  
Sidley Austin Brown & Wood LLP  
1501 K Street, N.W.  
Washington, DC 20005  
Telephone: (202) 736-8000

Mark C. Rosenblum  
Lawrence J. Lafaro  
Judy Sello  
AT&T Corp.  
Room 3A229  
One AT&T Way  
Bedminster, NJ 07921  
Telephone: (908) 532-1846

Its Attorneys

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## SUMMARY

In these comments, AT&T responds to four petitions for reconsideration. In Part I, AT&T endorses the petitions of AT&T Wireless and Verizon. These petitions demonstrate that the Commission should restore the presumption that all state CPNI regulations more restrictive than the federal rules are preempted. First, by failing to preempt presumptively, the Commission is negating its regulation of interstate services over which it has exclusive jurisdiction. Because of the nature of CPNI, a decision not to preempt has the effect of delegating to the state with the most restrictive CPNI regulations the power to set CPNI rules for the entire country. Second, the Commission's decision senselessly permits—indeed invites—states to violate carriers' First Amendment rights. As the Commission already has determined, only an opt-out rule can pass constitutional muster under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

In Part II, AT&T shows that the Commission should reject the proposed limitations on the use and disclosure of CPNI. Both the Arizona Commission and AOL disregard the plain language of section 222(c)(1). Because that provision unambiguously permits carriers to use and disclose CPNI “with the approval of the customer,” the Commission should not prohibit disclosure of CPNI to third parties absent “express written authorization” and should not preclude carriers from using CPNI for communications-related activities or from disclosing CPNI to joint venturers.

Finally, in Part III, AT&T demonstrates that the Commission should prevent ILECs from using the proprietary information of unaffiliated ISPs and their customers to market the ILECs' own ISP services. AOL is correct on this score. Such use of proprietary information

constitutes an unreasonable practice under section 201(b) and violates the spirit of section 222(b).

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**COMMENTS OF AT&T CORP. ON PETITIONS FOR RECONSIDERATION**

Pursuant to its Public Notice (Report No. 2586), published at 67 Fed. Reg. 76,406 (Dec. 12, 2002) ("Notice"), and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, AT&T submits the following comments on petitions for reconsideration of the Commission's Third Report and Order and Third Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No.

96-115, (July 25, 2002) (“*Third Report and Order*”), on telecommunications carriers’ use of CPNI.<sup>1</sup>

**I. THE COMMISSION MUST READOPT ITS PRESUMPTION OF PREEMPTING STATE CPNI REGULATIONS THAT ARE MORE RESTRICTIVE THAN THE FEDERAL RULES.**

Both AT&T Wireless and Verizon have petitioned for reconsideration of the Commission’s decision to abandon the presumption of preempting state regulations of CPNI that are more restrictive than the federal rules, *see Third Report and Order*, ¶ 70. AT&T fully supports these petitions. By failing to preempt presumptively all inconsistent state CPNI regulations, the Commission is effectively negating its regulation of interstate services and violating the First Amendment.

**A. By Failing To Preempt Presumptively State CPNI Regulations, The Commission Is Undermining Congress’s Objectives and the Commission’s Own Policy Choices With Respect To Interstate Services That Are Exclusively Within The Commission’s Domain To Regulate.**

As AT&T Wireless and Verizon have made clear, the Commission’s failure to preempt presumptively state CPNI regulations negates Congress’s objectives and the Commission’s own policy choices. *See* AT&T Wireless at 3-7; Verizon at 7-12. Because carriers engage in regional and national marketing, and because CPNI is jurisdictionally mixed, a decision not to preempt has the effect of delegating to the most restrictive state the power to set CPNI rules that would govern the marketing of *interstate* services. In similar circumstances, the Commission has duly exercised its power to preempt presumptively. Indeed, it did so earlier in this proceeding. Because there is no valid reason for the Commission to relinquish its

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<sup>1</sup> Four parties filed petitions for reconsideration: AT&T Wireless Services, Inc. (“AT&T Wireless”), the Verizon telephone companies (“Verizon”), the Arizona Corporation Commission (“ACC”), and America Online, Inc. (“AOL”).

congressionally delegated responsibility to establish national CPNI rules, it should preempt presumptively all inconsistent state regulations.

Verizon correctly recognizes that, “[i]n enacting Section 222, Congress gave the Commission—not the states—the authority to implement national, uniform CPNI rules.” Verizon at 7. Acting on this authority, the Commission correctly decided—after a careful analysis of over 40 comments and reply comments—that permitting opt-out approval for intra-company use of CPNI properly balances the potentially competing interests of customer privacy and carrier free-speech rights. *See Third Report and Order*, ¶¶ 31-44. In addition, enabling carriers to rely on opt-out approval best serves consumer welfare. *See id.*, ¶ 35.<sup>2</sup> First, opt-out makes it easier for telecommunications carriers to inform customers of the benefits of new products and services. Under opt-out, customer inertia will not create a barrier to the flow of useful information. *See id.* (“[T]he record . . . makes evident that a majority of customers . . . want to be advised of the services that their telecommunications providers offer. . . . Enabling carriers to communicate with customers in this way is conducive to the free flow of information . . .”). Second, by improving a telecommunications carrier’s knowledge of its customers and their needs, opt-out helps a carrier design innovative, quality products and bring them to market. *See id.* (“[T]he record establishes that customers are in a position to reap significant benefits in

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<sup>2</sup> *See also* Comments of AT&T, CC Docket No. 96-115, at 9-10 (filed Nov. 1, 2001); Reply Comments of AT&T, CC Docket No. 96-115, at 2-3 (filed Nov. 16, 2001); Comments of Verizon Wireless, CC Docket No. 96-115, at 5 (filed Nov. 1, 2001) (opt-out enables companies to “market new and innovative telecommunications services”); Comments of Verizon, CC Docket No. 96-115, at 4 (filed Nov. 1, 2001) (opt-out facilitates one-stop shopping); Comments of CenturyTel, CC Docket No. 96-115, at ii (filed Nov. 1, 2001) (opt-in would impose “significant costs”); Comments of Qwest, CC Docket No. 96-115, at 21-22 (filed Nov. 1, 2001) (opt-in would dam[] information flows and creat[e] uncertainty among carriers and customers”).

the form of more personalized service offerings . . . from their carriers and carriers' affiliates providing communications-related services based on the CPNI that the carriers collect.”). Third, opt-out is more cost effective. *See id.* (recognizing “possible cost savings”). If telecommunications carriers can rely on opt-out approvals, the carriers will not have to engage in expensive solicitations. As the Commission has noted, a “prior authorization [or opt-in] rule would vitiate a [carrier’s] ability to achieve efficiencies through integrated marketing to smaller customers” and would, as a practical matter, deny to all but the largest business customers the benefits of “one-stop shopping” and integrated marketing. Report & Order, *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd. 7571, ¶ 85 n.155 (1991).<sup>3</sup> Finally, as the Commission recognized earlier in this proceeding, restricting the use of CPNI within a firm “results in higher prices and reduced quality and variety of regulated services.” *Furnishing of Customer Premises*

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<sup>3</sup> *See also* Mem. Op. & Order, *Motion of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling that Section 22.903 and Other Sections of the Commission’s Rules Permit the Cellular Affiliate of a Bell Operating Company to Provide Competitive Landline Local Exchange Service Outside the Region in which the Bell Operating Company is the Local Exchange Carrier*, 11 FCC Rcd. 3386, 3395 (1995) (“[T]his proposed integration of wireless and landline services offers substantial benefits to consumers by avoiding duplicative costs, increasing efficiency, and enhancing [Southwestern Bell’s] ability to provide innovative service.”); Mem. Op. & Order on Reconsideration, *In re Applications of Craig O. McCaw and American Telephone and Telegraph Company, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, 10 FCC Rcd. 11786, 11795, 11799 (1995) (“The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company . . . to obtain information about various services . . .”), *affirmed sub. nom SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (explicitly permitting AT&T to bundle long distance and cellular service).

*Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, Report and Order, 2 FCC Rcd. 143, 147 (1987).

Despite these compelling benefits of permitting opt-out approval, the *Third Report and Order* completely negates federal regulation of interstate services by inviting states to adopt more restrictive CPNI regimes. As AT&T Wireless and Verizon firmly establish, CPNI is jurisdictionally mixed, AT&T Wireless at 5-6; Verizon at 8-10, and “it is not at all clear that carriers could separate intrastate and interstate CPNI.” Verizon at 9. “Because CPNI currently collected from individual customers includes data regarding intrastate and interstate services and is sorted by customer and not into separate interstate and intrastate services, it would be practically infeasible, if not virtually impossible, for carriers to implement such a jurisdictional distinction.” *Id.* at 10. And “[w]ireless carriers do not categorize customers as interstate or intrastate and would be unable to do so for the purpose of determining the lawful use of CPNI.” AT&T Wireless at 5-6. Similarly, as Verizon points out, its “systems do not distinguish between the portions of CPNI that are related to interstate versus intrastate services.” Verizon at 9-10. Moreover, “[m]ost carriers do not market services using CPNI on a state-by-state basis.” *Id.* at 8-9. Rather, for cost-efficiency purposes, they adopt “national or regional marketing plans.” *Id.* at 9. Indeed, the Commission itself has recognized that “varying state [CPNI] regulations” could impede “carriers’ ability to operate on a multi-state or nationwide basis.” *Third Report and Order*, ¶ 71; see also Second Report and Order, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 13 FCC Rcd. 8061, ¶ 16 (1998) (“*Second Report and Order*”) (“Where a carrier’s operations are regional or national in scope, state CPNI regulations that are

inconsistent from state to state may interfere greatly with a carrier's ability to provide service in a cost-effective manner.”).

Unable to market services cost-effectively on a state-by-state basis, and unable to distinguish interstate from intrastate CPNI, carriers will be forced to comply nationwide with the most restrictive CPNI regulations that any state promulgates. *See Verizon* at 18 (“In effect, the state with the most restrictive regulations could end up governing services in its region, or even the entire nation.”). The Commission’s regulation of interstate uses of CPNI—and Congress’s policy objectives—will have no remaining effect. Carriers will have to disregard the total service approach, *see Verizon* at 11; Wa. Admin. Code § 480-120-204 (adopted Nov. 7, 2002) (“A company may not use, disclose, or permit access to a customer’s [individually identifiable CPNI], unless the customer has given opt-in approval”), and abandon their use of opt-out approval, *Verizon* at 10 (citing California’s proposed rules); Wa. Admin. Code § 480-120-204. To prevent this from happening, the Commission should preempt all state CPNI rules that are more restrictive than the federal rules that the Commission recently adopted. “Because ‘compliance with conflicting state and federal [CPNI] rules would in effect be impossible,’ the Commission should exercise its authority to preempt across the board inconsistent state regulations.” *Verizon* at 7 (quoting *People of the State of California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994)).

As *Verizon* explained, the Commission often has preempted state regulations in areas where it would be impossible to separate the interstate and intrastate portions of telecommunications”<sup>4</sup> and where inconsistent state regulation would negate the Commission’s

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<sup>4</sup> This analysis has no application to the very different question of whether states may impose additional unbundling obligations on ILECs. As explained, because CPNI is  
(footnote continued on following page)

exclusive authority to regulate interstate services. *Id.* Moreover, “courts have consistently upheld this preemption authority.” *Id.* at 7-8 (citing *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982) (upholding preemption in Commission’s *Computer II* decision because, “state regulatory power must yield to the federal”); *People of the State of California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (upholding preemption in Commission’s *Computer III* rules because contrary state regulation would “essentially negat[e] the FCC’s goal”)). Following this precedent, the Commission should preempt state regulations that are more restrictive than the federal CPNI rules that the Commission has duly adopted.

Indeed, fully aware of the need to preempt, the Commission had adopted a policy of presumptive preemption earlier in this proceeding. *See* Order on Reconsideration and Petitions for Forbearance, *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information*, 14 FCC Rcd. 14409, ¶ 112 (1999); *see also* *Second Report and Order*, ¶ 18. It recognized then that a failure to preempt would negate federal policy with respect to interstate services.

There is no valid justification for the Commission’s abrupt departure from this position. Indeed, as AT&T Wireless observed, the Commission “declined to base [its departure]

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(footnote continued from previous page)

jurisdictionally mixed, state regulations of CPNI encroach upon the Commission’s exclusive authority to regulate interstate services. By contrast, UNEs are not services, but facilities that have no jurisdictional character. Thus, state regulation of UNEs does not run the risk of intruding into the Commission’s exclusive authority to regulate interstate services. Moreover, section 251(d)(3) explicitly authorizes the states to impose additional access and interconnection obligations. *See* 47 U.S.C. § 251(d)(3) (“In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission that . . .”). There is no comparable provision for CPNI.

on any determination that the burdens of complying with different state regimes have lessened.” AT&T Wireless at 4. Rather, the Commission merely asserted that “states may develop different records should they choose to examine the use of CPNI for intrastate services.” *Third Report and Order*, ¶ 82. For two reasons, this explanation is utterly deficient.

First, although it is certainly possible that one or more of the 50 states might develop a *different* record, it is unlikely that they will develop a *better* record—one that is more comprehensive than the Commission’s record. *See* AT&T Wireless at 2, 5 (“In fact, a number of states provided empirical information in this proceeding that they believed would support stricter CPNI rules. The Commission reviewed the evidence and rejected the states’ arguments.”); Verizon at 13. Drawing comments from a smaller pool of parties, the state commissions will probably not have the robust, national record that the Commission has before it.<sup>5</sup> Second, even if the state with the best record happens to be the one with the most restrictive regulations, there is no guarantee that these CPNI rules are the correct ones for the country as a whole. State commissions are not charged with developing national policy, are not entrusted to do what is right for the country, and are not expected to sacrifice the state’s interests for those of the entire nation. State commissions simply have no authority to regulate interstate uses of CPNI. Instead, Congress has charged the Commission with developing United States policy on CPNI, and the Commission should not forsake this duty by ceding its power to the state with the most prohibitive regulations.

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<sup>5</sup> In addition, even if a particular state were to develop a better record, that state’s CPNI laws would have no effect unless its laws were more restrictive than every other state’s laws. As explained above, because of the jurisdictionally mixed nature of CPNI, the most restrictive state regime (irrespective of whether *its* record is better or worse) will determine CPNI policy for the entire nation, and that state’s rules will effectively govern the use of CPNI with respect to interstate services.

**B. By Failing To Preempt Presumptively State CPNI Regulations, The Commission Is Inviting States To Infringe Carriers' First Amendment Rights.**

Moreover, as AT&T Wireless and Verizon demonstrate, the Commission is violating carriers' First Amendment rights by failing to preempt presumptively state CPNI regulations. *See* AT&T Wireless at 4-7; Verizon at 12-23. Twice now, the groups favoring tighter restrictions on CPNI have failed to develop a sufficient record to sustain an opt-in requirement against constitutional challenge. And there is no reason to believe that, given a third chance in the states, the outcome can be any different.

After these groups' first attempt to restrict the disclosure of CPNI, the Tenth Circuit held that, on the record before the court, an opt-in requirement was unconstitutional. *See US West v. FCC*, 182 F.3d 1224, 1234-39 (10th Cir. 1999). In response to this decision, the Commission allowed CPNI opponents to try again. It initiated a new round of comments and received responses from a broad array of interests, including pro-privacy consumer advocates and a variety of state agencies. The Commission then conducted an extensive review of this expansive record to assess the constitutionality of an opt-in requirement. But after months of analysis and dissection of the over 40 comments and reply comments, the Commission concluded that an opt-in rule for intra-carrier disclosures of CPNI could not pass constitutional muster.

The Commission was undoubtedly correct. Despite their efforts, the filers endorsing opt-in approval clearly failed to develop any record that could sustain opt-in against constitutional challenge. *See Third Report and Order*, Separate Statement of Chairman Michael K. Powell (“[D]espite the laudable efforts of the parties to generate such an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court.”). Because the speech at issue concerns a lawful activity and

is not misleading, the government can restrict it under *Central Hudson* only if: (1) the government has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest. *See Central Hudson*, 447 U.S. at 564-65. As AT&T explained in its previous comments in this proceeding (which AT&T incorporates by reference), an opt-in requirement fails both the second and third steps of *Central Hudson* scrutiny. *See* Comments of AT&T, CC Docket No. 96-115, at 5-9 (filed Nov. 1, 2001); Reply Comments of AT&T, CC Docket No. 96-115, at 4-5, 7-10 (filed Nov. 16, 2001). Most other commenters agreed.<sup>6</sup>

Because opt-out is the only approval mechanism consistent with the First Amendment, and because the record in this proceeding has twice confirmed that fact, neither the Commission nor the states can impose more stringent requirements. *See* AT&T Wireless at 2 (“There is no reason to believe that any state will be able to develop a record supporting a different result under the *Central Hudson* test than that reached by the Tenth Circuit or the Commission.”). It thus makes no sense to let the groups favoring opt-in approval take another stab at the issue with the state commissions. There is simply no basis for concluding that state proceedings—which are inherently more-limited in scope than the Commission’s national

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<sup>6</sup> *See, e.g.*, NTCA at 4 (“Providing carriers with the flexibility to choose either an ‘opt-in’ or ‘opt-out’ approach for obtaining permission to use CPNI, combined with current notice requirements about subscribers’ rights to limit CPNI use, will satisfy the Tenth Circuit’s remand and sufficiently address the Commission’s competitive concerns.”); OPASTCO at 11-12 (“[A]n opt-out approach is the most narrowly-tailored, free-market based approach to protecting CPNI.”); SBC at 14 (“The bottom-line is opt-out approval constituted approval prior to the Act and has been used by the Commission and other industries subsequent to the Act to adequately safeguard consumer privacy interests. There simply is an insufficient record to demonstrate otherwise or show proper tailoring.”); USTA at i (“The opt-out approach is rational, less restrictive than the opt-in approach, sufficiently protects customer privacy and is consistent with customer expectations.”).

proceeding—can produce a record sufficient to sustain opt-in approval upon judicial review. *See supra* at 8. By permitting the states to adopt an opt-in requirement, the Commission is only enabling them to violate the Constitution.

The infirmity of the Commission’s preemption position is made all the more clear by the Washington Utilities and Transportation Commission’s recent decision. Less than four months after the Commission determined that an opt-in requirement “cannot be justified,” *Third Report and Order*, ¶ 31, the Washington UTC has attempted to justify it. Under the state agency’s view, what was unconstitutional in July became constitutional in November. The state agency did not even purport to have compiled a more comprehensive or reliable record than the one developed by the FCC. Rather, it quickly skipped to the patently obvious but legally insufficient conclusion that it “weigh[ed] factors differently from the balance implicit in the FCC rules.” *In the Matter of Adopting and Repealing: WAC 480-120-201 through WAC 480-120-209 and WAC 480-120-216 through WAC 480-120-216, Relating to Telecommunications Companies – Customer Information Rules*, Docket No. UT-990146, General Order No. R-505, at 10 (Nov. 7, 2000) (“*Washington UTC Order*”).

The Washington UTC did not come close to satisfying *Central Hudson*. Despite mouthing the words “narrowly tailored,” it presented no evidence that an opt-in requirement “directly and materially” advances the state’s interests or is “no more extensive than necessary to serve those interests.” *U.S. West, Inc.*, 182 F.3d at 1237 (citation and internal quotation marks omitted). Indeed, instead of engaging in the rigorous scrutiny of evidence required by the Tenth Circuit, the agency relied on inconclusive anecdote and supposition comparable to that rejected by the court three years ago. Moreover, in the end, the Washington decision unabashedly turns on public opinion, stressing the “the general sentiment of telecommunications customers” and

the unfavorable reaction of Washingtonians to Qwest's opt-out notice. *See Washington UTC Order* at 23, 29-32. Because "the whole point of a constitution is to place certain principles beyond the reach of majority preferences," Reply Comments of AT&T, CC Docket No. 96-115, at 9 (filed Nov. 16, 2001), the Washington UTC's analysis is wholly inadequate.

Yet, despite the absurdity of this decision, AT&T and other carriers that operate in Washington will be bound by it until the Commission (or a court) reviews and rejects it. In the meantime, the speech of carriers and their marketing agents will be chilled. *See Verizon* at 21 (addressing "the chilling of speech that will occur during the interim period between the time states adopt more restrictive CPNI rules and the time that the Commission completes its 'case-by-case' review of such rules."). Because CPNI is jurisdictionally mixed, *see supra* at 5, the unconstitutional effects of the Washington rule will be felt nationwide. To prevent this constitutional harm, the Commission must decide to preempt all state CPNI regulations that are inconsistent with federal CPNI rules. Indeed, as Verizon explains, by leaving the door open to the states, "the Commission is itself infringing on First Amendment rights." *See Verizon* at 21 (citing *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991); *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996)).

## **II. THE COMMISSION SHOULD REJECT THE PROPOSED LIMITATIONS ON THE USE AND DISCLOSURE OF CPNI UNDER SECTION 222(c)(1).**

Both ACC and AOL have proposed unjustifiable limitations on the use and disclosure of CPNI. Under section 222(c)(1), a carrier may use and disclose any CPNI to whomever it chooses, as long as it first obtains "the approval of the customer." § 222(c)(1). Accordingly, the Commission has determined that, with the customer's approval, carriers may disclose CPNI to unaffiliated third parties and joint venturers and may use CPNI for all

communications-related activities, including information services. Neither ACC's nor AOL's challenge to this determination has any merit whatsoever.

First, ACC argues that disclosures to third parties should be impermissible absent "express written authorization."<sup>7</sup> ACC at 2-3. Such a requirement, however, would violate Congress's unambiguous intent. When Congress chose to require express written authorization, it said so unambiguously, as it did in the very next subsection of the statute. *See* § 222(c)(2) (requiring carrier to disclose CPNI upon "affirmative written request" by the customer). Interpreting "approval" to mean "express written authorization" would ignore Congress's careful selection of terminology.

ACC's argument in favor of a written-authorization requirement is based on a misreading of the statute. According to ACC, section 222(c)(2) precludes the disclosure of CPNI to third parties absent written consent. But section 222(c)(2), in fact, says something quite different. It provides that a "carrier *shall* disclose [CPNI] upon affirmative written request by the customer, to any person designated by the customer." § 222(c)(2). In other words, section 222(c)(2) is a mandatory disclosure rule, not a restriction on disclosure. It does not limit the disclosure that is permitted elsewhere in the Telecommunications Act, namely § 222(c)(1).

Moreover, if ACC's position were accepted, it would undermine the Commission's goals of promoting customer control and convenience, *see Second Report and Order*, ¶¶ 53-67. A customer would be completely unable to approve orally any disclosures of CPNI to third parties. Even if the customer called AT&T and emphatically declared that it wanted its CPNI disclosed, there is nothing AT&T could do to honor that request. The only way

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<sup>7</sup> The Arizona Corporation Commission also supports the Commission's preemption decision but failed to offer any argumentation or support whatsoever. ACC at 2.

the customer could permit disclosure would be to go through the trouble of writing down its request and mailing it to AT&T. To the extent that customers decide that making such a request is not worth the hassle, ACC's proposal will have thwarted customer choice.<sup>8</sup>

Although ACC baldly asserts that a customer's oral consent will be ill-informed, ACC provides absolutely no evidence for this claim. Nothing in the record even remotely suggests that a customer who orally authorizes a carrier to disclose CPNI does not understand the consequences of disclosure. Moreover, even if ACC's assumption of ignorance were correct, there is no reason to believe that the same customer would understand the consequences any better if he or she provided the authorization in writing. Because a written-authorization requirement impedes customer choice and does nothing to inform customers of the consequences of disclosure, the Commission should reject the requirement.

Finally, ACC's recommendations, if adopted, would violate the First Amendment. There is no evidence that the proposal would directly and materially advance any interest in privacy, or that it is narrowly tailored to serve that interest. Thus, the recommendation fails constitutional scrutiny under *Central Hudson*. See *Central Hudson*, 447 U.S. at 564-65.

Equally unjustifiable are AOL's challenges to the Commission's determinations that carriers who obtain a customer's approval may use CPNI for all communications-related activities and for any third-party joint venturer with a communications-related purpose. According to AOL, there should be an exception for "competitively sensitive CPNI," whatever

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<sup>8</sup> ACC also suggests (although the petition is far from clear on this point) that no disclosure should be permissible if the third party does not provide telecommunications service. If adopted, this proposal would further undermine customer choice. Customers simply could not compel disclosure, no matter how badly they want it. The proposal would also clearly violate section 222(c)(1), which expressly permits disclosure when the customer approves. § 222(c)(1).

that undefined term might mean. AOL at 5-9. Nothing in the statute, however, creates such an exception or limits the purposes for which CPNI can be used. Carriers may thus use CPNI (even “competitively sensitive CPNI”) for all communications-related activities and may disclose it to joint venturers for a communications-related purpose.

Moreover, although AOL asserts that the potential for abuse would justify restrictions on the use and disclosure of competitively sensitive CPNI, AOL does not present any evidence of abuses. Nor does AOL present a reasoned argument that such abuses will occur. Even if the Commission lacked jurisdiction to enforce CPNI rules against joint venturers, *see* AOL at 7-8, there are three reasons why the potential for abuse is not significant. First, the Commission undoubtedly has jurisdiction against the carriers and can thus initiate enforcement actions against them for any misuse of CPNI by the joint venturers. Second, the Commission already has established safeguards to curtail abuses by joint venturers. *See Third Report and Order*, ¶ 47 (requiring confidentiality agreements and records of disclosures). And third, if a carrier or its joint venturer were to abuse CPNI, a customer can always decide to opt-out, or even to switch to another carrier if the market is competitive.

In any event, AOL is predominantly concerned with the potential abuses by ILECs, not IXC. *See* AOL at 5 (“particularly incumbent exchange carriers”); *id.* at 3 (“especially ILECs”). Even if the ILECs—by virtue of their monopolistic position—have the ability to use CPNI to the detriment of independent ISPs, there is no justification for limiting AT&T’s statutory rights. Because section 222(c)(1) permits AT&T and other IXCs to use and disclose CPNI “with the approval of the customer,” the Commission should reject AOL’s contrary proposals.

### **III. THE COMMISSION SHOULD PREVENT ILECS FROM USING THE PROPRIETARY INFORMATION OF UNAFFILIATED ISPS AND THEIR CUSTOMERS TO MARKET THE ILECS' OWN ISP SERVICES.**

The Commission, however, should adopt AOL's final recommendation: ensuring that the proprietary information of unaffiliated ISPs and their customers is not used to market ILECs' own ISP services. As AOL explains, ILECs currently have the ability to exploit such information. *See* AOL at 3-4. Because "[v]irtually all loops terminate in ILEC offices," ISPs generally must rely on the ILECs' facilities. Comments of AT&T, *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, at 44, 49. The ISPs have no choice but to order service from the ILECs, who thus have access to proprietary information of ISPs and their customers.

Unquestionably, the ILEC should not be permitted to use this information "for purposes of selling the end user a competing Internet access service, or sharing th[e] DSL order information with its joint venturers." AOL at 10. Such use would violate the spirit of section 222(b), which provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and *shall not use such information for its own marketing efforts.*" § 222(b) (emphasis added). To be sure, section 222(b) speaks of proprietary information from "another carrier," not an ISP. But the competitive concern underlying section 222(b) is the same as the one at issue here. ILECs should not be allowed to leverage their monopolistic position to exploit the valuable information obtained from entities that must rely on the ILECs.

Moreover, even though ILEC use of ISPs' proprietary information to market the ILECs' own ISP services does not fit within the literal terms of section 222(b), it certainly is an unreasonable practice prohibited by section 201(b). As the Commission noted in implementing

section 222, “section 201(b) remains fully applicable where it is demonstrated that carrier behavior is unreasonable or anticompetitive.” *Second Report and Order*, ¶ 85 n.316. Thus, the Commission should adopt AOL’s final recommendation.

### CONCLUSION

For the foregoing reasons, the Commission should preempt state CPNI regulations that are more restrictive than the federal rules, refuse to make express written authorization a prerequisite to disclosing CPNI to third parties, decline to prevent carriers from using “competitively sensitive” CPNI and disclosing it to joint venturers with the customer’s approval, and preclude ILECs from using the proprietary information of unaffiliated ISPs and their customers to market the ILECs’ own ISP services.

Respectfully submitted,

AT&T CORP.

\_\_\_\_\_/s/ Daniel Meron\_\_\_\_\_  
Daniel Meron  
Jonathan F. Cohn  
Sidley Austin Brown & Wood LLP  
1501 K Street, N.W.  
Washington, DC 20005  
Telephone: (202) 736-8000

Mark C. Rosenblum  
Lawrence J. Lafaro  
Judy Sello  
AT&T Corp.  
Room 3A229  
One AT&T Way  
Bedminster, NJ 07921  
Telephone: (908) 532-1846

Its Attorneys

December 20, 2002

## CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of December, 2002, I caused true and correct copies of the foregoing Comments of AT&T Corp. on the Petitions for Reconsideration to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Marlene H. Dortch \*  
Office of the Secretary  
Federal Communications Commission  
Room TW-B204  
445 Twelfth Street, SW  
Washington, DC 20554

Maureen A. Scott  
Attorney, Legal Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

*Counsel for Arizona Corporation  
Commission*

Howard J. Symons  
Sarah F. Liebman  
Catherine Carroll  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo  
701 Pennsylvania Ave., NW  
Suite 900  
Washington, DC 20004

Douglas J. Brandon  
David P. Wye  
1150 Connecticut Ave., N.W.  
Suite 400  
Washington, DC 20036

*Counsel for AT&T Wireless  
Communications*

*Counsel for AT&T Wireless Communications*

Steven N. Teplitz  
Vice President and Associate General Counsel  
AOL Time Warner, Inc.  
800 Connecticut Ave., NW  
Suite 200  
Washington, DC 20006

Donna N. Lampert  
Mark J. O'Connor  
Linda L. Kent  
Lampert & O'Connor, PC  
1750 K Street, NW  
Suite 600  
Washington, DC 20006

*Counsel for America Online, Inc.*

*Counsel for America Online, Inc.*

\* By Electronic Filing

Michael E. Glover  
Edward Shakin  
Larewnce Katz  
1515 North Court House Road  
Suite 500  
Arlington, VA 22201-2909

*Counsel for Verizon*

Qualex International  
Federal Communications Commission  
Room CY-B402  
445 Twelfth Street, SW  
Washington, DC 20554

Andrew G. McBride  
Kathryn L. Comerford  
Wiley Rein & Fielding LLP  
1776 K Street, NW  
Washington, DC 20006

*Counsel for Verizon*

/s/ Patricia A. Bunyasi

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Patricia A. Bunyasi