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
	)	
2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	CC Docket No. 00-257

VERIZON'S[1] COMMENTS TO PETITIONS FOR RECONSIDERATION OF THIRD REPORT AND ORDER[2]

Introduction

The Commission should grant the petitions for reconsideration ("PFRs" or "petitions") filed by Verizon and by AT&T Wireless Services, Inc. ("AT&T Wireless"), which request that the Commission declare that inconsistent state CPNI regulations will be preempted. For the reasons stated more fully in those petitions, deciding preemption only on a case-by-case basis

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[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., and are listed at Appendix A.

[2] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;* Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002) ("Third CPNI Order").

would undermine the Congressional goals of establishing a uniform national CPNI policy, and would violate carriers' First Amendment rights.

The Commission should reject the petition filed by America Online, Inc. ("AOL"), which argues that the Commission should limit carriers' ability to use CPNI to market Internet services. The Commission has consistently recognized the propriety of allowing carriers to use CPNI to market information services (including Internet services), and long ago rejected arguments similar to those raised by AOL. The Commission should also reject the petition by the Arizona Corporation Commission ("Arizona"), because its concerns about the sharing of CPNI with third parties have been adequately addressed by the safeguards the Commission established in the CPNI rules.

I. THE COMMISSION SHOULD GRANT THE PETITIONS FOR RECONSIDERATION BY VERIZON AND AT&T WIRELESS, AND PREEMPT INCONSISTENT STATE CPNI REGULATIONS

Both Verizon and AT&T Wireless filed petitions for reconsideration of that portion of the Third CPNI Order that stated that the Commission would consider preempting inconsistent state CPNI regulations only on a case-by-case basis.[3] The Commission should instead revise its order to make it clear that all state CPNI regulations that are inconsistent with the federal CPNI rules, including state rules that adopt an opt-in requirement, are preempted.

AT&T Wireless argues that the problem of inconsistent state and federal CPNI rules is especially problematic for wireless providers, because "[w]ireless carriers do not categorize customers as interstate or intrastate and would be unable to do so for the purpose of determining

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[3] *See* Verizon's Petition for Reconsideration of Third Report and Order in CC Docket No. 96-115 (filed Oct. 21, 2002) ("Verizon Petition"); AT&T Wireless Petition for Reconsideration, CC Docket Nos. 96-115, 96-149, 00-257 (filed Oct. 21, 2002) ("AT&T Wireless Petition").

the lawful use of CPNI." AT&T Wireless Petition, at 5-6. And there is no question that inconsistent state rules *are* a major problem for wireless carriers. The problem certainly is not limited to wireless carriers, however: as explained at great length in Verizon's own petition, CPNI inherently is jurisdictionally mixed – that is, it cannot be separated into different interstate and intrastate components. Verizon Petition, at 7-12. Moreover, the problem of blurred interstate and intrastate lines will become only more pronounced as carriers – especially those attempting to compete with wireless packages that do not charge separate rates for local and long distance calls – begin more and more to bundle services.[4] Failing to preempt inconsistent state regulations therefore has the effect of allowing state CPNI regulations to trump federal law, because when carriers cannot separate interstate and intrastate CPNI they must either operate under the stricter (state) standard, or abandon use of CPNI altogether. *Id.*

Indeed, the Washington Utilities and Transportation Commission ("WUTC") has recently adopted state CPNI rules that purport to govern both *intra*state and *inter*state CPNI.[5] The WUTC has gone so far as to suggest that, to avoid consumer confusion, carriers should ignore the federal law and regulations regarding CPNI notices, and simply send out customer notices that comply with the new WUTC rules.[6] And it candidly admits that its regulations are intended

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[4] *See* Federal-State Joint Board on Universal Service, 17 FCC Rcd 3752, ¶ 133 (2002) ("Additionally, since 1997, marketplace developments also have blurred the distinctions between interstate/intrastate and telecommunications/non-telecommunications revenues on which the current contribution system is based. Carriers increasingly are bundling services together in creative ways, for example by offering flat-rate packages that include both local and long distance services").

[5] *See* WUTC Press Release, "Washington Regulators Adopt Nation's Strongest Telephone Customer-Privacy Rules," at 2 (Nov. 7, 2002) ("The WUTC rules apply to local and long-distance communications companies providing service in Washington"). Copies of the newly enacted Washington CPNI rules are available at www.wutc.wa.gov.

[6] *See* Washington Utilities and Transportation Commission, Order Repealing and Adopting Rules Permanently, Docket No. UT-990146, General Order No. R-503, Appendix A, at 6 (Oct. 16, 2002), *available at* www.wutc.wa.gov ("WUTC Order") ("If companies send two

to supersede inconsistent FCC and Congressional dictates.[7] To justify its more stringent CPNI rules for all (interstate and intrastate) telecommunications services, the WUTC frequently cites the Commission's order stating that it would consider preemption of inconsistent state regulation only on a "case-by-case" basis.[8]

As the new Washington rules show, the Commission's "case-by-case" approach invites *states* to attempt to preempt *federal* CPNI law. For all the reasons set forth in Verizon's petition here, such a policy undermines the Congressional goal of uniform national CPNI regulation and infringes carriers' First Amendment rights. Verizon Petition, at 7-22. The Commission should reconsider its case-by-case approach to preemption, and instead order that inconsistent state CPNI regulations will be preempted.

II. THE COMMISSION SHOULD REJECT THE LIMITATIONS ON CARRIERS' USE OF CPNI TO MARKET INTERNET SERVICES THAT ARE ADVOCATED IN THE AMERICA ONLINE PETITION FOR RECONSIDERATION

The AOL Petition argues that the Commission should impose limits on wireline carriers' ("especially the ILECs") ability to use customer CPNI to market Internet services on behalf of themselves and their joint venture partners. *See* AOL Petition, at 2-3, 6. However, AOL's arguments are nothing more than a repetition of arguments that the Commission considered – and rejected – long ago when it initially considered carriers' use of CPNI to market enhanced services.

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different notices to customers under the opt-out mechanism, no doubt confusion will be the result. Confusion can be avoided if companies send customers only the correct notice based on *these* rules") (emphasis added).

[7] *Id.*, at 3 ("Our proposed rules permit the use of CPNI in accordance with federal law except when these rules require otherwise.").

[8] *See, e.g.*, WUTC Order, ¶¶ 27, 37.

The Commission has long allowed carriers to use CPNI to market "enhanced" services. As early as 1987,[9] well before the Third CPNI Order, Bell Operating Companies ("BOCs") were permitted to use CPNI to market "enhanced services" – the Commission's previous term for services that include most "information services" under the Act.[10] Thus, the Third CPNI Order did not change the type of information that could be used to market Internet services.

AOL's arguments that allowing carriers to use CPNI would "substantially impair[] information services competition," AOL Petition, at 1, are almost identical to those made by voicemail providers, and previously rejected by the Commission, in the context of the BOCs' pre-Act use of CPNI to market enhanced services. *See* Computer III Phase 2 Order, ¶¶ 141-153. There, the Commission noted that the BOCs had no special market power in enhanced services, and that customers were generally aware that the market for these services is competitive. *Id.*, ¶ 153. Moreover, the Commission found that "the most valuable information" for marketing these services came not from CPNI, but from the customers themselves, sources that were "equally available" to BOCs and their competitors. *Id.* Thus, the Commission declined to adopt a rule that would require prior authorization before a BOC could use CPNI to market enhanced services. *Id.*

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[9] *See Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, ¶ 153 (1987) ("Computer III Phase II Order").

[10] To the extent AOL implies there is some ambiguity about the definition of "communications-related services," AOL PFR, at 5-7, that argument should be rejected out of hand. The Third CPNI Order makes it clear that the definition includes "information services typically provided by telecommunications carriers," which are themselves defined as including services "such as Internet access" services. *See* 47 C.F.R. § 64.2003(b),(c) (attached as Appendix B to Third CPNI Order).

The Commission's rationale in the initial enhanced services order applies even more strongly to the sub-market for Internet services. As AOL itself acknowledges, there already exists a "healthy and competitive ISP market." AOL Petition, at 5. Indeed, it is particularly disingenuous for AOL – the largest Internet provider in the world,[11] and one of the most successful users of cross-marketing advertising in the world – to file comments attempting to limit the ability of other companies to use customer information to target-market customers for Internet service offerings. In fact, AOL practices the very same "opt-out" policy for sharing its customers' information that it vehemently opposes here.[12]

What AOL does not admit in its petition, it readily demonstrates in its own corporate practice: that is, the fact that customer information can be a valuable tool in letting customers know of other products and services in which they may be interested. Indeed, the Commission recognized that use of CPNI is desirable in many cases, because "consumers may profit from having more and better information provided to them, or by being introduced to products or services that interest them." Third CPNI Order, ¶ 35. Indeed, AOL actively uses its access to customers to cross-market communications-related offerings: for example, AOL's website offers *two* links to invitations to purchase AOL Broadband services.[13] And another website page

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[11] *See* Patricia Fusco, ISP-Planet, *Top U.S. ISPs by Subscriber: Third Quarter 2002 Analysis,* Nov. 15, 2002 *available at* http://www.isp-planet.com/research/rankings/usa_insight_q32002.html ("America Online, the perennial leader of U.S. dial-up ISPs, serves more than 26,700,000 subscribers").

[12] AOL's "Privacy Policy" states that when AOL members access certain features, the company "will need certain information – such as name, Internet address or screen name, billing address, type of computer, credit card number – in order to provide that service or product" to the customer, and that it "*may also use that information to let [the customer] know of additional products and services about which [the customer] may be interested.*" *See AOL Anywhere Privacy Policy*, *available at* www.aol.com/info/privacy.html (emphasis added).

[13] *See* www.aol.com (visited December 17, 2002).

describes the "valuable member benefits" to AOL customers as including the opportunity to use AOL's long distance service, travel services, and credit card.[14]

In addition, there is no merit to AOL's claims that carriers could use CPNI from AOL customers when AOL orders DSL services. The Commission long ago stated that when providers of enhanced services (such as AOL or other ISPs) order services from a carrier, those providers are customers of the carrier, and can limit carriers' access to their CPNI.[15] Similarly, AOL's arguments about discrimination in favor of joint venture partners also are misplaced. *See* AOL Petition, at 7-9. If a carrier can use CPNI to market its own Internet services, there is no reason to limit its ability to share this CPNI with joint venture partners that are marketing such services in conjunction with the carrier.

The Commission should reject AOL's Petition.

III. THE COMMISSION SHOULD DENY THE ARIZONA COMMISSION PETITION, WHICH REQUESTS THAT THE COMMISSION IMPOSE ADDITIONAL LIMITS ON CPNI SHARED WITH THIRD PARTIES

The Arizona Petition appears to concede that there are "legitimate business" purposes that would justify sharing CPNI with agents acting on behalf of the telecommunications carrier. Arizona Petition, at 3. This is undoubtedly correct. As the Commission properly recognized, there is a distinction between sharing of information with agents and joint venture partners as opposed to other third parties. *See* Third CPNI Order, ¶¶ 45-63. When acting as an agent or partner of a carrier, these entities are not really third parties at all, but are deemed to have the same status as the carrier itself.[16] The Commission should not accept Arizona's blurring of this

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[14] *See America Online, Who We Are: AOL: The World's Leading Interactive Service, available at* http://www.corp.aol.com/whoweare/who_brandsaol.html.

[15] *See* Computer III Phase II Order, ¶ 154.

[16] Third CPNI Order, ¶ 46.

distinction by lumping all disclosures to persons outside the company as disclosures to "third parties."

Moreover, the Commission should reject the Arizona Petition even as it relates to third parties that are not carriers' agents or joint venture partners, because the Commission's rules already contain sufficient safeguards. The Arizona Petition is simply incorrect in arguing that the Third CPNI Order "appears to create a situation where once having given opt-in consent, the consumer has no knowledge of who will receive his or her proprietary information." Arizona Petition, at 3. The Commission's rules establish significant safeguards to protect customer privacy, and to ensure that carriers obtain knowing and informed consent from the customer before sharing CPNI with third parties. For example, rules state that:

- "Customer notification *must provide sufficient information to enable the customer to make an informed decision* as to whether to permit a carrier to use, disclose or permit access to, the customer's CPNI." 47 C.F.R. § 64.2008(c) (emphasis added).
- *"The notification must specify the types of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove of those uses, and deny or withdraw access to CPNI at any time."* 47 C.F.R. § 64.2008(c)(2) (emphasis added).
- "The notification must advise the customer of the precise steps the customer must take in order to grant or deny access to CPNI . . . ." 47 C.F.R. § 64.2008(c)(3).

Given these and other safeguards the Commission has established regarding the sharing of CPNI with third parties, Arizona's concerns are misplaced. The Commission should reject the Arizona Petition.

Conclusion

The Commission must preempt state CPNI regulations that are inconsistent with federal CPNI rules, for the reasons set forth more fully in the petitions for reconsideration filed by Verizon and by AT&T Wireless. It should reject the petitions filed by America Online and by the Arizona Commission.

Respectfully submitted,

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Appendix A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.