

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	
)	
Telecommunications Carriers' Use)	CC Docket No. 96-115
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;)	
)	
2000 Biennial Regulatory Review --)	CC Docket No. 00-257
Review of Policies and Rules Concerning)	
Unauthorized Changes of Consumers')	
Long Distance Carriers)	

**SUPPORT AND OPPOSITION OF QWEST SERVICES CORPORATION
ON PETITIONS FOR RECONSIDERATION**

Sharon J. Devine
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859

Attorneys for

QWEST SERVICES CORPORATION

December 26, 2002

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY.....	2
II. STATES SHOULD NOT BE PERMITTED TO ADOPT MATERIALLY MORE RESTRICTIVE CPNI RULES THAN THOSE ADOPTED BY THIS COMMISSION.....	3
A. The Commission Provided no Reasoned Analysis to Abandon its Previous Determination of Congressional Intent.....	4
B. The Tenth Circuit Opinion Precludes Granting Substantive Authority to States to Adopt an Opt-In Approval Requirement for Internal and Related CPNI Use.....	6
III. QWEST OPPOSES AOL's PETITION.....	10
IV. CONCLUSION.....	14

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	
)	
Telecommunications Carriers' Use)	CC Docket No. 96-115
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;)	
)	
2000 Biennial Regulatory Review --)	CC Docket No. 00-257
Review of Policies and Rules Concerning)	
Unauthorized Changes of Consumers')	
Long Distance Carriers)	

**SUPPORT AND OPPOSITION OF QWEST SERVICES CORPORATION
ON PETITIONS FOR RECONSIDERATION**

Pursuant to the Federal Communications Commission's ("Commission" or "FCC")
Public Notice requesting comment regarding various Petitions for Reconsideration¹ filed in this
proceeding,² Qwest Services Corporation ("Qwest") respectfully submits these comments.

¹ See The Arizona Corporation Commission's Petition for Clarification and/or Reconsideration ("ACC"), Petition for Reconsideration of AT&T Wireless Services, Inc. ("AWS"), Petition for Reconsideration of America Online, Inc. ("AOL"), Verizon's Petition for Reconsideration of Third Report and Order in CC Docket No. 96-115 ("Verizon"), all filed herein on Oct. 21, 2002. See also *Public Notice*, Report No. 2586, rel. Dec. 3, 2002; 67 Fed. Reg. 76406 (Dec. 12, 2002).

² *In the Matter of Implementation of the Telecommunications Act of 1996: 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; 2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,*

I. INTRODUCTION AND SUMMARY.

Qwest supports the Petitions of Verizon and AWS, urging the Commission to reconsider its decision to abandon a presumption of preemption when assessing the lawfulness of state regulations of Customer Proprietary Network Information (“CPNI”) that are more restrictive than those adopted by the Commission. Both Verizon and AWS present compelling arguments why the Commission’s change of position is unwarranted as a matter of law or policy. From the most basic legal perspective, the Commission cited to no persuasive evidence supporting its decision to deviate from its earlier well-articulated position that Congress expects a *single* nationwide approach to CPNI regulation. Nor, as argued by both Verizon and AWS, did the Commission accord sufficient deference to the constitutional principles articulated by the Commission itself in the *Third Report and Order*, principles grounded in the Tenth Circuit decision, *U S WEST v. FCC*.³

Those constitutional principles provide little room for the Commission to change course and permit states to adopt more restrictive CPNI requirements. This is especially true when that deviation is based on pure speculation that a state regulatory commission might be able to develop a record regarding CPNI regulation that would be capable, constitutionally, of supporting more restrictive CPNI regulations (such as an opt-in requirement) than imposed in the *Third Report and Order*. Not only was the Commission’s pre-*U S WEST v. FCC* record found to be deficient to support a CPNI opt-in approval requirement, the Commission found the record established subsequent to that decision insufficient to support an opt-in requirement as well. No state commission can reasonably be expected to create a more complete record than these two

Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd. 14860 (2002) (“*Third Report and Order*” or “*Third Further Notice of Proposed Rulemaking*”).

federal records. Therefore, the Commission is not free to eschew its obligations to implement Congressional intent or to uphold the federal constitution by insinuating into this proceeding notions of comity that lack any reasonable or anticipated foundation.

Qwest opposes the Petitions of the ACC and AOL. The ACC urges the Commission to reconsider its position and adopt an “opt-in” approach to CPNI use by carriers’ business partners. And AOL argues that the Commission unlawfully decided in the *Third Report and Order* that carriers could use CPNI in the context of Internet access and services, including when those services were jointly provided with other business associates. Because both parties misinterpret, to some degree, the Commission’s decisions in the *Third Report and Order*, their Petitions should be denied.

II. STATES SHOULD NOT BE PERMITTED TO ADOPT MATERIALLY MORE RESTRICTIVE CPNI RULES THAN THOSE ADOPTED BY THIS COMMISSION.

In its *Third Report and Order*, contrary to its earlier holdings, the Commission announced that it would no longer maintain a presumption against more restrictive state regulation of CPNI, even with respect to internal carrier uses or cooperative uses with business partners.⁴ Qwest supports the Petitions of Verizon and AWS urging the Commission to reconsider this unsupported reversal of position. As pointed out by both petitioners, the reversal violates the principles of sound statutory construction reflected in prior Commission decisions, is arbitrary and capricious because it is supported solely by unfounded speculation, and compromises the Commission’s obligation to uphold the federal constitution. Restrictive state CPNI regulations -- especially those seeking to impose an opt-in approval requirement for

³ *U. S. WEST, Inc. v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (“*U S WEST v. FCC*”).

⁴ *Third Report and Order*, 17 FCC Rcd. 14860 at ¶¶ 70-71.

internal-company (and related) uses of CPNI -- are not likely to be upheld as lawful by any federal court. For this reason, the Commission was not free as a matter of law to leave this door open to the states, nor should it have done so as a matter of policy.⁵

A. The Commission Provided no Reasoned Analysis to Abandon its Previous Determination of Congressional Intent.

In its original *CPNI Order*, the Commission concluded that Congress granted the Commission authority to fashion CPNI regulations regardless of the “nature” of the CPNI at issue (*e.g.*, interstate or intrastate).⁶ The Commission held that “Congress established a comprehensive . . . framework . . . which balances principles of privacy and competition in connection with the use and disclosure of CPNI and other customer information[]” when it enacted Section 222.⁷ And, in adopting its original CPNI regulations, the Commission found that it was acting in a manner “consistent with what Congress envisioned to ensure a uniform national CPNI policy.”⁸

In that same *Order*, the Commission held that state regulations regarding CPNI use and approvals would most likely be vulnerable to federal preemption if a state attempted to allow

⁵ The arguments in this section run contrary to the ACC’s Petition for a more expansive opt-in requirement, which Qwest opposes. The ACC characterizes the Commission’s *Third Report and Order* -- incorrectly in Qwest’s opinion -- as “allowing for unlimited release of CPNI to any unrelated third parties[.]” ACC Petition at 3. Since the Commission’s *Order* clearly does not do that, instead confining releases to agents and joint venture partners and then only after a notice and opt-out approval process, Qwest believes the ACC’s Petition is misdirected. Beyond this brief comment, however, Qwest does not address the ACC Petition independently.

⁶ *In the Matter of Implementation of the Telecommunications Act of 1996: 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, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061, 8074 ¶ 15, 8078 ¶ 19 (1998) (“*CPNI Order*”).

⁷ *Id.* at 8073 ¶ 14 (footnote omitted). *And see* Verizon Petition at 1.

⁸ *CPNI Order* at 8073 ¶ 14 (footnote omitted).

greater latitude than the Commission's rules or, alternatively, mandated greater restrictions.⁹ The primary reasoning behind the Commission's decision was Congressional intent:¹⁰ "state rules that sought to impose more restrictive regulations would seem to conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information."¹¹ The Commission concluded that more restrictive state regulations would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹²

The Commission can point to nothing in the Tenth Circuit's opinion -- the event giving rise to the instant proceeding -- that would suggest that the Commission reached the wrong result in the first instance. Therefore, the Commission is not free to simply divorce itself from its prior statutory interpretations and articulations of Congressional intent by holding the door open for state CPNI regulations that are more restrictive than those adopted by the Commission. As Verizon states, such action "has the effect of frustrating the Congressional goal of a uniform national CPNI policy and negating the balance struck by the Commission" in its most recent CPNI proceeding where a CPNI opt-out approval model was adopted.¹³

⁹ *Id.* at 8077 ¶ 18.

¹⁰ AWS states that the Commission was motivated originally to create a presumption of preemption because of potential burdens to carriers from complying with multiple state regulatory schemes. AWS Petition at 2. While cost considerations were certainly a factor in the Commission's decision (*CPNI Order*, 13 FCC Rcd. at 8075 ¶ 16), Qwest believes the primary factor was the promotion of consumer benefits from the use of CPNI, benefits the Commission found Congress intended. *See, e.g., id.* at 8066 ¶ 3.

¹¹ *Id.* at 8077 ¶ 18 (footnote omitted).

¹² *Id.* at 8077-78 ¶ 18. The Commission repeated these findings in its *CPNI Reconsideration Order, In the Matter of Implementation of the Telecommunications Act of 1996: 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, Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409, 14466 ¶ 112 (1999) ("*CPNI Reconsideration Order*").

¹³ Verizon Petition at 6.

B. The Tenth Circuit Opinion Precludes Granting Substantive Authority to States to Adopt an Opt-In Approval Requirement for Internal and Related CPNI Use.

The Commission acted arbitrarily and capriciously when it decided to eliminate its previously articulated presumption of preemption regarding state CPNI regulations. The Commission based its decision almost entirely on the speculative notion that a state regulatory authority could amass a *constitutionally sound* CPNI regulation record more complete than that before the Commission. This assumption is not reasonable and is, as AWS argues, counterintuitive.¹⁴

The *Second Further Notice*, leading up to the Commission's *Third Report and Order*, included the notion that "a more complete record on consent mechanisms" might provide the requisite foundation for the Commission to re-adopt an opt-in requirement.¹⁵ Yet despite the record amassed in response to that *Notice*, the Commission was forced to conclude that it could not constitutionally impose an opt-in CPNI approval requirement when carriers use CPNI internally or with trusted business partners.

In its Petition, AWS argues that a state commission would have before it "exactly the same record"¹⁶ as the Commission. It accurately describes the Commission's "cost/benefit/government interests analysis" as being based on a record compiled of "evidence supplied by every segment of the telecommunications industry, privacy advocates and *state*

¹⁴ AWS Petition at 4.

¹⁵ *In the Matter of Implementation of the Telecommunications Act of 1996: 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, Clarification Order and Second Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 16506, 16513 ¶ 16 (2001) ("Second Further Notice").

¹⁶ AWS Petition at 2, 5 (states would not be likely to "justify more restrictive rules by establishing records substantially different from that developed by the Commission[]").

regulatory commissions.”¹⁷ Verizon describes the breadth of that record as constituted of “comments from every corner of the industry, including carriers, marketing experts, state and local regulators and consumer groups.”¹⁸

In the face of the breadth of the current record proffered by diverse commenters, it is incredible and unreasonable to think that a state regulatory authority would have a better or more complete record before it regarding CPNI and its appropriate regulation than did the Commission. Any lesser record would be constitutionally infirm to support a CPNI opt-in approval requirement, under the principles articulated by the Tenth Circuit and endorsed by this Commission.¹⁹ For that reason, as Verizon has stated, the Commission’s decision to allow states to exercise authority over the approval process for CPNI use amounts to an unwarranted delegation of its responsibility to uphold the federal constitution and the First Amendment restrictions contained therein.²⁰

Moreover, it appears that the Commission fails to recognize the significance of constitutional principles articulated by the Tenth Circuit’s decision. That decision was not a road map detailing how the government might create a “proper record” for restrictive CPNI regulations. Nor was that decision about a failure of “reasoned decisionmaking,” the absence of “substantial evidence,” or any of the other deferential standards that typically apply to judicial

¹⁷ *Id.* at 2 (emphasis in original). *And see id.* at 4 (“the Commission developed a comprehensive record, painstakingly applied the *Central Hudson* test to the evidence gathered, and concluded that opt-in rules for intra-company use of CPNI were indeed unconstitutional[]” (footnotes omitted)).

¹⁸ Verizon Petition at 4.

¹⁹ *Compare Separate Statement of Chairman Michael K. Powell* (“no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court[]”), as attached to the *Third Report and Order*, 17 FCC Rcd. 14860.

review of agency orders. Rather, the Court held that opt-in CPNI approval requirements -- *regardless* of the substance of the agency record -- implicate fundamental First Amendment considerations and rights,²¹ and thus are subject to the rule of “constitutional doubt.”²²

Under a proper reading of the Tenth Circuit’s opinion -- which emphasized the “important civil liberties”²³ that were “abridge[d]” or “restrict[ed]”²⁴ by the mandatory opt-in process, expressed serious “doubts” regarding whether either of the “government interests” proffered by the Commission were “substantial,”²⁵ and ultimately concluded that in all events the regulations were not “narrowly tailored” to minimize the burden on protected speech²⁶ -- the type of CPNI approval process sustainable under the Constitution is not a close question. The First Amendment interests at issue here dictate that when *any governmental authority* seeks to regulate CPNI approval and use, the “burden” of overcoming inertia may not be placed on truthful speakers and interested listeners, but must be placed on those unquantified members of the intended audience who prefer not to receive communications based on information provided to, or generated by, their chosen carriers.

²⁰ Verizon Petition at 20 (“by failing to preempt state CPNI regulations that are inconsistent with the Commission’s rules, the Commission is essentially delegating federal policy decisions to the states in the first instance[.]”).

²¹ *U S WEST v. FCC*, 182 F.3d at 1228 (“this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment’s protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees . . . is at the heart of [the Court’s] responsibility.”).

²² *Id.* at 1231.

²³ *Id.* at 1228.

²⁴ *Id.* at 1232.

²⁵ *Id.* at 1235 (doubts regarding privacy interests), 1236-37 (skepticism about competitive interests).

²⁶ *Id.* at 1238-39.

In light of these considerations and rights, the Court struck down the Commission's CPNI rules, expressing not only doubt that the rules were supported by any reasonable demonstrated governmental privacy or competitive interest but also skepticism that they promoted in any direct or material way legitimate government objectives.

While the Tenth Circuit's decision may not literally have enjoined the Commission -- or other governmental entities -- from adopting opt-in CPNI approval processes, it made clear that proponents of such government mandates would bear a heavy evidentiary burden. A reviewing court would consider such mandates with a view to avoiding "serious constitutional problems," "ow[ing] the [regulator] no deference, even if its CPNI regulations are otherwise reasonable, and . . . apply[ing] the rule of constitutional doubt."²⁷

Under the constitutional principles articulated by the Tenth Circuit, not only did *this* Commission have to reach the right result in its CPNI approval proceeding to avoid serious constitutional doubt, it is not permitted to create opportunities for other governmental bodies to reach a contrary result. Like courts faced with serious constitutional problems, that are required to construe statutes to avoid such problems,²⁸ if possible the Commission must construe legislative pronouncements in a manner that avoids constitutional consequences.²⁹ Thus, holding open the door for more burdensome state CPNI regulations because of a possibility of a "better

²⁷ *Id.* at 1231.

²⁸ *Id.*

²⁹ See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). See also *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 5361, 5376-77 ¶ 37 (1997); *Second Report and Order*, 12 FCC Rcd. 3824, 3834 ¶ 24 (1997) (both *Orders* citing to *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464, 467, 469 (1994)(513 U.S. 64, 68-69, 72-74)).

state record” runs counter to the clear holding and reasoning of the Tenth Circuit opinion. Accordingly, the Commission should reconsider its decision and reinstate its presumption of preemption regarding more restrictive state CPNI rules and regulations.

III. QWEST OPPOSES AOL’S PETITION.

Citing to general regulatory statutory provisions that long pre-dated the passage of Section 222,³⁰ AOL seeks to revisit over a decade of findings by this Commission regarding the benefit to consumers and competition from carriers’ use of CPNI. It argues, contrary to all evidence submitted to the Commission in a variety of proceedings, that carriers’ use of customer information will “substantially impair[] information service competition.”³¹ This assertion is remarkably brash, coming as it does from one of the largest, most successful information services providers in the world!³²

AOL argues that the Commission, in its *Third Report and Order*, “unlawfully expanded wireline carrier use of competitively sensitive CPNI.”³³ This is hardly the case given the Commission’s historical treatment of CPNI with respect to the largest local exchange carriers (“LEC”) in the country. Nothing since the passage of the 1996 Act has changed this landscape. And the Commission did nothing by way of changing it either. Thus, it is difficult to understand exactly what AOL wants the Commission to reconsider at this point.³⁴

³⁰ AOL cites to 47 C.F.R. §§ 201, 202. AOL Petition at 1.

³¹ *Id.*

³² AOL boasts that it is “the nation’s largest provider of Internet and online services.” *Id.* at 2.

³³ *Id.*

³⁴ In fact, one can read the AOL Petition itself as an attempt to broaden the scope of the instant proceeding and the *Third Report and Order*. AOL argues that the Commission’s actions -- which it claims expanded existing CPNI jurisprudence -- were taken without appropriate Administrative Procedure Act (“APA”) actions for notice and comment. AOL Petition at 3. The other way to look at it is that the issues raised by AOL in its instant Petition were not addressed

There is no evidence stemming from this proceeding, for example, to support AOL's remarks that "wireline carriers today have access to the CPNI of AOL's members when they dial-in to AOL, call AOL for customer service, or order upgrades or additions to their services."³⁵ Nor is there any evidence to support a finding that carriers track calls to AOL such that those carriers -- or AOL's competitors -- would "obtain access to and use the CPNI of consumers dialing into a competing [information service provider] ISP's" services.³⁶ First, most carriers do not track local calling patterns beyond the provision of measured service.³⁷ Second, under the Commission's Open Network Architecture ("ONA") regime, carriers are precluded from creating lists of ISP customers and Qwest believes this principle would convert to one prohibiting the tracking of end-user calls to competing ISPs.³⁸

AOL's reconsideration request should be denied. The Tenth Circuit's decision makes clear that it disagreed with the Commission's determination that competitive factors played any material part in the passage of Section 222.³⁹ For this reason, the Commission was correct to confine its analysis in this recent CPNI proceeding to consumer privacy issues.

There is an aspect of the AOL Petition that might involve consumer privacy, CPNI and use of customer information in the hands of a LEC. It is possible to read the AOL Petition as fundamentally objecting to the fact that, post-*Third Report and Order*, the Commission allows

in the most recent proceeding or the *Third Report and Order*, rendering the instant Petition irrelevant.

³⁵ *Id.* at 2.

³⁶ *Id.* at 2-3.

³⁷ Some additional local calling information might be tracked as a result of interconnection agreements and compensation requirements.

³⁸ Even before the Commission prohibited such conduct, some carriers (such as then-U S WEST) advised that they had established procedures to prohibit such conduct by employees.

³⁹ *U S WEST v. FCC*, 182 F.3d at 1237.

carriers to use end-user CPNI for Internet access sales when those sales are made directly by a carrier or through a joint venture partner.⁴⁰ AOL does not believe that the Commission sufficiently alerted potential commenting parties to the fact that result might obtain post-Tenth Circuit opinion proceeding. In support of its position, AOL repeatedly cites to the Commission's 1999 *CPNI Reconsideration Order* as holding such use is not permitted under Section 222 or in the public interest.

This odd, looking-backward approach allows AOL to essentially ignore the intervening Tenth Circuit opinion. That opinion, for all intents and purposes, forced a reversal of the "opt-in" CPNI rules, even with respect to Internet access or similar services offered by carriers. The Commission was not free to exempt out this type of service offering, particularly in light of the Court's clear skepticism regarding the "competition-protection" aspect of Section 222.⁴¹ Thus, it is not correct to say -- as AOL does -- that the *Third Report and Order* fails to recognize a "significant policy shift from the [*CPNI Reconsideration Order*] [or] provide[s] any reasoned justification for it."⁴² Both the policy shift and the justification were fully articulated in the *Third Report and Order* -- the constitutional imperatives associated with the First Amendment and the Court's directive in *US WEST v. FCC*.

Nor is there reason for the Commission to reconsider its "joint venture" decision. While AOL argues that the permissive use of CPNI with joint venture partners suffers from

⁴⁰ AOL Petition at 4-5. In 1999, the Commission held in its *CPNI Reconsideration Order* that it was precluding carriers from using CPNI for this purpose at that time, reserving the right to readdress the issue in the future as technology might drive different consumer expectations. *CPNI Reconsideration Order*, 14 FCC Rcd. at 14434-35 ¶ 46.

⁴¹ *US WEST v. FCC*, 182 F.3d at 1237.

⁴² AOL Petition at 6.

vagueness,⁴³ carriers know when they are in sales and marketing relationships with others with respect to communications-related services. Therefore, the phrase will not be ambiguous when applied. Moreover, as applied, the CPNI sharing within the relationship is protected by contractual restrictions, as well as the full force and effect of the Communications Act's provisions as they relate to carriers and their reasonable conduct. The failure of a carrier to manage the relationship, to ensure that contractual restrictions are in place, or to avoid inappropriate discrimination, might all be challenged as Communications Act violations, as noted by AOL.⁴⁴

Finally, there is a notion in the AOL Petition that, if not clearly understood, could be commented or ruled upon in a manner that could create serious mischief for carriers and confusion for customers. The Commission must be careful when characterizing information on a customer's service record ("CSR"). That information may be CPNI or it may not. It may be information that relates to services provided by the LEC to the end user, or the information may involve services provided by other carriers⁴⁵ or other service providers.

In all cases, however, the CSR is a business record created by the LEC and is lawfully in the LEC's possession. While not all the information on that record may pertain to the LEC, it all pertains to the LEC's end user. That end user is free to grant his/her approval for the LEC to use

⁴³ *Id.* at 7-9.

⁴⁴ *Id.* at 8-9.

⁴⁵ In response to the Commission's *Third Further Notice of Proposed Rulemaking*, Qwest addressed this topic from the perspective of interexchange carrier ("IXC") information included on a CSR. See Comments of Qwest Services Corporation, CC Docket Nos. 96-115, 96-149 and 00-257, filed Oct. 21, 2002 at 11-14.

the information to benefit the end user through the provision of information about products or services or the provision of those services.⁴⁶

Stated differently, the information on the end-user's CSR is not solely the proprietary information of a non-LEC service provider, such as AOL argues.⁴⁷ Clearly, within a business relationship, information can be deemed proprietary by either party to the transaction and a claim of proprietary treatment can be waived by either party. Thus, in the situation where a LEC customer is receiving service from an ISP, for example, both the LEC customer and the ISP are free to approve the LEC's use of the information, even if the party approving the use of the information is not paying for the service his/herself.

For this reason, carriers should be relieved of liability in those cases where an end user consents to the use of customer information lawfully in the possession of the carrier and the carrier uses the information as part of a sales or marketing overture.

IV. CONCLUSION.

As persuasively presented by Verizon and AWS, the Commission should reconsider its reversal of position with respect to state CPNI regulations that are more restrictive than those adopted by the Commission. The Tenth Circuit's decision made clear that the Commission's discretion with respect to the promulgation of CPNI approval rules is subject to significant Constitutional constraints. Those constraints are not confined solely to federal regulatory authority but extend to state regulators, as well. The Commission is not free to abandon them.

The Commission should reject the AOL Petition since it seeks reconsideration of an issue fundamentally controlled by *US WEST v. FCC*, as well. Under that decision, the Commission

⁴⁶ The customer's approval might come from a "duration of the call" situation or from a notice and opt-out communication. The form of approval is not material to the analysis.

was not free to continue an opt-in approval requirement for carriers to use CPNI about their customers with respect to information or enhanced services marketing or sales. Nor should the Commission restrict carriers from using information on a CSR where both the information and the CSR are lawfully in the possession of the carrier and the carrier has the approval of the customer to whom the specific CSR relates.

Respectfully submitted,

QWEST SERVICES CORPORATION

By: Kathryn Marie Krause
Sharon J. Devine
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859

Its Attorneys

December 26, 2002

⁴⁷ AOL Petition at 10 (“when the end user orders DSL-based high speed Internet access service from AOL, it is AOL that holds the customer’s information”).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **SUPPORT AND OPPOSITION OF QWEST SERVICES CORPORATION ON PETITIONS FOR RECONSIDERATION** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via email on the entity marked with an asterisk (*) on the attached service list, and 3) served via First Class United States Mail, postage prepaid, on the other parties listed on the attached service list.

Richard Grozier
Richard Grozier

December 26, 2002

Steven N. Teplitz
AOL Time Warner Inc.
Suite 200
800 Connecticut Avenue, N.W.
Washington, DC 20006

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

Maureen A. Scott
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

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

Howard J. Symons.....AWS
Sara F. Leibman
Catherine Carroll
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, PC
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Ann H. Rakestraw
Michael E. Glover
Edward Shakin
Verizon
Suite 500
1515 North Courthouse Road
Arlington, VA 22201

Andrew G. McBride.....VERIZON
Kathryn L. Comerford
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

*Qualex International Inc.
qualexint@aol.com