

**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 Section 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 Charges of Consumers' Long Distance Carriers)	CC Docket No. 00-257
_____)	

**THE UNITED STATES TELECOM ASSOCIATION'S REPLY COMMENTS
TO OPPOSITIONS FOR RECONSIDERATION OF THE
THIRD REPORT AND ORDER IN CC DOCKET 96-115**

The United States Telecom Association (USTA),¹ through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.429 and 1.419,² hereby submits its reply Comments to Oppositions filed by The Arizona Corporation Commission (ACC), Washington Utilities and Transportation Commission (WUTC), National Association of State Utility Advocates (NASUA), and National Association of Attorneys General (NAAG) in the above-docketed proceeding. The aforementioned Oppositions were filed against Verizon's Petition for

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² 47 C.F.R. §§ 1.415 and 1.419.

Reconsideration (Verizon's Petition)³ and AT&T Wireless Services, Inc. Petition for Reconsideration (AT&T Petition).⁴ USTA filed comments in support of Petitioners' request that the FCC reconsider its decision allowing states to adopt more restrictive consumer proprietary network information (CPNI) requirements.⁵

DISCUSSION

USTA believes that the current CPNI rules provide adequate protection to consumers and that the CPNI rules should not be expanded by the states. Thus, we oppose the Oppositions filed by ACC, WUTC, NASUA, and NAAG to Petitioners' request for reconsideration of the FCC's CPNI requirements.

I. The WUTC CPNI Rules.

On November 7, 2002, the WUTC issued rules for CPNI for the state of Washington.⁶ The WUTC made three key changes to the FCC's CPNI rules that require the more restrictive "opt-in" rather than "opt-out" requirement.⁷ "Opt-in" is now required for "detailed transaction information that shows to whom, when, and where a customer places telephone calls, even when that information is used by the telecommunications company and its affiliates" and when CPNI "is sold or otherwise provided to unaffiliated contractor and joint venture partners."⁸

USTA has consistently advocated that the correct approach for carriers to share customer information is the "opt-out" approach.⁹ The FCC agreed after it reassessed its CPNI rules in

³ See Verizon's Petition for Reconsideration of the Third Report and Order in CC Docket 96-115, (Oct.21, 2002), *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, CC Docket No. 96-115 (rel. July 25, 2002) (Verizon Petition).

⁴ See AT&T Wireless Services, Inc. Petition for Reconsideration of the Third Report and Order in CC Docket 96-115, (Oct.21, 2002), *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, CC Docket No. 96-115 (rel. July 25, 2002) (AT&T Petition).

⁵ See USTA Comments in Support of Verizon's Petition and AT&T's Petition, (Dec. 23, 2002).

⁶ See Washington Utilities and Transportation Commission Opposition (WUTC) at 2.

⁷ *Id.*

⁸ *Id.* at 2-3.

⁹ See United States Telecom Association (USTA) Comments, CC Docket 96-115, (Nov. 1, 2001).

light of the Tenth Circuit determination in *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). The FCC in the Third Report and Order and Third Further Notice of Proposed Rulemaking (Third CPNI Order)¹⁰ “conducted a *Central Hudson* analysis of the burden of different approval mechanisms on protected speech, balancing carrier and customer rights to commercial speech with consumers’ rights to privacy in their CPNI.”¹¹ The FCC reversed its previous determination on First Amendment grounds and required an “opt-out” approach when carriers disclose CPNI to affiliates, third party agents, and joint venture partners providing communications-related services.

Now comes the WUTC adopting stricter CPNI regulations that the FCC found to be unconstitutional. The WUTC is able to adopt more restrictive CPNI rules because the FCC reversed its previous determination and declined “to apply any presumption that such requirements would be vulnerable to preemption.”¹² The FCC concluded that a change to its preemption approach was instigated by the realization that they did not incorporate an “opt-in” CPNI regime consistent with the First Amendment for intra-company use.

USTA believes that the FCC’s rationale is counter-intuitive. The end result of the FCC’s determination is the WUTC’s CPNI rules that totally disregard the *U.S. West* decision and the FCC’s Third Report Order. Thus, the FCC must act and reverse its determination before other states begin to enact more restrictive and unconstitutional CPNI rules.

¹⁰ 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, CC Docket No. 96-115 (rel. July 25, 2002) (Third CPNI Order). The FCC adopted an “opt-out” approach when carriers disclose CPNI to affiliates, third party agents, and joint venture partners providing communications-related services. In addition, the FCC determined that CPNI disclosure to unrelated third parties or carrier affiliates required opt-in approval.

¹¹ See *Id.* (citing *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564-65 (1980)).

¹² *Id.* at ¶ 69.

II. The FCC's CPNI Rules Must Again Be Found To Be Binding Upon the States.

We disagree with the NAAG that “nothing in the record before the Commission compels the prior and complete restraint of the exercise of state sovereignty that Verizon seeks.”¹³ In fact, the FCC found in the Second CPNI Order that section 222 of the Communications Act of 1934, as amended,¹⁴ was binding upon the states, “and that the states may not impose requirements inconsistent with section 222 and our implementing regulations.”¹⁵ The FCC based its conclusion on the statutory intent of section 222 in finding that “state regulation thus could negate the Commission’s lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶ Moreover, the FCC correctly recognized that “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.”¹⁷ The FCC independently found that state action would have a substantial financial impact upon a carrier and that Congress intended under section 222 that the FCC create national CPNI rules. Thus, the FCC determined on its own volition that preemption is what Congress intended under section 222 and the record shows that prior and complete restraint of the exercise of state sovereignty was found by the FCC to be the correct course of action.

Moreover, USTA agrees with the Cellular Telecommunications & Internet Association (CTIA) that the FCC never sought comment on the issue of preemption.¹⁸ USTA believes that

¹³National Association of Attorneys General Opposition (NAAG) at 2.

¹⁴ 47 U.S.C. § 222.

¹⁵ See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115, 13 FCC Rcd. 8061, ¶ 20 (1998) (Second CPNI Order).

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 16.

¹⁸ Cellular Telecommunications & Internet Association Comments at 2.

the FCC should have sought comment on the issue of preemption before allowing the states the opportunity to expand the CPNI rules. CTIA correctly states that “until the release of the Third R&O, carriers had reason to believe that the Commission was still committed to Congress’ goal of establishing a uniform national CPNI policy.” Thus, we concur with CTIA that since the FCC unexpectedly reversed itself it should have sought comment on the preemption issue, as required under Administrative Law.

III. The FCC’s Failure To Preempt State Rules Will Have A Financial and Administrative Impact Upon Carriers.

The FCC’s must find that its CPNI rules are national and that they preempt the states. Failure to do so will lead to conflicting and restrictive CPNI laws that will trump federal law and place a substantial financial burden upon carriers, e.g. Washington State. We agree with Verizon that CPNI is “inherently jurisdictionally mixed-that is, it cannot be separated into different interstate and intrastate components.” We also agree with the majority of commenters in this proceeding that inconsistent state CPNI rules is problematic for wireless carriers.¹⁹ Wireless carriers are unable to categorize their customers as interstate or intrastate, which prohibits their ability to determine the lawful use of CPNI.²⁰

Moreover, USTA is concerned about the impact that a patchwork of laws would have on carrier call centers. Call centers are located by region and serve multiple states. Without national requirements for CPNI, customer service representatives would need to be familiar with differing rules as to the ascertainment of customer data that could potentially lead to worse customer service. In addition, customers who are legitimately calling in requesting assistance with new products and services have little patience for overly burdensome rules. The expense of training customer service representatives and storing CPNI information differently for intrastate

¹⁹ See e.g. Comments of CTIA, Verizon, and AT&T Wireless.

²⁰ AT&T Wireless Petition at 5-6.

and interstate CPNI will have a substantial financial impact upon telecommunications carriers. Thus, USTA believes that higher rates and poorer customer service will be the end result of the FCC's determination to allow states to pass more restrictive CPNI rules.

CONCLUSION

For the reasons set forth above, USTA urges the FCC to dismiss the Oppositions filed by the ACC, WUTC, NASUA, and NAAG against Verizon's Petition and AT&T's Petition. Consequently, the FCC should grant Verizon's Petition and AT&T's Petition to reconsider the FCC's determination that state CPNI rules that are more restrictive than those adopted by the FCC should be preempted.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION



By: _____

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamain
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on January 6, 2002, Reply Comments To Oppositions For Reconsideration of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.

/s/Meena Joshi
Meena Joshi

