



March 8, 2007

EX PARTE PRESENTATION

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWA325
Washington, DC 20554

**Re: Implementation of the Telecommunications Act of 1996:
Telecommunication Carriers' Use of Customer Proprietary Network
Information and Other Customer Information, CC Docket No. 96-
115; Petition for Rulemaking to Enhance Security and Authentication
Standards for Access to Customer Proprietary Network Information,
RM-11277**

Dear Ms. Dortch:

In considering whether and how to modify the Customer Proprietary Network Information (CPNI) rules, the Federal Communications Commission (Commission) should not adopt an opt-in regime, should narrowly tailor any governmental notification requirements, and should give carriers at least one year to comply with any new CPNI rules requiring systems modification. The United States Telecom Association (USTelecom)¹ believes that to do otherwise would harm consumers and competition by hindering the marketing efforts of many USTelecom members, thus depriving customers of the opportunity to learn about new services and savings, and would unconstitutionally restrict protected commercial speech. In addition, it would overwhelm law enforcement with notifications of unauthorized access to call detail records and delay carriers' ability to notify their customers of unauthorized access. Finally, it would not allow adequate time for carriers to implement any new CPNI rules, which is likely to inundate the Commission with petitions for waiver and reconsideration.

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

I. Requiring Consumers to Opt-In to Receive Information About New Services and Savings Would Only Hurt Consumers and Competition and is Unconstitutional.

USTelecom wholeheartedly supports the Commission's goal of preventing pretexting and protecting CPNI from unauthorized use. Protecting customer privacy is an essential component of customer care for carriers' businesses and an unequivocal component of existing law. USTelecom members take their obligation to protect consumer privacy seriously and devote significant resources to implementing and observing strict security protocols. There is no evidence that use of CPNI for marketing purposes has created a security vulnerability. USTelecom is not aware of any evidence that joint venture partners, independent contractors, or other third-party marketers used by its members have misused any CPNI shared with them. Furthermore, existing consumer privacy rules require strict confidentiality agreements that hold marketers liable for misuse of consumer information.²

USTelecom believes that the Commission can protect customers' privacy rights while allowing them to receive information about communications services of benefit to them. Therefore, the Commission should not require carriers to obtain affirmative approval (opt-in) from customers before sharing their CPNI with joint venture partners and independent contractors for marketing purposes. The practical effect of this requirement would be to prohibit carriers, their affiliates, and their marketers from offering new services and savings to their own customers. Consumers want to be informed about new services their carriers offer and about how they can save money.³ CPNI plays a critical role in pinpointing these consumers. The unintended consequences of an opt-in requirement, however, would be that customers would no longer receive information about product and service offerings tailored to their individual needs such as money-saving bundled offerings.

Marketing and pretexting are not the same thing and do not require the same information. The customer information used for marketing is the type of service or package a customer has; the information sought by pretexters is call detail records. Requiring customers' affirmative consent before information may be shared for marketing purposes is neither directly relevant to the government's interest in protecting CPNI nor narrowly tailored to achieving that goal. Therefore, forcing carriers to reconfigure marketing relationships to avoid the use of third parties by performing

² See, e.g., Verizon White Paper at 8 (Jan. 29, 2007), Verizon subjects marketing vendors in possession of confidential customer data, including summary CPNI information, to strict safeguarding requirements.

³ See *Id.* at 14, note 28.

marketing in house or changing the status of independent contractors to agents is not only unfeasible for USTelecom companies, it is unconstitutional.⁴

As Verizon has shown, converting an independent contractor to an agent is much more than a semantic exercise. It would involve companies in the direct management of marketing activities and end their use of the specialized expertise provided by independent contractors—thereby depriving them of their preferred means of communicating with their desired audiences and their first amendment rights.⁵ The United States Supreme Court has made clear that a commercial speaker is entitled to select its audience, the content of its message, and its preferred means of disseminating information in order to maximize the effectiveness of its commercial speech.⁶ The Commission's own findings⁷ as well as other court decisions⁸ striking down restrictions on the use of third parties to disseminate protected speech show that a broad opt-in requirement restricting the sharing of all CPNI with marketers would be unconstitutional.

⁴ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), If the regulated speech is not misleading and does not concern unlawful activity, it can be limited only if the restriction (1) is in support of a substantial governmental interest, (2) directly advances that governmental interest, and (3) is not more extensive than necessary to advance that interest.

⁵ See Verizon White Paper at 2.

⁶ See *Id.* at 27. See also *Cent. Hudson*, subjecting restrictions on commercial speech to heightened scrutiny.

⁷ *Implementation of the Telecommunications Act of 1996: Telecommunication Carrier's Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Third Report and Order and Third Further Notice of Proposed Rulemaking (rel. July 25, 2002).

⁸ *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). In this decision, the Tenth Circuit considered an appeal of the Commission's 1998 CPNI Order, under which carriers were required to obtain opt-in consent from customers before they could use CPNI to market out-of-bucket services. (See *Implementation of the Telecommunications Act of 1996: Telecommunication Carrier's Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Second Further Notice of Proposed Rulemaking (1998).) The Tenth Circuit concluded that the rules established in the 1998 CPNI Order impermissibly regulated protected commercial speech in violation of the First Amendment. It held that the Commission presented no evidence showing that the restriction directly advanced its asserted privacy interest and that it failed to demonstrate that the opt-in authorization was narrowly tailored given the availability of the opt-out approach. See also *Verizon Nw., Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003) (striking down a Washington State opt-in rule).

If the Commission is determined to adopt an opt-in rule, it should not apply the rule to all CPNI but, rather, should limit it to call detail information. Even with this restriction, small and mid-size USTelecom members, which generally rely on contractors and joint venture partners for inbound and outbound calls, would incur significant operational changes and expense increases.

Alternatively because opt-in consent is unrelated to pretexting and because of the potentially huge competitive disadvantages to carriers of an opt-in requirement, the Commission should consider the recommendation of Sprint Nextel Corporation (Sprint Nextel) that the Commission require additional safeguards to be implemented through the confidential contracts between carriers and their joint venture partners and independent contractors. The new safeguards would require joint venture partners and independent contractors (1) not to disclose CPNI, (2) to limit access to CPNI on a need-to-know basis, (3) to prevent outsiders from gaining unauthorized access to CPNI, and (4) to return or destroy CPNI at the end of the relationship with the carrier.⁹

II. Limiting Notification to Governmental Agencies for Investigative Purposes Serves Law Enforcement Purposes and Protects Consumers.

The Department of Justice has asked that telecommunications carriers be required to notify the Federal Bureau of Investigation and the U.S. Secret Service in the event of any breach of security resulting in the unauthorized use or disclosure of or access to CPNI.¹⁰ If adopted by the Commission, this proposal would require carriers to report immaterial breaches and could force them to delay notifying their customers of major security breaches.¹¹ The Commission, therefore, should limit the instances in which carriers must notify law enforcement of unauthorized access to call detail records to cases in which there has been verified material fraudulent access to customer accounts. In determining “material fraudulent access,” the carrier should consider the scope of the unauthorized access, *i.e.*, whether there is a pattern or practice of unauthorized access by an individual or entity. If the notice requirement is not limited in this manner, carriers and law enforcement will likely be overwhelmed with reports of immaterial breaches and other activity that cannot reasonably lead to prosecutions—thereby simply delaying customer notice and other remedial efforts.¹² In addition, USTelecom members fear that if they are required to wait for approval from law enforcement before notifying their customers of unauthorized access to their accounts, they will experience a strong backlash from customers irate about not having been informed sooner.

⁹ See *Ex Parte* Notice of Sprint Nextel Corporation at 2, CC Docket No. 96-115 (Jan. 26, 2007).

¹⁰ Department of Justice *Ex Parte* letter (Dec. 28, 2006).

¹¹ See CTIA – The Wireless Association *Ex Parte* letter at 1 (Feb. 5, 2007).

¹² See AT&T *Ex Parte* letter at (Jan. 10, 2007).

III. Carriers Must Have Time Enough to Implement new CPNI Rules.

The Commission should allow carriers sufficient time to implement any new CPNI rules. Compliance will require carriers to make changes to their billing systems, which could require writing and testing new software, developing new procedures for using the software, and training personnel how to use the new software. Sprint Nextel, for example, has shown how it would take months to automate the ability to change customers' contact and authenticating information. Many Sprint Nextel customers make these changes over the telephone with the Sprint Nextel customer service department or on the Sprint Nextel customer service web site. Given the millions of transactions involved, notification of these changes cannot be done manually. Notification will require the development of technical capabilities to enable Sprint Nextel to send notification via U.S. mail, e-mail, and text messages.¹³ Like Sprint Nextel, USTelecom members will take many months to complete their systems work, and, therefore, they cannot feasibly implement the requirements immediately upon publication in the *Federal Register*. Giving carriers at least one year to be in compliance with any new rules requiring systems work would allow carriers to tackle the many challenges they will face in developing systems compliant with the new rules. Absent this timeframe for implementation, many carriers will not be in compliance, and the Commission is likely to be inundated with petitions for waiver and reconsideration.

In accordance with FCC Rule 1.1206(b)(1),¹⁴ I am filing this *Ex Parte* Presentation with the Commission electronically for inclusion in the public record. Please feel free to call me at (202) 326-7223 with any questions.

Sincerely,



Indra Sehdev Chalk
Counsel

¹³ *Id.* at 3.

¹⁴ 47 C.F.R. § 1.1206(b)(1).