

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of )  
 )  
Implementation of the ) CC Docket No. 96-115  
Telecommunications Act of 1996: )  
 )  
Telecommunications Carriers' Use )  
of Customer Proprietary Network )  
Information and Other Customer )  
Information )

**Reply Comments  
of the  
Competition Policy Institute**

Ronald J. Binz  
Debra Berlyn  
John Windhausen  
Competition Policy Institute  
1156 15th Street, N.W.,  
Suite 310  
Washington, D.C. 20005  
Phone: (202) 835-0202  
Fax: (202) 835-1132

June 26, 1996

## **Summary of the Reply Comments of the Competition Policy Institute**

The growth of competition and advances in telecommunications technologies pose risks to the privacy interests of consumers. Once a consumer's information is released, it may be forever lost. CPI supports national rules that provide strong protections for consumers' privacy rights. States should be permitted to go further to protect the privacy interests of consumers so long as they do not establish rules that conflict with those of the Commission.

CPI believes that consumers should retain control over the use of information about their use of telecommunications. The customer should ultimately determine whether information should be disclosed or withheld, regardless of the rules established by the Commission. The Commission's rules should only control in the absence of express, verifiable declarations of the consumer's desire.

In deciding how to enforce Section 702 of the Act, the Commission should keep four factors in mind: 1) the need to balance consumer privacy concerns with consumer convenience; 2) restrictions on the use of CPNI do not prevent the carriers from engaging in joint marketing; 3) strong privacy protections for consumers simultaneously protect against any possible anticompetitive abuse by incumbent local exchange carriers; and 4) consumers do not want to receive more telemarketing calls.

CPI supports the Commission's tentative conclusion to separate telecommunications service into three different categories of local, interexchange, and CMRS. These categories best approximate the understanding of consumers that services are divided into local, long distance, and cellular.

Before using the CPNI for services outside of these categories, the Commission should require explicit notice and written authorization. Only written authorization will provide the maximum protection against fraud and abuse. The only exception to this requirement of written authorization should be for "inbound telemarketing" calls where the consumer initiates the telephone call. In this case, oral approval will serve the convenience of the customer, as is recognized by Section 222(d)(3) of the Communications Act.

The Commission should reject the argument that strict privacy protections could constitute a "taking". CPNI is not the "property" of the carrier since it is generated by the consumer, not the carrier. In any case, any restriction on the use of CPNI can be overcome by obtaining the approval of the customer.

The Commission's Computer II and Computer III rules should remain in place until considered in a separate proceeding. It is premature to alter these rules until the impact of the Commission's rules on CPNI adopted in this proceeding is known.

## **Reply Comments of the Competition Policy Institute**

### **CC Docket No. 96-115**

The Competition Policy Institute (“CPI”) submits these reply comments on the Commission’s Notice of Proposed Rulemaking concerning Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information in CC Docket No. 96-115. CPI is a non-profit organization that advocates state and federal regulatory policies to bring competition to energy and telecommunications markets in ways that benefit consumers. We appreciate the opportunity to file these reply comments on the Commission’s proposed rules concerning Customer Proprietary Network Information (“CPNI”).

CPI supports national policies that will lead to rapid growth of competition in all sectors of the communications marketplace. Competition will stimulate the creation of new products and choices for consumers and constrain consumer prices for these services. At the same time, policy-makers must be mindful of the influence of competition on the privacy interests of consumers. As new entrants begin competing for local telephone service, and as information technology becomes more advanced, consumers will face increasing risks that information concerning their use of telecommunications services will spread beyond their control.

This concern is set forth in more detail in a report written by the National Telecommunications and Information Administration (“NTIA”) of the Department of

Commerce in October 1995 called “Privacy and the NII: Safeguarding Telecommunications-Related Personal Information” (“NTIA Privacy Report”). This report concluded that the lack of nationwide privacy protections for consumers could pose risks to consumers and harm the development of the National Information Infrastructure (NII).<sup>1</sup>

#### Need for National Rules

CPI supports the Commission’s tentative conclusion that it should adopt national rules concerning the use and disclosure of CPNI. By enacting Section 702 of the Telecommunications Act of 1996, Congress recognized the need for a nationwide approach to CPNI. Consumers will benefit from having a minimum set of policies applied to all carriers on a nationwide basis.

#### States Should Be Permitted to Go Further to Protect Consumer Privacy

The nationwide rules set forth by the FCC should set a minimum standard of protection for consumers. CPI urges the Commission to work with the States in crafting these rules to prevent duplication, overlap and any potential conflict. If, after the

---

<sup>1</sup>This report found that the United States

[had] no omnibus privacy law that covers the private sector’s acquisition, disclosure, and use of [CPNI]. Instead, American privacy law comprises a welter of Federal and state statutes and regulations that regulate the collection and dissemination of different types of personal information in different ways, depending on how it is acquired, by whom, and how it will be used. (NTIA Privacy Report, p. 8)

The limitations and weaknesses in the telecommunications privacy regulations . . . underscore the need for a more comprehensive approach governing the collection, use, and dissemination of [CPNI] by providers of telecommunications and information services. (NTIA Privacy Report, p. 19)

adoption of these rules, a State believes that particular circumstances in that State warrant additional measures to protect the privacy of consumers, the States should be permitted to adopt such measures, so long as they do not conflict with the rules established by the Commission.

CPNI Rules Must Apply to All Carriers.

CPI believes that Congress intended that the privacy provisions contained in Section 702 should apply to all carriers. CPI strongly objects to the arguments of some commenters that the provisions of Section 702 should only apply only to the Regional Bell Operating Companies (“RBOCs”), GTE and AT&T, or that certain small carriers should be exempt from the requirements. The language of the Act clearly applies to “every telecommunications carrier”. Congress considered and rejected versions of these provisions that would have exempted certain carriers.<sup>2</sup> CPI supports the comments of the Pennsylvania Office of Consumer Advocate (PaOCA) that all consumers should have the rights to their privacy protected whether they are served by RBOCs, independent companies, or new competitors. If a carrier believes that the Commission’s rules would impose an undue hardship, it may petition for forbearance under Section 401.

Consumer Control.

CPI strongly supports the basic principle suggested by the Consumer Federation of America (CFA) that control over CPNI should be kept in the hands of the consumer. The

---

<sup>2</sup>Senate bill section 252(g) applied to Bell Operating Companies, while Senate bill Section 301 (d) applied to “[a] telecommunications carrier”. House bill Section 105 added New Section 222 (b) applied to “a carrier”, but explicitly allowed the Commission to exempt carriers with fewer than 500,000 access lines.

FCC's rules should begin and end with the concept that the customer's word goes. If the consumer wants to disclose his or her CPNI, the carriers shall disclose it. If the consumer wishes to withhold his or her CPNI, it should be withheld. The role of the Commission is to adopt rules governing the treatment of CPNI in the absence of clear, explicit direction from the consumer. The Commission should make clear in its final order that an explicit, verifiable demonstration of the consumer's desire takes precedence over any Commission rules or carrier preferences.<sup>3</sup>

### Three Issues; Four Factors

There are three basic issues posed by the legislative language and by the Commission. Before turning directly to these questions, however, CPI suggests that the Commission consider the following four factors in making its decision:

#### Factor #1: FCC Should Balance Customer Privacy with Customer Convenience

In seeking to answer these questions, the Commission should balance the interests of consumers in protecting their rights to privacy, and the interests of consumers in easy and efficient access to information and services. While some consumers express profound concern about the availability of information concerning their use of telecommunications,

---

<sup>3</sup> To illustrate this point, take the following example. Assume that the Commission adopts its tentative conclusion that a carrier providing local service to the customer may use the CPNI for the provision of other local services. Some customers may not want to allow the carrier to use his or her CPNI for other local services. For instance, if a customer has only basic dialtone service, the customer should be able to forbid the carrier from using his or her CPNI to market call waiting to that customer, regardless of the Commission's rules. Similarly, a long distance customer may not want his or her CPNI used by the customer's interexchange carrier to market a long distance optional calling plan. The customer's choice should ultimately carry the day, whether the customer chooses to be more restrictive or more expansive than the Commission's rules.

other consumers may find it useful to allow this information to be made available to carriers who can tailor services specifically for their use.

Factor #2: Restrictions on Use of CPNI Do Not Preclude Joint Marketing

At the same time, the Commission should keep in mind that limiting the carrier's use of CPNI does not preclude the carriers from engaging in joint marketing. This distinction is ignored by virtually every commenter. Carriers may or may not, depending upon other provisions of law, be able to call a customer and offer to sell local, long distance, customer premises equipment ("CPE"), enhanced services, etc. Section 702 solely concerns whether a carrier may use CPNI, not whether or not the carrier can engage in joint marketing. CPI believes that there are times when consumers benefit from joint marketing and times when they may be harmed. But that is not the issue in this proceeding. Thus the comments that refer to the efficiencies to be gained from providing "one-stop shopping" are not on point. Neither the legislation, nor the Commission's tentative conclusions, nor the proposals set forth in these comments would prohibit carriers from engaging in joint marketing. The legislation and the Commission's rules in this proceeding solely concern whether carriers can use CPNI in marketing other services, including to "target" customers.

Further, the CPNI provisions do not forbid the company from knowing and passing on to its marketing arm whether the customer is already a customer of that company. CPNI covers, for instance, the number of lines ordered by the customer, how much the customer uses the service, whether the customer uses a residential line, business line, Centrex, or other service; where the customer calls and the amount of the telephone bills. Section 702 defines CPNI to exclude subscriber list information. CPI believes that the CPNI

restrictions do not limit the carrier's use of its customer lists, so long as the lists do not also contain information that falls within the definition of CPNI.

Factor #3: Strong Privacy Safeguards Also Protect Against Anticompetitive Abuse.

CPI supports the FCC's finding that, in enacting Section 702, Congress "sought to address both privacy and competitive concerns". (Notice, Para 15.) CPI believes that it is a mistake, however, to view consumer privacy and competitive concerns as competing objectives. In fact, rules that strictly limit the disclosure of CPNI would serve both purposes of the Act: they would provide strong privacy protections to consumers and also prevent incumbent telephone companies from disclosing CPNI to their subsidiaries in a manner that might give them a competitive advantage over unaffiliated enterprises. The weaker the restrictions on the disclosure of CPNI, the more the Commission will face arguments that additional restrictions are necessary for incumbent telephone companies to protect against anticompetitive behavior. While such restrictions on incumbent telephone companies are important, CPI believes that the consumer is best served, and legislative language best implemented, with rules that apply to all carriers.

Factor #4: The Commission's Policies Should Not Promote Telemarketing.

Many consumers fear that the growth of competition for local telephone service could lead to an increase in the number of telemarketing calls. While there are some customers who may be excited by this possibility, CPI believes that the overwhelming majority of consumers believe they already receive an excessive number of telemarketing calls today. The complaints concerning excessive telemarketing calls led Congress to pass the Telephone Consumer Protection Act of 1991. CPI does not suggest that the FCC should

take action to limit such calls in this proceeding. CPI does suggest that the Commission should not adopt policies, such as sanctioning oral authorization of CPNI disclosure on outbound telemarketing calls, that could encourage an increase in telemarketing calls.

Three Questions:

The Commission poses three basic questions: For what services should the consumer be presumed to have given consent and presumed not to have given consent? For services where consent is not presumed, what form of consent is required? And what kind of notice should be given by the carriers?

Issue #1: Customer Consent Should be Presumed for Local, Interexchange, and CMRS.

CPI supports the Commission's tentative conclusion that telecommunications services should be divided into the traditional service distinctions of "local", "interexchange", and Commercial Mobile Radio Service ("CMRS").<sup>4</sup> CPI believes these categories balance the consumers' interests in privacy and the consumers' interests in convenience. These categories roughly reflect the basic understanding of consumers that services are divided into local, long distance and cellular. CPI believes that consumers expect that the information they provide for local service is used for the provision of local service, not for long distance or cellular.<sup>5</sup> Under this approach, a carrier may use CPNI to identify those

---

<sup>4</sup>In other words, CPI believes that a customer for local service should be presumed to have given his or her consent to use CPNI for other local services. CPI believes, however, that a local service customer may choose to deny permission to use CPNI for another local service if he or she so chooses. See footnote 3, above.

<sup>5</sup>As the Commission notes, neither the Act nor the legislative history clarifies the meaning of the phrase "the telecommunications service from which the information is derived". Despite the efforts of parties on both sides of the debate to read into the statutory language a definitive interpretation, the language of the Act is simply unclear on this point. CPI nonetheless agrees with

local service customers who may benefit from adding additional lines of service, or those interexchange customers who may be eligible for a discount rate plan.<sup>6</sup> These are services that the consumer would expect the carrier to provide as part of the provision of the particular local, long distance, or cellular service to which the consumer subscribes.

CPI recognizes the question raised by the Commission and the argument raised by several of the commenters that changes in technology and regulation will allow carriers to provide more than one traditionally distinct service over time. CPI agrees that, eventually, the distinctions between local, long distance and cellular service may disappear. Further, CPI agrees with those who say that regulation should focus on the nature of the service and not the technology being used to provide the service. To adopt the holistic approach suggested by many of the carriers at this stage, however, would push consumers ahead of the market. The RBOCs do not today provide interLATA service within their region, and only a small fraction of consumers can purchase local service from long distance

---

the Commission that there is sufficient support in the legislation to limit the scope of the term “telecommunications service” to the categories the Commission has proposed. For instance, Congress’ use of the singular “telecommunications service” indicates an intention to limit the use of CPNI. The language in the Act is derived from the House bill, which explicitly recognized that there is a distinction between telephone exchange service and telephone toll service. See Section 105 of H.R. 1555, adding new section 222(b)(1)(B). Further, the House bill used the plural “common carrier services” in limiting the use of CPNI. The final language adopted by the Conferees, however, used the singular, a change that must be given significance by the Commission. Other areas of the Act also recognize distinctions among different types of telecommunications services, including telephone exchange and exchange access service, interLATA toll service, intraLATA toll service, CMRS, universal service, and payphone services. The distinct regulatory treatment for each of these services provides support for the argument that Congress did not intend the singular term “telecommunications service” to refer generically to all these services.

<sup>6</sup> Unless the customer objects to such usage (see footnote 3, above).

companies. Furthermore, because all local exchange carriers, including independent local exchange carriers, have implemented equal access, most consumers recognize the distinction today between local and long distance service. Cellular service is a relatively new product and customers do not expect that cellular service will be integrated with local or long distance service. This is especially the case since cellular companies usually operate under marketing names different from their telephone operations. At the point in time when carriers are actually providing integrated services and consumers recognize that, the Commission may want to revisit these categories.

Issue #2: Written Consent Should be Required Unless the Customer Initiates the Transaction.

What form of consent is required for services other than those from which the information is derived? CPI believes that the consent requirement should differ depending upon whether the consumer initiates the transaction. If the consumer initiates the transaction (“inbound telemarketing”), the consumer should be able to give his or her oral consent to the use of CPNI. Many consumers may find it unnecessarily burdensome to comply with written consent requirements before being able to receive a service that they have asked to receive. This requirement of oral consent for inbound telemarketing calls is implied, although not explicitly stated, in new Section 222(d)(3) of the Communications Act. CPI believes that, as is indicated in Section 222(d)(3), such oral consent should only be permitted if the customer is given notice of his or her CPNI rights and that such consent should last only for the duration of the call. This interpretation of Section 222(d)(3) will help consumers who actively seek additional services to receive assistance from the

carrier.

If, however, the carrier initiates the transaction, (“outbound telemarketing”), CPI believes that the carrier must receive the written consent of the customer prior to using the customer’s CPNI. CPI strongly opposes the proposal raised in the Commission’s Notice to permit carriers to use outbound telemarketing programs to obtain oral “approval” from customers for use their CPNI. A written approval requirement is more likely to prevent abuse and help to provide consumers with an opportunity to understand the nature of the disclosure.<sup>7</sup> CPI realizes that the requirement that carriers obtain written consent before using the CPNI for transactions initiated by the carrier could cause the carrier to undergo additional costs or could limit the carrier’s ability to target certain customers for certain product offerings. CPI recognizes that this requirement may discourage carriers from contacting consumers by telephone, a result that many consumers might applaud.

Issue #3: Carriers Should be Required to Provide Notice before Receiving Customer Consent.

CPI agrees with the Commission’s tentative conclusion that carriers seeking approval for CPNI use should notify those customers of their rights to restrict access to their CPNI.

The principle of “informed consent” is well-established in many areas of the law and should be implemented here as well. The Commission’s rules should make clear that no

---

<sup>7</sup> We note the comments of the National Association of Regulatory Utility Commissioners, which expresses the opinion that, because some state regulators have seen evidence of abuse by utilities, affirmative written consent should be required. While fraud and abuse is still possible when the consumer initiates the call, the number of cases of fraud and abuse should be limited. For one thing, when consumers place telephone calls to their carrier, they are more likely to talk to an employee of the carrier. Many outbound telemarketing calls, however, are placed by non-employee sales representatives who may not have the same training as a carrier’s employee.

consent, either oral or written, will be considered valid unless the customer was first notified of his or her rights to protect against disclosure of his or her CPNI.

CPI believes that the type of notice required should be commensurate with the type of authorization permitted. For “inbound telemarketing” calls initiated by the consumer, an oral notification of the customer’s CPNI rights should be sufficient for the customer to give his or her oral consent. Where written authorization is required, the notification of the consumer’s rights should also be in written form.

Whatever notice is required, the Commission should ensure that the consumer is informed of his or her rights not to release any CPNI at all. CPI notes the experience of some members of the Information Technology Association of America (“ITAA”) with RBOCs that provided a form of notice that give the customers various options for revealing their CPNI but did not give the customer the option of withholding his or her CPNI altogether. CPI takes no position on whether an annual or one-time notice is issued to the consumer. As long as notice is given prior to receiving any consent, CPI does not see the need for burdening carriers or consumers with additional paperwork.

CPNI Rules Do Not Constitute a “Taking”.

CPI strongly objects to the arguments of the United States Telephone Association (“USTA”) that CPNI should be treated as the “property” of the carrier and that onerous Commission rules could constitute a “taking” under the Constitution. USTA argues that an overly narrow reading of the term “telecommunications service” could deprive a carrier of its ability to make reasonable business use of one of its assets and constitute a “taking” that is prohibited by the Constitution. USTA argues that a broader reading of the term

“the telecommunications service” that would allow greater use of CPNI for all telecommunications services would not deprive a carrier and would not constitute a taking.

The Commission should not be swayed by this argument. First of all, if USTA is correct that CPNI is the “property” of the carrier, then the “takings” argument would apply to the legislation, not to the FCC’s rules. By limiting the carrier’s use of CPNI to the “telecommunications service from which such information is derived”, the legislation itself restricts the use of this information, no matter how broadly or narrowly the FCC interprets this provision. In other words, if USTA is correct that CPNI is the “property” of the carrier, then no matter how the FCC interprets the term “telecommunications service”, the takings argument could apply. Thus it is unnecessary for the FCC to consider the takings claim in fashioning its rules because no matter what it does, it could be subjected to the “takings” argument.

Furthermore, to say that individual CPNI is the “property” of the carrier ignores the fact that it is the customer who generates the information in the first place and provides this information to the carrier. The customer orders the number of lines, directs their type and technical configuration, initiates usage of the lines, and directs the routing of calls. The fact that the customer “gives” this information to or “shares” this information with the carrier does not mean that the carrier thereby “owns” that information.

Finally, even if CPNI is found to be the “property” of the carrier, neither the legislation nor the Commission’s proposed rules place an absolute ban on the carrier’s use of the information. The legislation and the FCC’s rules simply require the carrier to obtain the

consent of the customer before using the information for certain purposes. Once the carrier obtains the informed consent of the consumer, it is free to use the information as the carrier and the customer wish.

USTA's argument is a red herring that should not deter the Commission from adopting rules that protect the privacy of consumers.

#### ILECs Should Transmit CPNI to a Competing LEC that Wins the Customer

CPI agrees with the positions taken by AT&T (pp.17-19) and Sprint (p.5) that incumbent local exchange carriers ("ILECs") must relinquish CPNI to a competing local exchange carrier that will initiate service to the customer. Section 222(d) allows carriers to disclose CPNI to another carrier so that the new carrier can initiate service. CPI agrees that customers that change service providers should not suffer any interruption of service. The prompt transfer of the customer's CPNI to the new carrier will allow the new carrier to provide the type and quality of service appropriate for that customer. CPI agrees with AT&T's statement that "whatever authorization . . . satisfies the transfer of service requirements from the incumbent LEC to the ALEC should be deemed sufficient to transfer the customer information from the incumbent LED to the ALEC." (AT&T comments, p. 18).

#### The Commission's Computer II and Computer III Rules Should Remain in Effect for Now.

The CPNI provisions contained in Section 702 of the Telecommunications Act are simultaneously broader and narrower than the Commission's Computer II and Computer III rules. The legislation is broader in that it covers all carriers (not just the RBOCs, GTE

and AT&T) and all uses of CPNI outside of the telecommunications service (not just enhanced services or customer premises equipment). The legislation is narrower in that it does not call for annual notice requirements and protections against third-party disclosure. To the extent the legislation conflicts with the FCC's rules, the legislation controls. To the extent the legislation does not conflict with the FCC's rules, the Commission's rules should remain in place.

Although the FCC has asked for comment in the proceeding on whether the Computer II and Computer III rules should remain in place, CPI believes that it is wiser for the Commission to defer action on these issues until after it adopts rules to implement Section 702. Only then can parties accurately comment on how the new rules implementing Section 702 fit with the Commission's preexisting CPNI rules. The rules adopted as part of the Computer II and Computer III proceedings were highly contested and have a significant effect on the marketplace. These rules deserve to be scrutinized more clearly in a separate proceeding. Until then, CPI recommends that the Computer II and Computer III rules remain in effect to the extent they do not conflict with the legislation and the FCC's rules adopted in this proceeding.

The Commission should narrowly interpret the phrase "necessary to or used in"

In addition to the "telecommunications service from which such information is derived", Section 222(c)(2) allows carriers to use CPNI for services "necessary to, or used in, the provision of such telecommunications service." CPI believes that this phrase should be narrowly construed. CPI supports the Commission's suggestion in paragraph 26 that the phrase should include the installation, maintenance, and repair of the particular

telecommunications service, not all telecommunications services. This interpretation would be most in line with consumer expectations and help the carriers to provide service to the customer most efficiently.

Conclusion

In summary, the growth of competition and advances in new technologies pose risks to the telecommunications-related privacy interests of consumers . The Clinton Administration and Congress recognized these concerns and sought to provide a national policy for the protection of CPNI when they enacted Section 702 of the Telecommunications Act of 1996. The Commission must adopt strong federal rules to comply with the intention of Congress and to ensure that consumers retain control over the information concerning their use of telecommunications services.

Respectfully Submitted,

-----

John Windhausen, General Counsel  
Ronald J. Binz, President  
Debra Berlyn, Executive Director

Competition Policy Institute  
1156 15th St. N.W. Suite 310  
Washington, D.C. 20005  
202 835-0202 202 835-1132 (fax)