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

BELLSOUTH COMMENTS

BELLSOUTH CORPORATION

By Its Attorneys

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BELLSOUTH COMMENTS

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. and its wholly owned affiliated companies ("BellSouth"), submits these comments in response to the Common Carrier Bureau's recent *Notice* in the above referenced proceeding.[1]

I. Introduction and Summary

The Commission issued this *Notice* pursuant to the 10th Circuit opinion vacating rules related to customer proprietary network information ("CPNI").[2] The 10th Circuit opinion analyzed whether the Commission's opt-in process violated the First Amendment of the Constitution. The Court found that based on the test for commercial speech established by the

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[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket Nos. 96-115 and 96-149, *Clarification Order and Second Further Notice of Proposed Rulemaking*, FCC 01-247 (rel. Sept. 7, 2001) ("*Notice*" or "*Clarification Order*").

[2] *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U. S. 1213 (2000).

Supreme Court,[3] the opt-in program required by the Commission did violate the First Amendment and ordered that the rule be vacated. The Commission now seeks comments on whether an opt-in program is constitutional, and if so, whether the Commission should return to an exclusive opt-in program, or should instead retain the opt-out program that it has currently established.[4]

Additionally, the Commission asks whether an opt-out program should affect the determination it made of the interplay between Sections 222 and 272 of the Telecommunications Act.[5]

A. The 10th Circuit Decision

In its *CPNI Order*[6] issued subsequent to the passage of the Telecommunications Act of 1996 ("Act"), the Commission established policies and procedures to implement Section 222. Part of those procedures included customer approval requirements necessary to allow a carrier to use CPNI. The Commission decided to require an opt-in approach, which required carriers to obtain an express approval from the customer through either written, oral, or electronic means. This approach was selected over an opt-out approach, which required carriers to notify the customers of their rights and allowed approval to be inferred unless a customer specifically requested that his or her CPNI be restricted.

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3 *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

4 Pursuant to the vacatur of the opt-in approach in *U.S. West*, the Commission established an opt-out approach in the *Clarification Order*.

5 *Clarification Order* at ¶¶ 24-26.

6 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket Nos. 96-115 and 96-149, *Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998) ("*CPNI Order*").

Several carriers appealed the Commission's decision to the 10th Circuit, arguing that the restrictions placed on the carriers by the opt-in approach violated the First Amendment. The carriers contended that the opt-in approval process restricted their ability to engage in commercial speech with their customers. The 10th Circuit found that the opt-in approach raised serious constitutional questions because it restricted protected commercial speech. It therefore analyzed the rules under the standard set by the Supreme Court in *Central Hudson* and found that the Commission had failed to provide evidence to show that all of the tests comprising that standard had been met. In this proceeding the Commission is challenged to provide the evidence the Court found lacking under two of those tests established. Such evidence, however, is nonexistent; an opt-in approach therefore is unlawful.

The *Central Hudson* analysis is a four-part test to determine whether the government can regulate commercial speech. As a threshold question the government must determine whether the commercial speech concerns a lawful activity and is not misleading. If this threshold is met, the government may regulate the speech only if it proves: "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."[7] The 10th Circuit first found that the speech in question – carriers' discussions with their existing customer base about additional services – is a lawful and non-misleading activity. In fact, neither party to the appeal questioned this test.

Having found the activity to be lawful, the court next looked to whether the Commission had a substantial state interest in the speech. The Commission argued that it did have a substantial state interest in protecting privacy of customers and promoting competition. While

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[7] *U.S. West* at 1233.

the court agreed that privacy considerations clearly drove the enactment of Section 222, it expressed doubts as to whether the interest as presented by the Commission rose to the level of substantial. For the sake of the appeal, howover, the court accepted that privacy presented a substantial state interest. The court also failed to see the connection between Section 222 and the promotion of competition and found that competition alone would not justify the Commission's rule. Nevertheless, the court concluded that the privacy concerns considered in concert with the competition concerns allowed the Commission to meet its substantial state interest requirement. It is the final two prongs of the *Central Hudson* analysis that the court found that the Commission had failed to satisfy.

In looking to the next prong of the test, the court stated that the Commission must demonstrate that the harms that the Commission claims will occur in the absence of an opt-in approach are real and that an opt-in approach will in fact alleviate such harms to a material degree. Here the court found the Commission's explanation lacking. The Commission had presented no evidence to support a showing of harm to either privacy or competition if an opt-in approach was not used. Indeed, no such evidence exists.

The notification process is merely a means by which carriers obtain permission from their customers to provide CPNI within the carrier's corporate family but outside of the categories of services that the corporate family provides to the customer. This integrated use of CPNI presents no harm to the customer, so, as a threshold matter, corporate structure is not generally a concern of the consumer. Indeed, most customers are likely to trust their carriers to use CPNI within the corporate family in order to better meet their service needs. Nevertheless, if customers wish to limit the use of their CPNI, the opt-out approach provides them the protection they need just as well as the opt-in approach. Therefore, privacy concerns will be no better protected through an

opt-in than through an opt-out approach. There is no evidence to suggest otherwise. Without such evidence the Commission cannot use the opt-in approach that the 10th Circuit found to be unlawful.

The court also found that the Commission failed to narrowly tailor the CPNI requirements, thereby failing the requirements of the fourth prong of the test. The court found that the Commission had not adequately considered the opt-out strategy, thus the approach chosen could not have been narrowly tailored. Moreover, the Commission offered no evidence, but relied wholly on speculation to support the position that an opt-out approach would not sufficiently protect the stated Commission interests. As the court stated, "[s]uch speculation hardly reflects the careful calculation of costs and benefits that ...commercial speech jurisprudence requires."[8] Beyond speculation, there simply is no credible evidence that would support the vacated rules. As discussed above, an opt-out approach adequately protects customers' privacy concerns. Moreover, the costs and efforts necessary to implement an opt-out approach are far less than an opt-in approach. Although the court's decision did not absolutely prohibit implementation of an opt-in approach, the decision did place significant requirements around the lawfulness of such an approach. Because the regulations can be no more extensive than necessary to serve the Commission's stated interests, an exclusive opt-in approach cannot pass constitutional muster.[9]

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[8] *U.S. West* at 1239.

[9] Just as with the alleged privacy concerns, to the extent the Commission contends that competitive harms exist and can be alleviated only by an opt-in approach, the Commission must also present real evidence to support these claims. BellSouth does not believe any such evidence exist. Even if it did, however, the 10th Circuit found that competition, standing alone does not constitute a substantial state interest. Thus, any potential competitive harms will not make an opt-in approach lawful unless the Commission can also present evidence to prove privacy harms.

B. An Opt-Out Approach Should be Maintained by the Commission

Not only is sufficient evidence lacking to support an opt-in approach, Section 222 of the Act itself provides clear evidence that Congress did not intend to require an opt-in approach. The literal language of the Act is quite obvious in its exclusion of a requirement that carriers obtain "affirmative" approval, either written or oral. Section 222(c)(1) only refers to actions carriers may take "with the approval of the customer." This expression of the predicate approval required of carriers' internal use of CPNI is in stark contrast with the requirement in Section 222(c)(2) that carriers disclose CPNI externally "upon *affirmative written* request."[10] Under fundamental principles of statutory construction, the absence of a requirement that approvals be either "affirmative" or "written" for a carrier's internal use of CPNI within the same subsection and the presence of such express conditions on requests for disclosure of CPNI externally provides clear indication that Congress intentionally chose not to impose such conditions on internal use of CPNI. The Commission should not assume a requirement of affirmative approvals in Section 222(c)(1) where Congress has plainly chosen not to require it.

Nor does the clause "with the approval of the customer" require by its own terms a conclusion that an approval must be affirmative. Approval easily may be inferred from a customer's inaction, particularly when that inaction is preceded by notice of the consequences of inaction. All carriers, therefore, should be allowed to use CPNI unless the affected customer, having been notified of the carrier's plans, takes some action to stop such use.

Such an opt-out approach is also consistent with that imposed by Congress on cable operators. Under Section 551, cable operators are required only to notify their subscribers of the cable operator's intended use of "personally identifiable information" in providing cable and

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[10] 47 U.S.C. § 222(c)(2) (emphasis added).

"other services," which includes any wire or radio communication service provided over the operator's cable facilities.[11] No affirmative response is required of subscribers before cable operators are permitted to use such information internally for these broad purposes. Only when the cable operator desires to disclose such information to someone other than the subscriber or cable operator is affirmative consent of the subscriber required. Again, under basic principles of statutory construction, the Commission should not assume a requirement of affirmative approval under Section 222(c)(1) where one has not been assumed or required under comparable Section 551.

A notice and opt-out process also is consistent with the procompetitive objective of the Act and this Commission. "[T]he free flow of information —even personal information — promotes a dynamic economic marketplace, which produces substantial benefits for consumers and society as a whole."[12] Stated conversely, unnecessary restriction on the flow and use of information will hinder development of a dynamic economic marketplace and retard the production of benefits for consumers and society. The Commission should avoid reading into the Act a requirement that would have an effect directly opposite that intended by Congress.

Nor is an affirmative approval requirement necessary to prevent carriers or any subset of them from having an unfair competitive advantage. Prior to the CPNI Order, all LECs had long operated under an opt-out or implied consent procedure for both residential and business customers in their marketing of CPE and enhanced services, and all but the BOCs were able to do so with no prior notification obligation. And, even the BOCs' notification obligation was limited to multiline business customers. With or without prior notice, however, the opt-out

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[11] 47 U.S.C. § 551.

[12] *See Privacy and the NII: Safeguarding Telecommunications-Related Personal Information,* U. S. Department of Commerce, National Telecommunications and Information Administration (October 1995) ("NTIA Study") at 24-25.

approach gave these LECs no unfair "leverage" that enabled them to disrupt these competitive markets. Nor should there be any expectation, – indeed, there is no evidence – that an opt-out approach would provide LECs any unfair competitive advantage in the long distance market place. The Commission should not be swayed by arguments that are likely to be made that an opt-out approach will stifle competition in these markets.

C. The Commission Should Retain Its Current Finding Regarding the Interplay Between Sections 222 and 272.

The *Notice* asks whether, if an opt-out approach for obtaining customer approval for use of CPNI is allowed, the Commission should then reconsider its position that CPNI does not constitute "information" subject to the nondiscrimination provision of Section 272(c). The answer is no. The Commission's decision to exclude CPNI from the nondiscrimination provision of Section 272(c) was the right decision and moving to an opt-out approach for customer notification should not alter it. The Commission's analysis on this subject is quite clear and convincing. Regardless of the notification process used – opt-in or opt- out – the Commission must not overlook its prior analysis on the interplay between Sections 222 and 272.

Although the Commission considered its adoption of an opt-in approach as part of its analysis regarding Section 272(c), this was not the decisive factor. Indeed, many other factors were significantly more important. First, proper statutory construction produces the result reached by the Commission. Many carriers, including BellSouth, filed extensive comments explaining how Sections 222 and 272 should operate within the framework established by Congress in the Act. For brevity's sake, BellSouth will not repeat those arguments here but includes a copy of those comments as an attachment to be included in the record. Those comments were filed at the request of the Commission and responded to specific questions related to the interplay between Sections 222 and 272. As explained there, Congress intended

customers to receive the full benefits afforded to them pursuant to Section 222, which the Commission recognized would not occur if CPNI were subject to the non-discrimination provisions of Section 272.

Second, the reasons that the Commission expressed for determining that CPNI is not subject to the Section 272 nondiscrimination provision are applicable regardless of whether the customer notification process is an opt-in or an opt-out approach. The Commission recognized that applying the nondiscrimination provision of Section 272 to CPNI would do a number of things. One, it would force BOCs to not only obtain approval for using CPNI for themselves but also for any number of other carriers. The Commission determined that such approval was inappropriate because it would not "constitute effective notice [to] or informed approval"[13] by the customer. Two, because BOCs would have to obtain approval not only for themselves but also for countless other carriers (which, as just stated, the Commission found to be inappropriate), the Commission realized that the BOCs would be effectively prohibited from sharing CPNI with their 272 affiliates. As the Commission stated "the burden imposed by the nondiscrimination requirements would, in this context, pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown."[14] This would clearly cut against the intent of Congress by not serving the customers' interests as envisioned under Section 222. Based on this analysis, the Commission correctly determined that CPNI is not information that

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[13] *CPNI Order*, 13 FCC Rcd at 8176-77 ¶163.

[14] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14485 ¶ 142 (1999) ("*CPNI Reconsideration Order*").

must be shared on a nondiscriminatory basis pursuant to Section 272(c). The Commission properly reconfirmed its position in the *CPNI Reconsideration Order*.

Regardless of whether an opt-in or opt-out notification process is used, the Commission's analysis of the relationship between Sections 222 and 272 remains the same. If an opt-out approach is used, BOCs will face the same "insurmountable burdens" in applying Section 272(c) nondiscrimination obligations to CPNI that they face with an opt-in approach. Just as with an opt-in approach, an opt-out notice will be equally ineffective and will not provide adequate informed consent to the customer about having to disclose CPNI to countless other carriers, known and unknown. Therefore, the Commission cannot simply reverse its finding that CPNI is not information pursuant to Section 272(c) because an opt-in approach is unlawful.

II. Conclusion

While the 10th Circuit did not forbid an opt-in program as being unconstitutional, it made clear that such a program could only be sustained by a requisite showing of evidence to support the *Central Hudson* analysis. No such evidence exists. Even if it did, however, this evidence is needed merely to determine the program's lawfulness. The Commission should not make policy decisions on the basis of whether a decision is legal or illegal but on what will better the industry as a whole. On this standard, an opt-out program will prevail. Finally, the Commission should not change its original decision regarding the interplay between Sections 222 and 272 no matter

what decision it reaches on the opt-in/opt-out question. As the Commission has properly determined, CPNI should not be subject to the nondiscrimination obligations of Section 272(c).

Respectfully submitted,

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Dated: November 1, 2001

ATTACHMENT

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BELLSOUTH FURTHER COMMENTS

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SUMMARY

The Bureau has posed a series of questions that purport to probe the relationship between the customer information provisions of Section 222 that are applicable to all carriers and the nondiscrimination provisions of Sections 272 and 274 that apply only to the BOCs. In considering BellSouth's responses to those questions, the Bureau should remain mindful of the following:

Notwithstanding the Commission's conclusion that CPNI is within the scope of "information" subject to Section 272(c)(1), the specific rules Congress enacted in Section 222 to govern the handling and treatment of CPNI by all carriers, including the BOCs, prevail over the more generalized "information" provisions of Section 272(c)(1). Thus, the BOCs' use of CPNI is exempt from the general provisions of Section 272(c)(1) by the specific provisions of Section 222.

Moreover, the proclaimed "unqualified" nature of the nondiscrimination obligation of Section 272(c)(1) is very much qualified by the express provisions of Section 272(g)(3). BOCs engaged in activities permitted under Section 272 may engage in "the same types of marketing activities as any other service provider," including the use of CPNI, unencumbered by the nondiscrimination obligations of Section 272(c)(1). Similarly, BOCs engaged in marketing activities permitted under Section 274 are under no special obligations for sharing CPNI with nonaffiliates, absent written direction from the customer, that are not also applicable to other carriers.

A BOC engaged in permitted Section 272 or 274 activities does not escape nondiscrimination obligations entirely, however. Section 222 includes its own nondiscrimination standard that Congress imposed on all carriers in balance with the equally important policy

objective of protecting customers' reasonable expectations of privacy while facilitating uses of CPNI beneficial to the customer. Thus, while Section 222 operates principally to protect customer privacy interests by requiring carriers to hold customer information in confidence (but permitting carriers to make use of the information in ways beneficial to the customer without imposing onerous approval burdens on the customer), Section 222 also obligates carriers to disclose CPNI to nonaffiliates upon written direction from the customer. BOCs, like all other carriers, are thus prohibited from discriminating against other entities by refusing to share CPNI when a customer has affirmatively expressed its desire for such sharing. Where Congress has already established the appropriate balance of these potentially competing interests in the specific context of carriers' use and disclosure of CPNI, the Commission cannot upset that balance by superimposing a generalized nondiscrimination standard that defeats rather than protects customers' privacy expectations. Instead, the Commission must resolve the interplay between these provisions in a way that maintains the specific balance already struck by Congress in Section 222.

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Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	

BELLSOUTH FURTHER COMMENTS

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. and its affiliated companies ("BellSouth"), submits these comments in response to the Common Carrier Bureau's recent Public Notice in the above referenced proceeding.[1]

The Bureau has requested further comment to supplement the record on issues previously raised in this proceeding and to focus on the interplay of those issues with the Commission's decisions interpreting and applying Sections 272 and 274 of the Act.[2] Specifically, the Bureau has posed a series of questions that purport to probe the relationship between the customer

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[1] Public Notice, CC Docket No. 96-115, DA 97-38 (rel'd Feb. 20, 1997).

[2] Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* *See, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-489 (rel'd Dec. 24, 1996) ("*Non-Accounting Safeguards Order*"); *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services*, CC Docket No. 96-152, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-35 (rel'd Feb. 7, 1997) ("*Electronic Publishing Order*").

information provisions of Section 222 that are applicable to all carriers and the nondiscrimination provisions of Sections 272 and 274 that apply only to the BOCs. Because many of the questions are narrowly focused and often seemingly based on implicit assumptions that are not appropriate in the first instance, however, BellSouth's responses are preceded by a summary look at the interrelationships of the provisions of the Act in question.

Overview of Sections 272 and 222

Before one can assess the interplay of Sections 272 and 222, one must first look to the internal structure, purpose, and meaning of the respective sections.

Section 272 defines the permitted relationship between a BOC and its interLATA services affiliate. Included within Section 272 is a general obligation that the BOC not discriminate in favor of that affiliate "in the provision or procurement of goods, services, facilities, and information."[3] The Commission has deemed this nondiscrimination obligation to be "unqualified,"[4] and has also concluded that CPNI is included within the "information" that is subject to this provision.[5]

Also included within Section 272 is specific authority for a BOC to engage in marketing and sales relationships with its Section 272 affiliate. The Section 272 affiliate may market and sell

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[3] 47 U.S.C. § 272(c)(1).

[4] *Non-Accounting Safeguards Order*, at ¶ 197.

[5] *Non-Accounting Safeguards Order*, at ¶ 222. Notwithstanding the Commission's conclusion that CPNI is within the scope of "information" subject to Section 272(c)(1), the specific rules Congress enacted in Section 222 to govern the handling and treatment of CPNI by all carriers, including the BOCs, prevail over the more generalized "information" provisions of Section 272(c)(1). Thus, in addition to the exemption from Section 272(c)(1) for BOCs' use of CPNI for activities permitted under Section 272(g) -- an exemption internal to Section 272 -- the BOCs' use of CPNI is also exempt from the general provisions of Section 272(c)(1) by the specific provisions of Section 222.

the telephone exchange services of the BOC if the BOC permits others to do so as well.[6] Further, upon obtaining Section 272(d) relief, the BOC may market and sell the services of the Section 272 affiliate.[7]

Contrary to the Commission's pronouncement regarding the "unqualified" nature of the nondiscrimination standard of Section 272(c)(1), that standard is very much qualified by the specific language of Section 272(g)(3). This latter section provides a precise rule of construction to resolve potential conflicts between the nondiscrimination standard of Section 272(c) and the marketing activities permitted by Sections 272(g)(1) and (g)(2). That rule makes clear that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c)."[8] Thus, *any* joint marketing or sales activity undertaken by a BOC or its 272 affiliate that is permitted under either Section 272(g)(1) or (g)(2) is exempt from the nondiscrimination obligation of 272(c).[9] Further, because the permitted marketing activities themselves are exempt from Section 272(c)(1), so too is the use of information in the course of performing those permitted activities.

While a BOC's use or disclosure of CPNI in the context of marketing activities permitted under Section 272(g) is exempt from Section 272(c),[10] however, the BOC does not escape all

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6 47 U.S.C. §272(g)(1).

7 47 U.S.C. §272(g)(2).

8 47 U.S.C. §272(g)(3).

9 Moreover, as discussed below, the Commission has already determined that BOCs that have obtained Section 271(d) relief are permitted under Section 272(g) "to engage in the same type of marketing activities as any other service providers." *Non-Accounting Safeguards Order*, at ¶ 291.

10 As described in note 5, *supra*, a BOC's use of CPNI is also excluded from the general provisions of Section 272(c)(1) by the specific provisions of Section 222.

nondiscrimination obligations regarding CPNI. Section 222 includes its own nondiscrimination standard that Congress imposed on all carriers in balance with other equally important policy objectives: protecting customers' reasonable expectations of privacy while facilitating uses of CPNI beneficial to the customer. Thus, while Section 222 operates principally to protect customer privacy interests by requiring carriers to hold customer information in confidence[11] (but permitting carriers to make use of the information in ways beneficial to the customer without imposing onerous approval burdens on the customer[12]), Section 222 also obligates carriers to disclose CPNI to nonaffiliates upon written direction from the customer.[13] BOCs, like all other carriers, are thus prohibited from discriminating against other entities by refusing to share CPNI when a customer has affirmatively expressed its desire for such sharing. Where Congress has already established the appropriate balance of these potentially competing interests in the specific context of carriers' use and disclosure of CPNI, the Commission cannot upset that balance by superimposing a generalized nondiscrimination standard that defeats rather than protects customers' privacy expectations. Instead, the Commission must resolve the interplay between these provisions in a way that maintains the specific balance already struck by Congress in Section 222.

Section 272(g)(1), Nondiscrimination, and CPNI. Section 272(g)(1) permits a BOC's Section 272 affiliate to market and sell the BOC's telephone exchange services as long as the BOC also permits other entities offering the same or similar services also to sell the BOC's

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11 47 U.S.C. § 222(a) ("Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to . . . customers . . . .").

12 47 U.S.C. § 222(c)(1).

13 47 U.S.C. § 222(c)(2).

telephone exchange services. Thus, while Section 272(g)(3) expressly exempts a BOC that permits its Section 272 affiliate to sell its telephone exchange services from the nondiscrimination standard of Section 272(c), Section 272(g)(1) reintroduces an alternative nondiscrimination obligation -- *i.e.*, the obligation to permit other entities also to market and sell the BOC's services.

This Section 272(g)(1) nondiscrimination obligation, however, is clearly different from the "unqualified" obligation of Section 272(c), for Congress would not have expressly excluded 272(g)(1) from the reach of 272(c) and at the same time reimposed that same standard within the very subsection it was excluding from that standard. Accordingly, the nondiscrimination standard in Section 272(g)(1) must be read to be not as rigid as the "unqualified" standard of Section 272(c),[14] but to be consistent with the general nondiscrimination standard of Section 202,[15] which prohibits only unreasonable discrimination and which, conversely, permits reasonable discrimination.

The CPNI provisions of Section 222 as they relate to activities conducted pursuant to Section 272(g)(1) must be considered in the context of this reasonable discrimination standard, not the purported "unqualified" standard of Section 272(c). First, as noted above, Section 222 already includes its own nondiscrimination standard that permits different treatment of customers'

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[14] The nondiscrimination standard of Section 272(g)(1) requires only that the BOC "permit" other entities to market and sell its services if the BOC's Section 272 affiliate markets and sells those services. In the *Non-Accounting Safeguards Order*, the Commission already has gratuitously expanded this obligation to mean that the BOC not only must *permit* such marketing and sales, but also must provide other entities "the *same opportunity* to market or sell the BOC's telephone exchange service under the *same conditions* as the BOC affiliate." *Non-Accounting Safeguards Order*, at ¶ 286. Clearly, of course, Section 272(c) does not provide any basis for this explication of the standard applicable under 272(g)(1) because Section 272(c) expressly does not apply in that context.

[15] 47 U.S.C. § 202 ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination . . . .").

CPNI[16] depending on justified presumptions and individual indications of customers' expectations or preferences with respect to their CPNI. Under this standard, some entities will be afforded access to customer information, others will not. But, the decision on whether a BOC's affiliate or any other entity may be provided CPNI rests with the customer. Moreover, this structure of Section 222 is entirely consistent with the structure of Section 272(g)(1), which requires a BOC "to permit" other entities to sell its services, but which includes no obligation to share CPNI to support a nonaffiliate's sales efforts absent affirmative written authorization from the customer pursuant to Section 222.

Thus, in contrast with the Commission's interpretation that Section 272(c) is an "unqualified" obligation to provide "information," any obligation for sharing of customer information under Section 272(g)(1) is very much qualified by the provisions of Section 222 that are designed to protect customers' reasonable expectations of privacy with respect to such information. The qualified nondiscrimination standard for permitted marketing activities under Section 272(g)(1) is entirely consistent with the balance Congress drew in Section 222 between presuming a customer expectation of use of CPNI by a carrier with whom the customer has a relationship, and affiliates of that carrier, and presuming a customer's expectation that such CPNI would not be shared with nonaffiliated entities without the customer's affirmative authorization.

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[16] While the "different treatment" permitted by Section 222 may be perceived as between entities, there is no "different treatment" of CPNI as between customers because the customer's expectations are always met. The Commission's rules should be focused on whether customers' expectations and indicated preferences are met in a nondiscriminatory manner, not on whether a BOC must ignore those customer expectations or preferences in order to ensure that the BOC's competitors all have the same access to the BOC's customer information resources as does the BOC in spite of customers' expectations.

Section 272(g)(2), Nondiscrimination, and CPNI. Like activities conducted pursuant to Section 272(g)(1), activities conducted pursuant to Section 272(g)(2) are expressly excluded from the "unqualified" nondiscrimination obligation of Section 272(c). Unlike Section 272(g)(1), however, Section 272(g)(2) does not reintroduce any alternative nondiscrimination standard. Thus, any marketing activity conducted pursuant to Section 272(g)(2) is not held subject to a specific nondiscrimination obligation. However, a BOC's use or disclosure of CPNI in the course of permitted Section 272(g)(2) activities remains subject to the nondiscrimination principles that Congress balanced in Section 222.

As the Commission noted in the *Non-Accounting Safeguards Order*, Section 272(g)(2) presently permits BOC to market and sell out-of-region interLATA services in combination with local exchange service, but restricts the present marketing or selling of any in-region interLATA services within a state until Section 271(d) relief is obtained for that state. This current restriction, the Commission has concluded, is comparable to the restriction imposed on AT&T, MCI, and Sprint by Section 271(e)(1). Upon Section 271(d) relief within a state, however, the restriction of Section 272(g)(2) will no longer be applicable and the BOC will not be limited within that state in its marketing with its 272 affiliate.[17] Moreover, because such marketing with the Section 272 affiliate is permitted under Section 272(g)(2) by virtue of the lifting of the

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[17] *Non-Accounting Safeguards Order*, at ¶ 291 ("After a BOC receives authorization under Section 271, the restriction in section 272(g)(2) is no longer applicable, and the BOC will be permitted to engage in the same type of marketing activities as other service providers."). Moreover, because the limitations on joint marketing activities imposed on AT&T, MCI, and Sprint by Section 271(e)(1) expire at the time a BOC receives Section 271(d) authorization in a state, a BOC obtaining imposed Section 271 relief "will be permitted to engage in the same type of marketing activities as" AT&T, MCI, and Sprint, including the use and disclosure of CPNI to the same extent these carriers use or disclose their own CPNI in such marketing activities. This equal marketing opportunity (including the use of CPNI) that obtains under Section 272(g)(2) is entirely consistent with Congress's decision to treat all carriers equally under Section 222.

restriction in that section, the nondiscrimination standard of Section 272(c) expressly does not apply.

As with Section 272(g)(1), above, however, a BOC engaging in activity permitted under Section 272(g)(2) does not escape a nondiscrimination obligation entirely. The BOC remains subject to the nondiscrimination principles of Section 222. Those principles require a BOC and every other carrier to protect customers' reasonable privacy expectations, but to observe individual preferences with respect to use or disclosure of CPNI. Thus, BOCs, like other carriers, remain obligated not to selectively honor customers' CPNI preferences.

Overview of Sections 274 and 222

Similar to Section 272 and its definition of the permitted relationships between a BOC and its interLATA services affiliate, Section 274 defines the permitted relationships between a BOC and its electronic publishing separated affiliate. Unlike Section 272, however, Section 274 also contemplates additional relationships between a BOC and electronic publishing joint ventures in which the BOC participates and between a BOC and other entities in teaming or other business arrangements. Also unlike Section 272, Section 274 has no broad "unqualified" nondiscrimination standard comparable to Section 272(c)(1). Instead, the general nondiscrimination standard of Section 274 merely requires the BOC to "provide network access and interconnection for basic telephone service to electronic publishers at just and reasonable rates."[18]

In addition, a BOC that provides inbound telemarketing or referral services to its electronic publishing affiliate must make such services available on nondiscriminatory terms.[19]

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[18] 47 U.S.C. § 274(d).

[19] 47 U.S.C. § 274(c)(2)(A); *Electronic Publishing Order*, at ¶ 149-56.

Nothing in the expression or context of this obligation, however, requires a BOC that has customer approval to use, access, or disclose CPNI in the course of providing these services to an affiliate to presume that it also may (or must) use, disclose or permit access to that CPNI by a third party absent affirmative customer authorization. Indeed, any such requirement would upset the balance of customer interests and competitive safeguards struck by Congress in Section 222.

Similarly, Section 274(c)(2)(B) permits BOCs to "engage in nondiscriminatory teaming or business arrangements,"[20] which the Commission has held to "encompass a broad range of permissible marketing activities."[21] Although the Commission has generally concluded that the foregoing nondiscrimination obligation includes the obligation to offer "basic telephone service information" to third parties on the same terms it is provided to the teaming arrangement,[22] the Commission has also declined to interpret the nondiscrimination standard of this section in a way that "would provide a disincentive for BOCs to engage in teaming arrangements in contravention of the plain language of Section 274(c)(2)(B) and the pro-competitive goals of the 1996 Act."[23] This same consideration militates against compelling a BOC to choose between forgoing teaming opportunities or subjecting customer information to undesired disclosure to or access by third parties. Accordingly, this nondiscrimination standard, too, must be read to be conditioned upon customer approval obtained in a manner consistent with customers' expectations. Indeed, a BOC honoring its customers' preferences, whatever they may be, regarding the BOC's use or disclosure of CPNI cannot be said to be favoring anyone.

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20 47 U.S.C. § 274(c)(2)(B).

21 *Electronic Publishing Order*, at ¶ 165.

22 *Electronic Publishing Order*, at ¶ 168.

23 *Electronic Publishing Order*, at ¶ 168.

Finally, Section 274(c)(2)(C) addresses BOCs' electronic publishing activities through participation in a joint venture enterprise. Although the BOC is prohibited from entering such arrangements on an exclusive basis, there is no specific nondiscrimination obligation that attaches, particularly with respect to the BOC's use of CPNI in that joint venture. Accordingly, a BOC's use of CPNI in its participation in an electronic publishing joint venture is governed solely by the terms of Section 222.

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BellSouth addresses individually below each of the Bureau's questions in the context of the foregoing overview.

I. Interplay Between Section 222 and Section 272

A. Using, Disclosing, and Permitting Access to CPNI

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of . . . services . . . and information . . ." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

CPNI is "made available to all other entities" by virtue of Section 222(c)(2) irrespective of a BOC's use, disclosure, or access to it for *any* purpose. Further, a BOC, like any other telecommunications carrier, *must* disclose CPNI to other entities when the customer directs it to do so in writing.[24] Beyond that, a BOC's use, disclosure, or access to CPNI for purposes of any activity in which the BOC is authorized to engage, including the marketing and sales of the

[24] 47 U.S.C. § 222(c)(2).

services of the BOC's Section 272 affiliate, triggers no additional obligation to identify or to disclose to other parties either the actual CPNI utilized by the BOC or any other CPNI.

A BOC that obtains Section 271(d) relief is permitted to market and sell the services of its Section 272 affiliate.[25] A BOC that does so is not engaged in activity "for or on behalf of" the affiliate, but is engaged on its own behalf in activity in which it is expressly authorized to engage. In performing these permitted activities, the BOC is specifically excluded from the reach of Section 272(c).[26] Thus, a BOC may use, disclose, or permit access to CPNI in the course of performing the marketing and sales activities it is permitted to perform under Section 272(g)(2) without incurring an obligation under Section 272(c) to disclose CPNI to any other entity. The BOC remains obligated, of course, to disclose CPNI to another party upon the customer's affirmative written request pursuant to Section 222(c)(2).

Further, even if a BOC performing marketing and sales activities it is permitted to perform under Section 272(g)(2) were considered to be performing those functions "for or on behalf of" the BOC's affiliate, which it is not, the BOC still would not incur an obligation under Section 272(c) to make CPNI available to all other entities. It matters not under Section 272(g)(3) whether the permitted marketing activity under Section 272(g)(2) is "for or on behalf of the affiliate." That the activity is permitted under that section removes the activity from the reach of Section 272(c).

Finally, the language of Section 272(c) itself confirms that a BOC's use, disclosure, or access to CPNI in the course of performing marketing and sales activities it is permitted to

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25 47 U.S.C. § 272(g)(2).

26 47 U.S.C. § 272(g)(3).

perform under Section 272(g)(2), even if considered to be "for or on behalf of the affiliate," would not be obligated under Section 272(c) to make that CPNI available to any other entity. The Section 272(c) nondiscrimination obligation attaches only to the BOC's "*provision* of . . . information" to the affiliate. The BOC's use of, or access to, CPNI or its disclosure to any entity other than the Section 272 affiliate[27] would not be the "provision of information" to the affiliate and would not be subject to Section 272(c).

That the Commission has determined that CPNI is "information" for purposes of Section 272(c) does not negate the specific exclusionary effect of Section 272(g)(3).[28] To the extent Section 272(c) does have any residual application to a BOC's use, disclosure, or permission of access to CPNI, however, it requires a BOC to abide by and honor customers' CPNI restrictions and disclosure approvals without discriminating on the basis of the identity of the entity that is seeking to use or have access to that customer's CPNI. In other words, it obligates the BOC to observe and protect customers' reasonable expectations of privacy with respect to CPNI, but to deviate from the norm when requested to do so by the customer, regardless of whether that deviation inures to the detriment of the Section 272 affiliate or to the benefit of the affiliate's

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[27] To the extent CPNI is disclosed to the Section 272 affiliate for purposes of marketing and sales activities permitted under Section 272(g)(1) or (g)(2), Section 272(c) would not apply by virtue of Section 272(g)(3). This circumstance is excepted from the discussion in the text above merely to show that even without Section 272(g)(3), Section 272(c) clearly does not reach a BOC's use of CPNI that does not involve the "provision" of CPNI to the Section 272 affiliate. Thus, for example, the provision of CPNI to a services affiliate of the BOC that provides marketing services to both the BOC and its Section 272 affiliate is not subject to Section 272(c)(1). *See*, *Non-Accounting Safeguards Order*, at ¶ 182.

[28] Indeed, as discussed *supra*, the specific and detailed requirements of Section 222 prevail over the general and nonspecific provisions of 272(c)(1).

competitor. Thus, like Section 222, Section 272(c) prohibits a BOC from selectively honoring customers' CPNI preferences.[29]

Section 272(c) does not, however, obligate a BOC to accept or require the same form of expression of approval or restriction for use or disclosure of CPNI. To do so would be contrary to the scheme established in Section 222, which recognizes that *all* carriers' customers have reasonable expectations of protection and use of CPNI that differ depending on whether the CPNI is to be used by the carrier (or its affiliates) or to be disclosed to an unrelated third party. Any requirement under Section 272(c) that a BOC protect its customers' expectations differently from other carriers and in a way that requires the BOC to make a choice between exposing the customers' CPNI to greater risk of disclosure to third parties or, conversely, that constrains the BOC's ability to use CPNI (and share it with affiliates) in a manner beneficial to the customer would be in conflict with Section 222. Accordingly, Section 272(c) cannot be read to compel such a result.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

Section 272(c)(1) does not require a Section 272 affiliate to be treated as a third party for purposes of Section 222(c)(2).

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[29] Because this section prohibits the BOC from selectively honoring customers' CPNI preferences, whether approvals or restrictions, it works in tandem with Section 222 to safeguard customers' privacy expectations. Under no circumstances should Section 272(c) be interpreted or applied in a manner that would compel a BOC to act contrary to its customers' CPNI preferences or in any manner that would otherwise jeopardize customers' reasonable expectations regarding CPNI.

Section 222(c)(2) must be read in the context of Section 222, generally, and Section 222(c)(1), specifically. Section 222 is designed to protect customers' reasonable expectations with respect to a telecommunications carrier's use of CPNI and, accordingly, obligates every telecommunications carrier to protect the proprietary information of its customers.[30] Section 222(c)(1) is a permissive CPNI-use provision, authorizing a carrier to use CPNI to provide the telecommunications service from which it is derived, and allowing for presumptive approval of other uses, following notice, that are consistent with customers' generalized expectations.[31] In contrast, Section 222(c)(2) is a mandatory disclosure provision, but one that balances the obligation of a telecommunications carrier to protect a customer's proprietary information from improper disclosure under Section 222(a) against a third party's interest in such information when an individual customer has, in essence, waived its rights under Section 222(a).

Thus, while Section 222(c)(2) creates an obligation that is an exception to a carrier's obligation under Section 222(a) and that is inconsistent with customers' generalized expectations, that section also permits the disclosing carrier to require affirmative written authorization from the customer as an evidentiary record of the individual customer's CPNI preferences. The need for this record is particularly acute when there may be reason to doubt a competing carrier's mere representation of having customer permission.[32] In contrast, when the separate entity is an affiliate

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30 47 U.S.C. § 222(a).

31 For documentation of customers' expectations regarding local exchange carriers', including BOCs', use of CPNI under notice and opt-out approval mechanisms, *see,* Pacific Telesis *ex parte* presentation of CPNI/Privacy Study, filed December 11, 1996 ("Pacific Telesis CPNI/Privacy Study").

32 *See, e.g., Policies and Rules Concerning Changing Long Distance Carriers,* 7 FCC Rcd 1038 (1992), *recon. denied,* 8 FCC Rcd 3215 (1993).

of the carrier, the carrier may reasonably conclude that the need for such an evidentiary record does not exist.

The separate affiliate requirements of Section 272 and, in particular, the nondiscrimination obligations of Section 272(c)(1), have no bearing on the operation of Section 222(c)(2). In the first place, the Commission has concluded that upon Section 271(d) relief, a BOC may engage in the same type of marketing activities as any other service provider. Thus, in engaging in such activities, the BOC is not required to treat its Section 272 affiliate any differently than another carrier treats its affiliates.

Moreover, customers' expectations of use of CPNI by a carrier that may have multiple affiliates are not dependent on the reasons that the carrier has affiliates. Indeed, in most cases, the customer is unlikely to know whether the carrier has established separate legal entities and is even less likely to know or care[33] about the carrier's reasons for doing so. Specifically, customers are not likely to care that a BOC has established a Section 272 affiliate for one set of legal reasons and may have another affiliate for another set of legal reasons (*e.g.*, tax or labor laws). Customers' expectations regarding the BOC's use or disclosure of CPNI with or among its various affiliates are simply unaffected by the reasons for the affiliate. Thus, it would make no sense to read Section 272(c) in a way that would require BOCs to act contrary to their customers' expectation merely as result of a regulatory or legal contrivance about which the customer does not care.

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[33] Customers are only likely to care about the presence of affiliates if the customer is unable to interact through a single point of contact. Given that the Commission has determined that upon Section 271(d) relief a BOC may engage in the same marketing activities as any other service provider, a requirement that a Section 272 affiliate be treated as third party would be inconsistent with both the customer's expectations and the Commission's own prior conclusion.

3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?

By its terms, Section 222 applies equally to every telecommunications carrier. Moreover, as discussed above, Section 272(c)(1) has no bearing on the application of Section 222(c)(2). Thus, the answer to this question must be the same for all telecommunications carriers.

As discussed in the preceding response, customers generally neither know nor care whether or why a telecommunications carrier may have established affiliates or intra-company operating units. Additionally, the record in this proceeding and past Commission decisions firmly establish that customers generally expect that a business with whom the customer has an established relationship will use or share information among its affiliates in a way that offers benefits to the customer.[34] Further, the need for an evidentiary record of a customer's authorization for a telecommunications carrier to share CPNI with another entity is not as acute when the other entity is an affiliate. Accordingly, a telecommunications carrier should not be required to treat its affiliates as third parties for purposes of Section 222(c)(2).[35]

B. Customer Approval

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI,

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[34] *See, e.g.*, Pacific Telesis CPNI/Privacy Study; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992).

[35] If the Commission concludes that *any* carrier must treat its affiliates as third parties under Section 222(c)(2), then it must conclude that *every* carrier must do so because Section 222 applies by its terms to "every telecommunications carrier."

must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

A BOC that utilizes a notice and opt out mechanism to obtain customer approval to disclose CPNI to a Section 272 affiliate is not required to utilize the same mechanism to obtain approval to disclose CPNI to a nonaffiliate.

Notice and opt out CPNI approval processes are an appropriate and efficient mechanism for obtaining a customer's approval for action that is presumed to be consistent with the customer's reasonable expectations. As the Commission has found on prior occasion and as the present record confirms, customers generally expect a business with whom the customer has an existing relationship to share information about that relationship among affiliates of the business.[36] Accordingly, notice and opt out procedures are an appropriate means of validating the presumption, while giving customers whose expectations differ from the norm an opportunity to protect their individual expectations.

Conversely, notice and opt out is an inappropriate means of obtaining customer authorization for activity that is presumed to be contrary to the customer's interest. Inherent in Section 222 is the presumption that customers prefer that their CPNI not be shared with entities not affiliated with the carrier. Indeed, Section 222(a) imposes the affirmative duty on all telecommunications carriers to protect the confidentiality of such information. Accordingly, a notice and opt out mechanism is an inappropriate tool for seeking authorization for information disclosure to entities unaffiliated with the carrier.

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[36] *See* note 34, *supra.*

Moreover, Section 222(d)(3) confirms that any telecommunications carrier may rely on oral approval to overcome a restriction on CPNI under circumstances described therein, including, for BOCs, referrals to a Section 272 affiliate. A BOC accepting oral approval for purposes of that section incurs no obligation to accept oral approvals for disclosure of CPNI to other entities because the circumstances described in that section do not contemplate the involvement of a nonaffiliated entity and, separately, because a referral to a Section 272 affiliate is a permitted marketing activity that is exempt from the requirements of Section 272(c)(1).

5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

If the Commission requires the BOCs to accept the same standard of approval for CPNI disclosure to nonaffiliates that it accepts for internal use or sharing of CPNI with a Section 272 affiliate, the Commission also must require all other carriers to observe a uniform standard. Subjecting the BOCs to different obligations under Section 222 is contrary to the express language of that section, which applies to "every telecommunications carrier." Moreover, a BOC with Section 271(d) relief is permitted to engage in the same type of marketing activity as any other carrier and those activities are excluded from the reach of Section 272(c)(1). Accordingly, Section 272 provides no basis for treating the BOCs differently.

6. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? If so, what specific steps, if any must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities. If the customer approves disclosure to both the BOC's section 272 affiliated and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same

rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?

A BOC that canvasses its customers regarding their preferences with respect to the BOC's use or disclosure of records relating to the business relationship between the customer and the BOC is not providing an "approval solicitation service" to its Section 272 affiliate or any other affiliate. Rather, the BOC is fulfilling its own obligations under the Act to protect the confidentiality of the customer's information and to use, disclose, or permit access to the information only with its customers' approval. Moreover, a BOC solicitation of approval to use CPNI for marketing activities permitted under Section 272(g), *i.e.*, "the same type of marketing activities as other service providers," is part of the marketing function itself, *i.e.*, the identification of potential customers. A BOC's solicitation for this purpose is thus not subject to Section 272(c)(1), and the BOC incurs no obligation to solicit its customers in support of its competitors' marketing efforts.[37]

Even if a BOC's solicitation of customer approval for CPNI use is not considered to be within the permitted marketing activities under Section 272(g), the BOC incurs no obligation to perform such a function on behalf of others. The First Amendment prohibits the Commission from compelling a BOC to contact its customers and "speak" on behalf of nonaffiliated entities.[38]

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[37] Further, the parent company of the BOC and the Section 272 affiliate or another BOC affiliate may canvass the customers of the BOC and perform other marketing functions for both entities. *Non-Accounting Safeguards Order*, at ¶ 183. Because the parent company is not a BOC, no Section 272(c) nondiscrimination obligation attaches, and the parent company or other BOC affiliate would have no obligation to solicit CPNI approvals on behalf of any other party.

[38] *Pacific Gas and Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 13 (1986) (First Amendment prohibits compelled access to private property, such as billing envelopes or customer information newsletters, because such compelled access "forces speakers to alter their speech to conform to an agenda they do not set.").

Section 272(c)(1) cannot be interpreted or applied to impose an unconstitutional burden on the BOCs. Accordingly, a BOC cannot be compelled to perform an "approval solicitation service" on behalf of nonaffiliates.

C. Other Issues

7. If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

As discussed in prior responses, Section 272(g)(3) removes entirely from the reach of Section 272(c)(1) any activities conducted pursuant to Sections 272(g)(1) and (g)(2). And, as the Commission has determined, once a BOC obtains Section 271(d) relief, it is permitted under Section 272(g)(2) to engage in the same marketing activities as any other service provider. Thus, the obligations of Sections 222(c)(1) and (c)(2) apply to a BOC's permitted marketing activities in the same manner as they would apply to the marketing activities of any other service provider; no specific obligations apply to the BOCs.[39]

Under Section 222, a BOC engaged in marketing activities permitted by Section 272(g), like any other telecommunications carrier, use, disclose or permit access to CPNI to provision the service from which the information was derived (and other associated purposes under Section 222(c)(1)(B)) and, with customer approval, may use, disclose, or permit access to CPNI for any other purpose. The BOC, like any other telecommunications carrier, may rely on customers'

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[39] This outcome is consistent with and reinforced by the plain language of Section 222, which by its terms applies to "every telecommunications carrier" without distinction.

reasonable expectations of the carrier's handling of CPNI, coupled with an informed notice and opt out mechanism to validate those expectations and to provide opportunity for exception, as a means of obtaining such approval.[40] With such approval, a BOC may use CPNI in marketing and selling the services of its Section 272 affiliate pursuant to Section 272(g)(2) and may disclose CPNI to the affiliate for the affiliate's marketing and selling of the BOCs services pursuant to Section 272(g)(1).[41]

8. To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.

Section 272(g) permits a BOC with 271(d) relief to sell the services of its affiliate and to engage in the same type of marketing activities as any other service provider. As with any carrier, a BOC's access to its own CPNI is a critical cornerstone of both the marketing and selling functions.

BellSouth is doubtful that any credible argument can be made that a BOC's use of CPNI is not essential to the BOC's marketing and sales activities under Section 272(g). Indeed, as this

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40 The Commission also should confirm that bill inserts are an appropriate and efficient tool for implementing a notice and opt-out approval mechanism.

41 Section 272(g)(1) requires a BOC that permits its Section 272 affiliate to market or sell its services also to permit other entities to market and sell the BOC's services. This obligation to permit others to sell the BOC's services is exempt from the provisions of Section 272(c)(1) and remains subject to the BOC's obligation to protect the confidentiality of its customer's information. Thus, the BOC is not obligated to disclose CPNI to a nonaffiliate merely because a customer has not objected to the BOC's disclosure of that information to its affiliate. Of course, the BOC is obligated to disclose the customer's information to another entity upon the customer's written request.

Commission has previously determined, the greatest value of a carrier's flexible access to its own records when selling the services it is permitted to sell is found in the carrier's ability to offer efficient customer service and true "one-stop shopping" for those services.[42] Thus, where Congress intended Section 272(g) and 271(e)(1) to operate in tandem "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services,"[43] and where this Commission has concluded that BOCs with 271(d) relief have the same opportunity to engage in the same type of marketing as any other service provider, it would be incongruous for the Commission to conclude that CPNI is not an essential element of a BOC's permitted marketing activities or to impose rules that hamper a BOC's use of CPNI in those activities. Accordingly, it would be error for the Commission to encumber a BOC's use, disclosure, or access to CPNI for statutorily permitted purposes by determining that a BOC's solicitation of approval for those permitted uses is not itself included within the marketing authority granted by Congress.

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services ... concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any ... services ... or information concerning its provision of exchange access to [its affiliate] unless such ... services ... or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

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42 *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards;* 6 FCC Rcd 7571, 7610 (1991) *("BOC Safeguards Order"), aff'd in part, vacated in part and remanded, California v. FCC,* 39 F.3d 919 (9th Cir. 1994) *("California III"), cert denied,* 115 S. Ct. 1427 (1995).

43 *See, e.g., Non-Accounting Safeguards Order,* at n. 715, *citing and paraphrasing* S. Rep. No. 104-23, 104th Cong., 1st Sess. 43 (1995).

The phrase "information concerning [a BOC's] provision of exchange access" in Section 272(e)(2) does not include CPNI as defined in Section 222(f)(1).[44] The information to which Section 272(e)(2) refers is information about the nature of exchange access service itself and the manner in which it is provided by the BOC -- information that may be relevant to an unaffiliated entity's request for such service pursuant to the preceding Section 272(e)(1). Indeed, if Section 272(e)(2) referred to CPNI, it would be at odds with Section 222 which leaves up to the customer about whom such information relates the decision whether the information is to be shared with a nonaffiliate. If CPNI were included under Section 272(e)(2), that section would operate contrary this customer prerogative by requiring public availability of the information even if the customer chose only to disclose it to the BOC's affiliate. The Commission should avoid a reading that creates a such a conflict within the Act when an alternative, internally consistent reading is available.[45]

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

A BOC contacting its customers to seek approval to use CPNI to engage in activities in which the BOC is permitted to engage is not performing a service for or on behalf of its Section 272 affiliate, but for itself. Accordingly, no "transaction" under 272(b)(5) has occurred.

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[44] The reference in Section 272(e)(2) to "services" similarly is unrelated to any CPNI approval solicitation process.

[45] At most, the reference to "information about [a BOC's] provision of exchange access" under Section 272(e)(2) is comparable to aggregate CPNI under Section 222(c)(3) for which a BOC already has a duty to make available when used outside a Section 222(c)(1) purpose.

Alternatively, the parent company of the BOC and the Section 272 affiliate or another BOC affiliate may canvass the customers of the BOC and other affiliates and perform other marketing functions, as long as the parent or other affiliate properly documents and apportions the costs incurred in doing so.[46] Again, however, such an arrangement is not between the BOC and its Section 272 affiliate, and therefore does not constitute a "transaction" under Section 272(b)(5).

11. Please comment on any other issues relating to the interplay between sections 222 and 272.

12. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 272.

The Commission need only affirm in whatever rules it adopts under Section 222 that those rules apply evenly to all carriers, including the BOCs, and that Section 272(c)(1) imposes no special CPNI burdens on the BOCs.

II. Interplay between Section 222 and Section 274

A. Threshold Issues

13. To what extent, if any, does the term "basic telephone service information," as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?

Although there is some apparent overlap between "basic telephone service information" ("BTSI") and CPNI, the two concepts are not identical. BTSI is defined to be network and customer information of a BOC and other information acquired by the BOC as a result of engaging in the provision of basic telephone service,[47] which is defined in turn to be wireline

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46 *Non-Accounting Safeguards Order*, at ¶ 182.

47 47 U.S.C. § 272(i)(3).

service.[48] CPNI, in contrast, refers to certain types of information a carrier has about "telecommunications service" subscribed to by a customer.[49] Thus, while BTSI might be more limited by its reference to wireline service, it may be broader by its reference to "network and . . . other information" the BOC may have that might not be within any of the categories of the CPNI definition. The distinction, however, may be one without significance.

The Commission has determined that a BOC may team with an electronic publishing provider, including a separated affiliate, under Section 274(c)(2)(B) if the respective teaming participants market only their own services.[50] A BOC with appropriate approvals may use CPNI in all of its own marketing efforts pursuant to Section 222, and thus may use CPNI in its respective marketing activities in a teaming arrangement. To the extent information is BTSI, a BOC using the information for its marketing its own services under a teaming arrangement is using the information "as authorized by this section [274]."[51] Thus, the only limitation on a BOC's use of its information to market its services under a teaming arrangement would be if the BOC did not have any necessary CPNI approval for that use. The BOC would still be able to use for that marketing purpose any BTSI that is not CPNI.

B. Using, Disclosing, and Permitting Access to CPNI

(i) Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

14. Does section 274(c)(2)(A) mean that a BOC that is providing "inbound telemarketing or referral services related to the provision of electronic publishing" to a separated affiliate, electronic publishing joint venture, or affiliate may use, disclose, or permit access to CPNI in connection with those services only if the CPNI is made available,

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48 47 U.S.C. § 272(i)(2).

49 47 U.S.C. § 222(f)(1).

50 *Electronic Publishing Order*, at ¶ 166.

51 47 U.S.C. § 274(c)(2)(B).

on nondiscriminatory terms, to all unaffiliated electronic publishers who have requested such services? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(A) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

A BOC that is providing inbound telemarketing or referral services under Section 274(c)(2)(A) must do so on a nondiscriminatory basis. That does not require a BOC that is engaged in such activities with an affiliate, separated affiliate, or joint venture and that uses, access, or discloses CPNI in accordance with customer approvals pursuant to Section 222(c)(1) to make that CPNI available to third parties who request those services, unless such third parties also have appropriate customer approval under Section 222.

Moreover, Section 222(d)(3) provides that a carrier, including a BOC, that performs any inbound telemarketing or referral function may use, disclose, or permit access to CPNI for the purpose of such activities for the duration of the call and with customer approval. A BOC providing inbound telemarketing or referral services under Section 274(c)(2)(A) that does not disclose or permit access to CPNI by the affiliate, separated affiliate, or joint venture incurs no obligation to make CPNI available to unaffiliated electronic publishers.

(ii) Section 274(c)(2)(B) -- Teaming or Business Arrangements

15. To the extent that basic telephone service information is also CPNI, should section 274(c)(2)(B) be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher" may use, disclose, or permit access to basic telephone service information that is CPNI in connection with that teaming or business arrangement only if such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(B) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

A BOC may engage in nondiscriminatory teaming or other business arrangements with any electronic publisher. Yet, the Commission has determined that in such arrangements, the BOC can only market its respective services.[52] Thus, a BOC's use of CPNI to market its own services in a teaming arrangement creates no obligation to use, disclose, or permit access to CPNI by any electronic publisher with whom the BOC has no teaming arrangement.

16. If section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party, only pursuant to the customer's "affirmative written request," does section 274(c)(2)(B) require that the entities, both affiliated and non-affiliated, engaged in section 274 teaming or business arrangements with the BOC be treated as third parties for which the BOC must have a customer's affirmative written request before disclosing CPNI to such entities?

A BOC marketing its own services pursuant to a teaming arrangement needs no affirmative written consent from the customer to use CPNI for that purpose. Nor does an affiliate or separated affiliate that is a member of the teaming or business arrangement need affirmative written consent. Similar to the discussion regarding Section 272, an informed notice and opt out approval mechanism is an appropriate means of validating customers' presumed expectations regarding a BOC's and its affiliate's use and sharing of CPNI. Once having validated that presumption, no further approval is required.

Nor should affirmative written approval be required for use, disclosure or access to CPNI by a teaming member that is not an affiliate of the BOC as long as such use, disclosure, or access is limited to the purpose of the teaming arrangement and as long as that purpose is within the scope of the notice of the BOC's intended use of CPNI. Although the teaming partner may not be a BOC "affiliate" under a given definition, customers' expectations regarding business's use of

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52 *Electric Publishing Order*, at ¶ 166.

information are based on customers' perceptions of the business as an enterprise, not as individual entities and legal relationships. A BOC that discloses that customer information may be used in teaming arrangements with nonaffiliated participants should not have to obtain further written approval.

(iii) Section 274(c)(2)(C) -- Electronic Publishing Joint Ventures

17. Should section 274(c)(2)(C) be construed to mean that an electronic publishing joint venture be treated as a third party for which the BOC must have a customer's approval, whether oral, written, or opt-out, before disclosing CPNI to that joint venture or to joint venture partners?

A BOC that is engaged in a joint venture activity to provide electronic publishing services should be permitted to use, access or disclose CPNI for the purpose of the joint venture activity without treating the joint venture as a third party for purposes of CPNI approval. For the reasons set forth above, a customer is not concerned with the legal niceties of the business structure of the business enterprise with whom they have a relationship. Adequate notice to the customer that the BOC may use CPNI in electronic publishing joint venture should, absent an opt-out response from the customer, constitute approval for the BOC to use and share CPNI for the purpose of the joint venture.

C. Customer Approval

(i) Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

18. Must a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher" under section 274(c)(2)(A) obtain customer approval pursuant to section 222(c) before using, disclosing, or permitting access to CPNI on behalf of such entities? If so, what forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation? What impact, if any, does section 222(d)(3) have on the forms of customer approval in connection with section 274(c)(2)(A) activities?

A BOC's notice and opt out approval process is sufficient to achieve initial approval for use of CPNI in providing inbound telemarketing or referral services under Section 274(c)(2)(A). Any customer from whom the BOC does not have approval for access to CPNI for such purposes may grant such approval orally during the inbound call pursuant to Section 222(d)(3).

19. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its separated affiliate or electronic publishing joint venture also offer to solicit that approval on behalf of affiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers when it provides such a service for its section 274 separated affiliates, electronic publishing joint ventures, or affiliates under section 274(c)(2)(A)? What impact, if any, does section 222(d)(3) have on the BOC's obligations under section 274(c)(2)(A) with regard to the solicitation of a customer's approval during a customer-initiated call? What specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 274 separated affiliates or electronic publishing joint ventures or affiliates over unaffiliated entities? If the customer approves disclosure to both the BOC's section 274 separated affiliates or electronic publishing joint ventures or affiliates and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 274 separated affiliates or electronic publishing joint ventures or affiliates?

A BOC that canvasses its customers regarding their preferences with respect to the BOC's use or disclosure of records relating to the business relationship between the customer and the BOC is not providing an "approval solicitation service" to its Section 274 affiliate or any other affiliate. Rather, the BOC is fulfilling its own obligations under the Act to protect the confidentiality of the customer's information and to use, disclose, or permit access to the information only with its customers' approval. A BOC incurs no obligation to solicit its customers in support of its competitors' marketing efforts. The First Amendment prohibits the Commission from compelling a BOC to contact its customers and "speak" on behalf of

nonaffiliated entities.[53] Section 274(c)(2)(A) cannot be interpreted or applied to impose an unconstitutional burden on the BOCs. Accordingly, a BOC cannot be compelled to perform an "approval solicitation service" on behalf of nonaffiliates.

20. To the extent that sections 222(c)(1) and 222(d)(3) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its section 274 separated affiliate, electronic publishing joint venture, or affiliate under section 274(c)(2)(A)? If, for example, a BOC may disclose CPNI to its section 274 separated affiliate pursuant to the customer's oral or opt-out approval, is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

Under Section 222, a BOC, like any other telecommunications carrier, may use, disclose or permit access to CPNI to provision the service from which the information was derived (and other associated purposes under Section 222(c)(1)(B)) and, with customer approval, may use, disclose, or permit access to CPNI for any other purpose. The BOC, like any other telecommunications carrier, may rely on customers' reasonable expectations of the carrier's handling of CPNI, coupled with an informed notice and opt out mechanism to validate those expectations and to provide opportunity for exception, as a means of obtaining such approval. A BOC that utilizes a notice and opt out mechanism to obtain customer approval to disclose CPNI to a Section 274 affiliate is not required to utilize the same mechanism to obtain approval to disclose CPNI to a nonaffiliate.

Notice and opt out CPNI approval processes are an appropriate and efficient mechanism for obtaining a customer's approval for action that is presumed to be consistent with the customer's reasonable expectations. As the Commission has found on prior occasion and as the

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53 *Pacific Gas and Electric Co. v. Public Utilities Comm'n*, note 38, *supra*.

present record confirms, customers generally expect a business with whom the customer has an existing relationship to share information about that relationship among affiliates of the business. Accordingly, notice and opt out procedures are an appropriate means of validating the presumption, while giving customers whose expectations differ from the norm an opportunity to protect their individual expectations.

Conversely, notice and opt out is an inappropriate means of obtaining customer authorization for activity that is presumed to be contrary to the customer's interest. Inherent in Section 222 is the presumption that customers prefer that their CPNI not be shared with entities not affiliated with the carrier. Indeed, Section 222(a) imposes the affirmative duty on all telecommunications carriers to protect the confidentiality of such information. Accordingly, a notice and opt out mechanism is an inappropriate tool for seeking authorization for information disclosure to entities unaffiliated with the carrier.

(ii). Section 274(c)(2)(B) -- Teaming or Business Arrangements

21. Must a BOC, that is engaged in a teaming or business arrangement under section 274(c)(2)(B) with "any separated affiliate or with any other electronic publisher," obtain customer approval before using, disclosing, or permitting access to CPNI for such entities? What forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation?

A BOC that is engaged in a teaming or other business arrangement to provide electronic publishing services should be permitted to use, access or disclose CPNI for the purpose of that activity without treating the teaming or other business arrangement as a third party for purposes of CPNI approval. For the reasons set forth above, a customer is not concerned with the legal niceties of the business structure of the business enterprise with whom they have a relationship.

Adequate notice to the customer that the BOC may use CPNI in a teaming or other business arrangement should, absent an opt-out response from the customer, constitute approval for he BOC to use and share CPNI for the purpose of that activity.

22. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of any of its teaming or business arrangements under section 274(c)(2)(B) also offer to solicit that approval on behalf of other teaming arrangements and unaffiliated electronic publishers? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers and teaming arrangements under section 274(c)(2)(B)? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its electronic publishing teaming or business arrangements over unaffiliated entities? If the customer approves disclosure to both the BOC's electronic publishing teaming or business arrangements and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its electronic publishing teaming or business arrangements?

A BOC that canvasses its customers regarding their preferences with respect to the BOC's use or disclosure of records relating to the business relationship between the customer and the BOC is not providing an "approval solicitation service" to participants in teaming or other business arrangements. Rather, the BOC is fulfilling its own obligations under the Act to protect the confidentiality of the customer's information and to use, disclose, or permit access to the information only with its customers' approval. A BOC incurs no obligation to solicit its customers in support of its competitors' marketing efforts. The First Amendment prohibits the Commission from compelling a BOC to contact its customers and "speak" on behalf of nonaffiliated entities.[54] Section 274(c)(2)(B) cannot be interpreted or applied to impose an unconstitutional burden on the BOCs. Accordingly, a BOC cannot be compelled to perform an "approval solicitation service" on behalf of nonaffiliates.

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[54] *Pacific Gas and Electric Co. v. Public Utilities Comm'n*, note 38, *supra*.

23. To the extent that sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its teaming or business arrangements under section 274(c)(2)(B)? If, for example, a BOC may disclosure CPNI to a section 274 separated affiliate with which the BOC has a teaming arrangement pursuant to the customer's oral or opt-out approval, is the BOC likewise required to disclose CPNI to unaffiliated electron publishers or teaming arrangements upon obtaining approval from the customer pursuant to the same method?

Under Section 222, a BOC, like any other telecommunications carrier, may use, disclose or permit access to CPNI to provision the service from which the information was derived (and other associated purposes under Section 222(c)(1)(B)) and, with customer approval, may use, disclose, or permit access to CPNI for any other purpose. The BOC, like any other telecommunications carrier, may rely on customers' reasonable expectations of the carrier's handling of CPNI, coupled with an informed notice and opt out mechanism to validate those expectations and to provide opportunity for exception, as a means of obtaining such approval. A BOC that utilizes a notice and opt out mechanism to obtain customer approval to disclose CPNI to a Section 272 affiliate is not required to utilize the same mechanism to obtain approval to disclose CPNI to a nonaffiliate.

D. Other Issues

24. Does the seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 274 separated affiliate or electronic publishing joint venture constitute a "transaction" under section 274(b)(3)? If so, what steps, if any , must the BOC and its section 274 separated affiliate or electronic publishing joint venture take to comply with the requirements of section 274(b)(3) for purposes of CPNI?

A BOC contacting its customers to seek approval to use CPNI to engage in activities in which the BOC is permitted to engage is not performing a service for or on behalf of its Section

274 affiliate or electronic publishing joint venture, but is contacting the customer on the BOC's own behalf. Accordingly, no "transaction" under 274(b)(3) has occurred.

25. Please comment on any other issues relating to the interplay between sections 222 and 274.

The Commission should confirm that a BOC may disclose CPNI to an affiliate without customer approval for the purpose of publishing a directory,[55] even if that directory is electronically published, without incurring an obligation to make such information available to other electronic publishers without customer approval. Further, subscriber list information that is provided to a BOC's directory publishing affiliate for purposes of an electronically published directory need only be made available to other persons for the purpose of publishing a directory.[56] The BOC is not obligated to make that information available to other electronic publishers generally. Thus, the fact that the BOC's affiliate is publishing a directory electronically does not create an obligation for the BOC to provide subscriber list information to all other electronic publishers, only to persons for the purpose of publishing a directory, which may be in electronic format.

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[55] 47 U.S.C. § 222(c)(1)(B).

[56] 47 U.S.C. §222(e).

26. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 274?

The Commission need only affirm in whatever rules it adopts under Section 222 that those rules apply evenly to all carriers, including the BOCs, and that Section 274 imposes no special CPNI burdens on the BOCs.

Respectfully submitted,

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CERTIFICATE OF SERVICE
(CC Dkt 96-115)

I hereby certify that I have this 17th day of March, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH FURTHER COMMENTS by placing a true and correct copy of the same in the United States mail, postage prepaid, addressed to the parties on the attached service list.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 1st day of November 2001 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S COMMENTS** by Electronic Mail addressed to the parties listed as follows.

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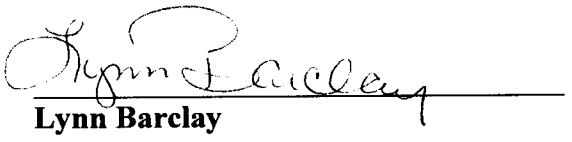

Lynn Barclay