

Public Utilities Commission  
San Francisco

MEMORANDUM

**DATE:** April 7, 2006

**TO:** The Commission  
(Meeting of April 13, 2006)

**FROM:** Gretchen Dumas, Legal Division  
Public Utilities Counsel IV

**RE:** Federal Communications Commission -- CC Docket No. 96-115;  
Notice of Proposed Rulemaking Regarding the Privacy of  
Customer Proprietary Network Information

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**SUMMARY:**

Legal Division seeks authority to file comments on the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking Regarding the Privacy of Customer Proprietary Network Information (CPNI). These comments would address the following issues: (1) the current state of how CPNI is being used by California telecommunications carriers; (2) concerns regarding whether federal and state laws that protect CPNI are being followed; (3) whether there are other problems that current law fails to address that the FCC should deal with in this rulemaking; and (4) the need for the FCC to respect unpublished numbers, particularly those of cellular customers.

**BACKGROUND:**

The Federal Communications Commission (FCC) is seeking comment on whether it should take additional steps to protect the privacy of customer proprietary network information (CPNI). The FCC is responding to a Petition filed by the Electronic Privacy Information Center (EPIC), which expressed concerns about the sufficiency of carrier practices related to CPNI. Specifically, EPIC's Petition notes that there are several web sites that advertise the sale of personal telephone records, including cell phone records, calling records for land-line and Voice over Internet Protocol (VoIP) numbers, as well as for non-published phone numbers.

Currently, CPNI is regulated on the federal level under §222 of the 1996 Telecommunications Act (1996 Act), and in California under §2891 and §2891.1 of the California Public Utilities (P.U.) Code. These sections create a framework to govern telecommunications carriers' use of information obtained by virtue of their provision of telecommunications services.

§ 222 (c)(a) of the 1996 Act provides as follows:

Privacy requirements for telecommunications carriers.  
– Except as required by law with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of telecommunications service shall only use, disclose or permit access to individually identifiable customer proprietary network information in his provision of (a) the telecommunications services from which such information is derived, or (b) services necessary to or used in the provision of the telecommunications services, including the publishing of directories.

The FCC's initial interpretation of this statute is set forth in the FCC order entitled, *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's 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*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (hereafter, "CPNI Order 1") In that Order, the FCC had required a customer's affirmative consent, described as "opt-in" approval, in order for a telecommunications carrier to be able to share that customer's CPNI with its affiliate and agents. However, various telecommunications carriers challenged this Order, and the Tenth Circuit Court of Appeal ultimately rejected the FCC's "opt-in" approach in *U.S. West v. FCC*, 182 F3d 1224 (10<sup>th</sup> Cir. 1999) cert. denied, 530 U.S. 1213. (June 5, 2000).

Accordingly, on July 16, 2002, the FCC adopted a further Order, *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's 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*, Third Report and Order And Third Further Notice of Proposed Rulemaking (hereafter, "CPNI Order 2"), utilizing an approach that the FCC believes comports with the *U.S. West* decision. In this Order, the FCC found, first, that use of CPNI by carriers requires a customer's

knowing consent in the form of notice using approval procedures described as "opt-out". Second, the FCC found that disclosure of CPNI to unrelated third parties or to carrier affiliates that do not provide communications-related services requires express customer consent, described as "opt-in" approval. See, CPNI Order 2, pp. 15 - 31, ¶ 31-50.

Based on EPIC's Petition, the FCC is seeking comment on whether this "opt-out" approach, which gives access to CPNI to carrier affiliates and agents, is responsible for the leakage of information that violates the rights of customers and puts them in jeopardy of identity theft. More specifically, the FCC is seeking comment on the nature and scope of the problem identified by EPIC, and on the feasibility of various safeguards that would protect consumer interests, such as the use of pass words. Also, EPIC suggests that companies be required to notify customers when the security of their CPNI may have been breached, and in this regard, the FCC asks whether the carrier should be required to call the customer before releasing her/his CPNI. The FCC also seeks comment on how carriers maintain CPNI and how data brokers are able to obtain access of this information from carriers. Finally, the FCC is requesting comment on the best way to ensure that the provisions of §222 of the 1996 Act and the FCC's rules on CPNI are enforced.

## **DISCUSSION:**

### **How CPNI Is Being Used by California Carriers**

To obtain answers to the various questions posed by the FCC, the CPUC staff has been in contact with California carriers. As of the date this memo is being circulated, not all carriers have complied with our request. However, as a result of staff's survey to date, the following information has been gathered.

At the time of this memo, responses have been received from 16 ILECs (incumbent local exchange carriers), including AT&T Inc., but not including Verizon California, or all four major wireless carriers. Of the responses received, at least eight California ILECS do not utilize CPNI for marketing purposes. Eleven carriers, including AT&T, have responded that they either do not share or disclose CPNI at all, that CPNI is not shared outside of the company (i.e. with third-party entities), or that CPNI is not shared without proper user authorization. Six carriers specifically mentioned utilizing "opt-out" mechanisms to protect CPNI, such as a biennial notification sent to all customers. Thus far, carriers have also indicated that they do not sell, share, or disclose CPNI to non-communications entities, such as data brokers.

Common CPNI protection measures include annual reviews of company practices, privacy protection training for employees (including customer service representatives), encouraging or requiring the use of user passwords, and releasing CPNI only if requested by the account holder in writing or in person with photo ID. According to those who responded, both residential and business customers were covered by carrier CPNI protections, whether dictated by their California tariffs or their company policy. Several carriers, including AT&T, stated that should a breach of CPNI security occur, a full investigation would be launched, and any affected customers would be notified. Carriers that offer online access to user accounts protect the customer by requiring both the user ID and a unique user-selected password; should the user forget his/her information, a new password is sent to the user's email address.

The information that staff has gathered to date does not raise significant concerns. However, it does offer practical ideas of how carriers are currently protecting CPNI (password). The legal division recommends that it be authorized to file comments discussing the above.

### **Respect for Unpublished Numbers**

California is one of the ten states that have taken a special interest in the right of privacy by making it an unalienable state constitutional right. In 1974, the California Constitution was amended to state:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life, liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy. (See, Cal. Const. Art. I, § 1.)

Proponents of this constitutional amendment included a statement in the state election brochure that read, in part:

Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American. At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian. The right of privacy is the right to be left alone... It prevents ...business interests from collecting and stockpiling unnecessary information about us and from misusing the information gathered for one purpose in order to serve

purposes or to embarrass us. Fundamental to our privacy is the ability to control circulation of personal information... The proliferation of ...business records over which we have no control limits our ability to control our personal lives. (quoting November 1972 state election brochure at 233).

Californians' interest in privacy has been explicitly extended to CPNI through P.U. Code § 2891. P.U. Code § 2891 prohibits Telephone Corporations from making available "to any other person or corporation" private financial information, calling patterns, types of telephone services utilized or demographic information about a residential customer without obtaining the customer's written consent.

P.U. Code § 2891.1 further limits the use of information about a subscriber:

A telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number.

PU Code § 2891.1 was drafted in reaction to the huge public outcry that occurred when the then Pacific Bell announced plans, in mid-March, 1986, to begin selling customer directory information to third parties. The legislative history of this law found that consumer privacy was of paramount importance in enacting this statute.

Two other relevant sections of the P.U. Code are focused on wiretap issues but can be read as being directly applicable to the issue being addressed by the FCC. P.U. Code § 7903 mandates as follows:

Every agent, operator, or employee of any telegraph or telephone office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, obtained, or in any manner turns, or attempts to turn, the information so obtained to his own account, profit, or advantage, is punishable by imprisonment in the state prison, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding ten thousand dollars (\$10,000), or by both such fine and imprisonment.

Furthermore, P.U. Code § 7906 requires as follows:

The Public Utilities Commission shall regularly make inquiry of every telephone corporation under its jurisdiction to determine whether or not such corporation is taking adequate steps to insure the privacy of communications over such corporation's telephone communication system.

These requirements of California law that are so clearly protective of the privacy of telecommunications customers. Given that, cell phone customers, who are the main focus of the FCC's inquiry in this Docket, should be afforded similar protections, and should be allowed to have their numbers unlisted unless they choose to have them published. This is particularly important for cell phone customers, because such customers must typically pay for incoming as well as outgoing calls.

Legal division accordingly recommends that it be authorized to file comments to the effect that the FCC follow California's lead by adding a provision to its rules blocking the publication of a subscriber cell phone number in a cell phone directory without the communications provider first obtaining the explicit, affirmative consent of the subscriber.

**RECOMMENDATION:**

For the reasons set forth above, staff recommends that the Commission authorize it to file comments on the FCC's Notice of Proposed Rulemaking Regarding the Privacy of CPNI in accordance with the following discussion.

Assigned staff: Legal: Gretchen Dumas (GTD, 3-1210); Telco: Roxanne Scott (RS2, 3-5263)

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