

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**COMMENTS OF  
THE ELECTRONIC PRIVACY INFORMATION CENTER**

**October 21, 2002**

Pursuant to the Commission's request for public comment<sup>1</sup> and notice<sup>2</sup> and in accordance with the Commission's rules<sup>3</sup> the Electronic Privacy Information Center (EPIC) submits the following comments regarding telecommunications carriers' use of customer proprietary network information (CPNI) in the event that a carrier goes out of business, sells all or part of its customer base, or seeks bankruptcy protection.

Considering the current wave of bankruptcies within the telecommunications industry, EPIC urges the Commission to protect the privacy rights of American consumers by implementing an opt-in approach towards telecommunications carriers' use of CPNI, pursuant to section 222 of the Communications Act of 1996, when a carrier goes out of business, or seeks to sell CPNI as an asset. The Commission has a fundamental responsibility, mandated by Congress in the passage of the Communications Act of 1996, to protect the privacy interests of those using the nation's telecommunications system, and this responsibility is all the more prescient now. This responsibility can only be met by adopting an opt-in approach to the use of CPNI when a carrier acquires customer information from a carrier that is exiting the telecommunications market. In addition, we ask the Commission to require carriers to provide advance notice to customers

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<sup>1</sup> *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214, (rel. July 25, 2002) (*Third CPNI Order*), 2002 WL 1726815; 2002 FCC LEXIS 3663.

<sup>2</sup> 67 Fed. Reg. 59236 (Sept. 20, 2002).

<sup>3</sup> 47 C.F.R. § 1.415.

acquired by the sale or transfer from another carrier in compliance with the Commission's authorization and verification (slamming) rules.<sup>4</sup>

While we proceed with these comments assuming that some disclosure of CPNI may be necessary to facilitate a smooth transition and no loss of service for the customer when a carrier goes out of business, it is essential to protect customers' privacy interests. Under the Commission's Third CPNI Order, a successor in interest should not qualify as an affiliated party permitted to use the more lax opt-out standards. The sale of CPNI as a business asset could result in serious and irreversible privacy harm to consumers. To the extent that the Commission allows any sale of CPNI, we believe that such sale may only be allowed if the recipient is a telecommunications provider and an opt-in mechanism is provided to customers.

### **I. A Successor in Interest Must Obtain Opt-In Consent to Use of Customer Information for Marketing Purposes**

The Commission's Third CPNI Order draws a careful distinction between telecommunications' carriers use of CPNI when engaging in transactions with affiliated parties providing communications services, and the use of CPNI when engaging in transactions with unaffiliated third parties or affiliates not providing communications services.<sup>5</sup> This approach, the Commission deemed, struck the right approach between the privacy interests of the customers and the promotion of the carriers' meaningful commercial interests in marketing customer information. Consistent with this approach, telecommunications carriers receiving CPNI as successors in interest should be required to opt-in to their commercial use of CPNI, as the marketing interests are not present in this scenario. The sole interest present during a bankruptcy transfer of CPNI data to a successor in interest is the continued provision of customer service, which can be satisfied by mandating an opt-in approach to marketing uses of CPNI data.

#### *A. Congressional Intent Underlying Section 222 was to Protect Customer Privacy*

When Congress enacted section 702 of the Telecommunications Act of 1996, its express intent was to protect the privacy interests of consumers by insisting that confidential information remain protected. Section 702 of the Telecommunications Act of 1996 requires all telecommunications carriers "to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier."<sup>6</sup> Specifically, a telecommunications carrier is precluded from disclosing CPNI it receives as a result of providing its service without customer approval, subject to narrow exceptions.<sup>7</sup>

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<sup>4</sup> 47 C.F.R. § 64.1120(e) and orders in CC Docket No. 00-257, specifically, *In the Matter of 2000 Biennial Review: Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, 16 FCC Rcd 11218 (2001) (*Slamming Order*).

<sup>5</sup> *Third CPNI Order*, ¶ 2.

<sup>6</sup> Telecommunications Act of 1996 § 702(a), 47 U.S.C. § 222(a) (2000).

<sup>7</sup> Telecommunications Act of 1996 § 702(c)(1), 47 U.S.C. § 222(c)(1) (2000).

Section 222 (c)(1) requires a telecommunications carrier to obtain a customer's approval before it can use, disclose, or allow access to that customer's CPNI.<sup>8</sup> In the Committee Report, the House Commerce Committee explained that the Section 222 was to balance "the need for customers to be sure that personal information that carriers may collect is not misused" against the customer's interest in ensuring "that when they are dealing with their carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about their service."<sup>9</sup>

*B. The Supreme Court has Recognized that an Interest in Privacy of Personal Information is Substantial*

American jurisprudence recognizes a fundamental right to privacy in personal communications, and the courts and Congress have recognized the paramount interest a citizen has in protecting her privacy.<sup>10</sup> The constitutional right of privacy protects two distinct interests: "one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."<sup>11</sup> Telecommunication carriers' use of CPNI implicates both of these interests. Citizens have a legitimate and significant expectation of privacy with respect to sensitive personal information such as which telephone numbers they have dialed. In addition, customers have a right to personally determine how those carriers in possession of their personal information shall use this information.

The fact that some CPNI, such as a consumer's name and address, may be publicly available is irrelevant, because "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."<sup>12</sup> More significantly, the protections afforded by the regulations go well beyond concerns with the use or disclosure of publicly available information. The regulations and the underlying statute also protect even more sensitive data about telephone numbers the customer called or from which the customer received a call and the length of the call. As Justice Stewart wrote:

Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.<sup>13</sup>

In addition, privacy is a real and significant interest to most Americans: in a recent major survey, the top concern listed by consumers was that companies they patronize will share their personal

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<sup>8</sup> *Id.*

<sup>9</sup> H.R. Rep. No. 104- 204, pt. 1, at 90 (1995).

<sup>10</sup> *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[T]he protection of potential clients' privacy is a substantial state interest.").

<sup>11</sup> *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

<sup>12</sup> *Department of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 500-02 (1994) (finding that unions could not use FOIA to obtain the home addresses of federal employees represented by unions).

<sup>13</sup> *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).

information with other companies without consumer authorization.<sup>14</sup> The Commission has cited this same study, showing that 73 percent of those polled would bar disclosure of CPNI to companies other than their own telephone company.<sup>15</sup>

It is notable that Congress recognized the importance of a citizen's privacy interest by enacting other statutes limiting disclosure of similarly privacy-invasive information. For example, Congress has enacted an elaborate statutory scheme to protect the privacy of telephone communications,<sup>16</sup> and specifically prohibited the use of pen registers without a court order.<sup>17</sup> Thus, Congress has determined that people have a legitimate expectation of privacy with respect to the phone numbers they dial and has decided that this information is so sensitive that it has developed an entire statutory scheme governing law enforcement's ability to collect such data. Similar rules have been established to protect the privacy of cable subscriber records,<sup>18</sup> video rental records,<sup>19</sup> credit reports,<sup>20</sup> and medical records.<sup>21</sup>

### *C. Opt-in Should be Required When Acquiring Carriers Seek to Use CPNI*

Under an opt-in approach, customers must give the carrier express authorization before the company can divulge their CPNI, which, as the Commission explained, "will minimize any unwanted or unknowing disclosure" of the information.<sup>22</sup> Under the opt-out approach, consumers may not possess the knowledge that they must affirmatively act to prevent carrier distribution of their CPNI. If they do not have this knowledge, then they cannot exercise discretion regarding it. Because "approval" requires an affirmative action by an informed consumer, only the opt-in approach satisfies congressional intent. It is the most reasonable fit between Congress's ends and the means chosen to reach those ends.

In the *Third CPNI Order*, the Commission required only an opt-out approach for intra-company and joint venture use of CPNI by providers of telecommunications services.<sup>23</sup> As justification for

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<sup>14</sup> Harris 2002 Survey, Feb. 20, 2002. Press release available at <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=429> (hereinafter "*Harris Survey*"). See also Testimony of Lee Rainie before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce (May 8, 2001) (86 percent of internet users surveyed stated that Internet companies should ask people for permission [opt-in] to use their personal information); *Third CPNI Order* at notes 129-30.

<sup>15</sup> *Third CPNI Order* at ¶ 53, n. 130, citing *Harris Survey* at 44.

<sup>16</sup> See Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-2521 (2002)).

<sup>17</sup> See Pub. L. No. 99-508, 100 Stat. 1868 (1986) (codified as amended at 18 USC. § 3121-3127 (2002)).

<sup>18</sup> See Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. § 551 (2000)).

<sup>19</sup> See Video Privacy Protection Act, Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified as amended at 18 USC § 2710 (2002)).

<sup>20</sup> See Fair Credit Reporting Act, Pub. L. No. 91-508, Tit. VI, § 601, 84 Stat. 1129 (codified as amended at 15 U.S.C. § 1681 (2000)).

<sup>21</sup> See 42 U.S.C. § 290dd-2(a)(1994); See generally Marc Rotenberg, *The PRIVACY LAW SOURCEBOOK 2002: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS* 1- 173 (2002).

<sup>22</sup> *In the Matter of Implementation of the Telecommunications Act of 1996; 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*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 at ¶ 87 (1998) (First CPNI Order).

<sup>23</sup> See *Third CPNI Order* at ¶¶ 31-49.

opt-out, the Commission relied on the carrier's need for a continuing relationship with the customer as an effective deterrent to prevent a carrier's abuse of CPNI.<sup>24</sup> It must be noted, however, that this incentive may be diminished for the exiting carrier, and the use or transfer of CPNI could have devastating effects for personal privacy. Although the acquiring carrier will presumably be regulated by the FCC and subject to section 222 of the Act, perhaps giving it an incentive to not abuse CPNI, the carrier has nonetheless not been initially chosen by the customer. While it could be argued that the acquiring carrier has an incentive to not abuse CPNI and risk losing a customer, this assumes that customers in this position are always free to choose another carrier because a competitive choice exists for the customer. The Commission has recognized that this is not always so.<sup>25</sup>

In the context of its Authorization and Verification rules, the Commission requires an acquiring carrier to give notice to the affected subscribers that their telecommunications services will be transferred to another carrier.<sup>26</sup> In requiring the notice to state that the customer has the right to make another carrier selection, the Commission reasons that, "The affected subscribers did not choose the acquiring carrier and should receive reasonable notice that they have the right to select a new carrier if they do not want to be served by the acquiring carrier."<sup>27</sup> This is a salient point. When a carrier exits the market, a customer can not choose who the acquiring carrier will be, but can only either accept the new carrier as their preferred carrier or elect to choose a different carrier. As noted above, consumers do not always enjoy the ability to make a competitive choice, especially when dealing with a LEC. The customer is in a precarious situation by being transferred to another carrier, and requires additional safeguards against the acquiring carrier's use and disclosure of CPNI. An effective opt-in mechanism, combined with adequate notice requirements, is the only way to mitigate potential harm to customers' privacy.

## **II. An Opt-out Mechanism Will Not Adequately Protect the Transfer of Customer Information When a Carrier Leaves the Market**

As the telecommunications industry experiences a wave of bankruptcies and mergers, maintaining privacy protections for customer's personal information is critically important. Although the Commission adopted a partial opt-in approach in the *Third Report and Order*, the approach was narrowly tailored to apply only to CPNI disclosure by a customer's carrier and its affiliates that provide communications-related service.<sup>28</sup> Opt-in is the most feasible approach to permit informed customer consent and to permit individuals to restrict the use of personal information, where there is no legitimate countervailing commercial interest.

### *A. The FCC Has Mandated an Opt-in Approach*

In the *Third Report and Order*, the Commission mandated an opt-in approval method for CPNI disclosure to unrelated third parties or to carrier affiliates that do not provide communications

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<sup>24</sup> See *id.* at ¶ 37.

<sup>25</sup> *Id.* at ¶ 37 and n. 109, "We recognize that this constraint [to not lose customers] is less effective where competitive choices are less readily available."

<sup>26</sup> See *Slamming Order* at ¶¶ 15-16.

<sup>27</sup> *Id.* at ¶ 26.

<sup>28</sup> *Id.* at ¶¶ 31-49.

related services.<sup>29</sup> In doing so, the FCC recognized that certain customer-business relationships require the added protection of an opt-in mechanism to ensure privacy in the disclosure of CPNI.<sup>30</sup> The Commission also noted that CPNI includes sensitive customer information,<sup>31</sup> and that the government has a substantial interest in limiting the unexpected disclosure of CPNI.<sup>32</sup>

*B. Customers Should Be Given Advance Notice of the Carrier Transfer*

While we have serious concerns about the disclosure of CPNI from an exiting carrier to an acquiring carrier, we understand that some disclosure may be necessary to prevent an interruption of customers' service. To the extent that the disclosure of CPNI is necessary, we urge the Commission to mandate that an acquiring carrier give at least 30 days advance notice to customers of the CPNI transfer. This approach would be consistent with the FCC's Authorization and Verification Rules, which require a 30 day advance notice to inform customers of a carrier change.<sup>33</sup> If the CPNI transfer is not necessary to maintain service, we urge the Commission to only allow the exiting carrier to share CPNI with the acquiring carrier after receiving express consent from customers by way of an opt-in notice. If the Commission chooses to place the burden on the acquiring carrier, we believe the acquiring carrier should be required to provide notice and obtain opt-in approval for any CPNI use and disclosure. This approach will ensure that a carrier who has no previous relationship with the customer will not abuse the customer's CPNI.

*C. A Company's Exit From the Market Raises Significant Privacy Concerns*

In 2000, the Federal Trade Commission brought an action against on-line retailer Toysmart.com, who, as it was nearing bankruptcy, offered sell personal customer information to visitors of its website in contravention of its own privacy policy. The FTC's complaint alleged that Toysmart.com had violated Section 5 of the Federal Trade Commission Act<sup>34</sup> and the Children's Online Privacy Protection Act.<sup>35</sup> Both sides eventually entered into a consent agreement requiring that Toysmart.com destroy all personal customer information it possessed, unless a Bankruptcy Court allowed the sale of the information to a "qualified buyer."<sup>36</sup> The basic premise of this case is that customer information protected by a privacy guarantee cannot be treated as a company asset. This conclusion is compulsory where the privacy guarantee protecting the customer information is

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<sup>29</sup> See *Third CPNI Order* at ¶¶ 2, 50-68.

<sup>30</sup> See e.g. *Third CPNI Order* at n.88, where the Commission encouraged carriers who are allowed to use an opt-out mechanism to adopt an opt-in approval method nonetheless, because opt-in provides customers with "heightened privacy protections."

<sup>31</sup> *Id.* at n. 95, citing Juan Tuan, *U.S. West v. FCC*, 15 BERKELEY TECH L.J. (2000). Tuan notes that CPNI "can be processed and translated into customer profiles which may contain information about the identities and whereabouts of subscribers' friends and relatives, which businesses subscribers patronize, when subscribers are likely to be home and awake, product and service preferences, and subscribers' medical, business, client, sales, organizational, and political telephone contacts." *Id.* See e.g. *supra*, note 12 and accompanying text.

<sup>32</sup> *Third CPNI Order* at ¶ 33, "We conclude that the government's interests in limiting unexpected disclosure and use of consumers' CPNI is a substantial one."

<sup>33</sup> See *id.* at ¶¶ 15-16.

<sup>34</sup> 15 U.S.C. § 45(a) (2000).

<sup>35</sup> *Id.* § 6503.

<sup>36</sup> *Federal Trade Commission v. TOYSMART.COM, LLC and TOYSMART.COM, INC.* (Dist. Mass. 2000) available at <http://www.ftc.gov/os/2000/07/toysmartconsent.htm>.

statutorily mandated: therefore, we urge the Commission to reach a similar conclusion regarding the sale of CPNI as a business asset.<sup>37</sup>

The Commission has recognized the dangers posed by sale of CPNI: the Commission noted in the *Third CPNI Order* that “[o]nce CPNI enters the stream of commerce, consumers are without meaningful recourse to limit further access to, or disclosure of, that personal information.”<sup>38</sup> The Commission has drawn a distinction between those companies that provide communications services to the customer and those that do not; allowing telecommunications companies who offer telecommunications services to the customer to use opt-out, while requiring companies that do not provide services to use an opt-in approach to the use of CPNI.<sup>39</sup> We believe that, to the extent it is allowed at all, the sale of CPNI may be allowed under the 1996 Act only if the buyer/recipient is a telecommunications carrier with which the customer has a current business relationship. In addition, any sale of CPNI as a business asset must be conditioned on an opt-in approval mechanism.

The current state of communication technologies allows myriad abuses of consumer privacy, from the unauthorized use of a person’s financial information to outright identity theft.<sup>40</sup> As communication technologies and capabilities continue to converge, companies will likely address the issue of falling revenues by mergers and restructuring.<sup>41</sup> The Commission must establish effective personal privacy protections that are applicable to all carriers, regardless of service type. A uniform approach will give consumers confidence that their personal information is not being misused, and will give carriers the regulatory certainty they need to operate efficiently in the market.

On behalf of millions of telephone customers in the United States, EPIC respectfully urges the Commission to limit the sale or transfer of sensitive customer information, and condition any sale or transfer of CPNI on both the provision of proper notice to affected subscribers, and on an opt-in approval mechanism.

Respectfully submitted,

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<sup>38</sup> *Third CPNI Order* at ¶ 54.

<sup>39</sup> “[T]he record unequivocally demonstrates that, in contrast to intra-company use and disclosure of CPNI, there is a more substantial privacy interest with respect to third-party disclosures...the privacy interests are more significant in the case of unintended disclosure to third parties.” *Id.* at ¶ 51.

<sup>40</sup> See e.g. <http://www.ftc.gov/bcp/online/pubs/credit/privchoices.htm>; <http://www.consumer.gov/idtheft/>.

<sup>41</sup> See e.g. *Remarks of Michael K. Powell, Chairman, FCC, at the Goldman Sachs Communicopia XI Conference, New York, NY, Oct. 2, 2002, at Sec. II, available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226929A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226929A1.pdf).