qualitatively different from those at stake in the *BNA* and *Caller ID* proceedings. Unlike BNA, which only includes information necessary to the billing process, CPNI includes sensitive and personal information about whom a subscriber calls, the time of day the call is made, and how often the subscriber calls a particular number,[364] among other things.[365] Moreover, the Commission noted in the *BNA Order* that customers expect BNA to be used for billing purposes only, and it limited carriers' use based on that expectation.[366] This reasoning is fully consistent with our interpretation in connection with CPNI announced herein. CPNI and caller ID are similarly distinguishable. In the case of caller ID services, the only information that can be transmitted through the network includes the caller's name and the calling party number.[367] We find that the transmission of this information is far less sensitive than the disclosure of CPNI. Furthermore, consistent with our approach herein, the Commission in the *Caller ID* proceedings restricted the use by businesses of information regarding the identity of calling parties to marketing purposes within the existing customer relationship.[368]

98. Finally, several parties, pointing to our implementation of the TCPA,[369] argue that we recognized in that order that solicitations to persons with whom the carrier has a prior business relationship do not adversely affect customer privacy interests, and may even be deemed to be invited based on that pre-existing relationship.[370] While we crafted an

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[364] *See* 47 U.S.C. § 222(f).

[365] As the Commission stated in the *BNA Order*, "BNA is essential to make validation service of any practical value to those IXCs who do not have billing and collection agreements with the LECs." *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Report and Order, 7 FCC Rcd 3528, 3535 ¶ 38 (1992) (*BNA Order*).

[366] *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Second Report and Order, 8 FCC Rcd 4478, 4483 ¶ 27 (1993). In so doing, we expressly rejected U S WEST's argument that it should be able to use BNA for non-billing purposes.

[367] The transmission of the calling party number, however, is blocked in the case of unlisted and nonpublished numbers and also may be blocked if a listed caller manually withdraws his or her number on a per call basis.

[368] *Caller ID Order*, 9 FCC Rcd at 1773 ¶ 58, (concluding that "an ANI (automatic number identification) services subscriber may use ANI to offer products or services to an established customer that are directly related to products or services previously provided by the ANI services subscriber to that customer."), *supra* note 363.

[369] 47 U.S.C. § 227; *TCPA Order supra* note 126.

[370] Bell Atlantic Comments at 8; GTE Comments at 8; U S WEST Comments at 16. The TCPA is codified at section 227 of the Communications Act, as amended. *See* 47 U.S.C. § 227. Section 227(a)(3) of the Act defines "telephone solicitation" as "the initiation of a telephone call . . . for the purpose of encouraging the purchase or rental of, or investment in, property goods, or services, which is transmitted to any person, but such

exception for established business relationships in implementing the TCPA, our action in that proceeding is not inconsistent with the express approval requirement we adopt in this order. In contrast to section 222, section 227 specifically excepts from the definition of "telephone solicitation" a call or message "to any person with whom the caller has an established business relationship."[371] Congress did not so except from the approval requirement of section 222(c)(1) calls made to customers with whom a carrier has a pre-existing business relationship.[372] We likewise reject the arguments that Congress' express provision for a notice and opt-out mechanism in section 551 of the Act somehow compels that result here even though the language of section 222 contains no similar express reference to such a mechanism.[373] To the contrary, section 551 confirms that Congress knew how to draft a notice and opt-out provision when it determined that such an approach was appropriate. For all these reasons we reject commenters' arguments that notice and opt-out is in some manner required by the language of section 222, or other precedent.[374]

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term does not include a call or message . . . (B) to any person with whom the caller has an established business relationship. . . ." 47 U.S.C. § 227(a)(3). Section 227(b)(1)(B) of the Act generally prohibits the initiation of a telephone call to any residential subscriber using artificial or pre-recorded voice messages. 47 U.S.C. § 227(b)(1)(B). Section 227(b)(2)(B) allows the Commission to make exceptions to this prohibition, however, for calls made for commercial purposes that it determines "will not adversely affect the privacy rights that [section 227] is intended to protect," and "do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B)(ii). The rules we adopted to implement this provision exempted from the general prohibition any prerecorded or artificial voice message calls from a person with whom the subscriber has an established business relationship. 47 C.F.R. § 64.1200(a)(2).

[371] 47 U.S.C. § 227(a)(3).

[372] In addition, our interpretation of section 222 does recognize that customers expect their carriers to offer related offerings within the total service to which they subscribe, and in this way is not inconsistent with the result the Commission reached in implementing the TCPA. We simply disagree that such expectation extends to all of a carrier's available service offerings, regardless of the existing service relationship with the customer, as suggested by some parties. ALLTEL Comments at 5-6; Ameritech Reply at 7; Bell Atlantic Comments at 7-9; GTE Comments at 6-8; NYNEX Comments at 16-17; USTA Comments at 5. *See supra* ¶ ¶ 54-56.

[373] U S WEST Comments at 7-10; Bell Atlantic Comments at 8 & n.20, 22; Bell Atlantic Reply at 2-3; BellSouth Comments at 19-20; *see also* USTA Comments at 8-9 (permitting opt-out approval will avoid market confusion and advance equal treatment between telecommunications carriers and cable operators); *see* discussion of 1992 Cable Act, *supra* note 127. In general, section 551 of the Act requires cable companies to provide a written notice informing subscribers of the nature of "personally identifiable information" sought to be collected, as well as the frequency and purpose for such collection, among other things, in order to use such information to render a cable service or other service. 47 U.S.C. § 551 The term "other service" is defined in section 551 as "any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service. . . ." 47 U.S.C. § 551(a)(2)(B).

[374] Ameritech Comments at 9-10; Ameritech Reply at 7; AT&T Comments at 13; BellSouth Comments at 18; GTE Comments at 7; GTE Reply at 4-5; NYNEX Comments at 15; PacTel Comments at 7; SBC Comments at 10; SBC Reply at 10-11; U S WEST Comments at 15

99. Our express approval requirement also is justified by the principles of customer control and convenience that are embodied in section 222.[375] These principles contemplate that the customer, not the carrier, will decide whether and to what extent CPNI is used. Consistent with these principles, we find that express approval, in contrast to a notice and opt-out approach, best ensures that customers maintain control over carrier use of sensitive CPNI, and that those that wish to limit the use and dissemination of their information will know how, and be able to do so.[376] A market trial conducted by U S WEST supports the view that, when asked, customers more often than not want to limit their carrier's use of their CPNI for purposes beyond the existing service relationship. In its trial, U S WEST attempted to obtain affirmative approval through various means, including inbound and outbound telephone solicitations, as well as through direct mail. In seeking approval from its local service customers, U S WEST generally explained that:

> We're calling all of our customers to ask for their permission to continue to share information about their telephone account services within the *expanding* U S WEST family of product areas. This will allow us to keep on working cooperatively with *other* U S WEST product areas -- like wireless, long distance and the Internet -- to customize product packages to match your individual needs.[377]

The study generally found that, of those customers even willing to listen to U S WEST's request for approval (*e.g.*, in the outbound telephone solicitation, those that did not hang up or were otherwise not reached), the majority of customers contacted did not approve the carrier's use of their CPNI as proposed by U S WEST.[378] This failure to obtain approval from most customers resulted regardless of whether the solicitation for approval was undertaken by telephone or by mail, or accompanied by financial incentives.[379] For example, the outbound telephone solicitation trial produced a weak response, with more residential customers

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[375] *See supra* ¶ ¶ 53-56.

[376] *See* CPI Reply at 4 (while some consumers may find it useful to allow information to be made available to carriers that can provide tailored offerings, others express concern about the availability of information concerning their use of telecommunications).

[377] U S WEST *ex parte* (filed Oct. 8, 1997).

[378] U S WEST *ex parte* (filed Sept. 9, 1997). Only six to eleven percent of residential customers and five to nine percent of small business customers in U S WEST's direct mail trial approved the use of CPNI for marketing purposes. *Id.* Similarly, only about 28 percent of residential customers in U S WEST's outbound telephone solicitation trial consented to CPNI use. *Id.* at 10. U S WEST was able to secure a 72 percent affirmative response rate in its inbound telephone solicitation trial. *Id.* at 9.

[379] *Id.*

denying rather than granting approval for CPNI use.[380] Similar results were obtained in response to the direct mail campaign, even when financial inducements were provided.[381]

100. U S WEST argues that these findings reflect consumers' aversion to marketing generally, rather than any particular privacy concern regarding CPNI, and further show that affirmative customer consent, whether written or oral, is too difficult and expensive to secure to be practical.[382] We believe, however, that an equally plausible interpretation of these results is that they suggest that many customers value the privacy of their personal information, and do not want it used or shared for purposes beyond the existing service relationship.[383] Moreover, even if U S WEST is correct, and customers do not grant approval simply because they do not want to be marketed to, this finding would not support permitting notice and opt-out. Indeed, it would suggest, as MCI observes, that contrary to U S WEST's claim, customers do not want to hear about "expanding service offerings," and in particular do not want their CPNI used toward that end.[384]

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[380] *Id.* at 10. U S WEST contacted 578 residential customers in its outbound telephone solicitation trial. About 28 percent of these customers granted approval for CPNI use; 33 percent denied approval. *Id.* The remainder of customers sampled represented "hang-ups" or "unworkables," or requested to be placed on a "do-not-call" list. *Id.*

[381] U S WEST's direct mail trial was conducted via first class mail to 15,200 individuals, separate from any U S WEST billing, and specifically requested an affirmative response. Some respondents were asked to mail back a form, while others were asked to call a toll-free number. Some mailings offered no incentive to respond, while others offered one dollar or five dollar incentives. According to U S WEST, response rates were low, regardless of the specific notification approach and the response media used. As noted above, positive response rates ranged from six to eleven percent for residential customers and from five to nine percent for small business customers. *Id.* at 11.

[382] *Id.* at 15.

[383] Only five to eleven percent of the respondents in U S WEST's direct mail campaign granted approval, even when financial inducements were offered. *Id.* at 11. By contrast, an epidemiological research team studying cellular phone users was able to elicit a 71 percent response to a survey conducted by mail, with thirty minutes of free airtime offered in exchange. Dennis P. Funch, Kenneth J. Rothman, Jeanne E. Loughlin, and Nancy A. Dreyer, "Utility of Telephone Company Records for Epidemiologic Studies of Cellular Telephones," submitted by Wireless Technology Research. WTR Reply at Attachment C at 299. The higher response rate obtained in this context may be interpreted to suggest that customers are willing to grant approval for uses of CPNI that they perceive to be valuable or beneficial, such as scientific research, but *not* marketing.

[384] MCI *ex parte* (filed Oct. 8, 1997) at 4. MCI contends that the negative response obtained by U S WEST in its affirmative approval trial is attributable to the inherent difficulty of telemarketing generally, rather than the difficulty of obtaining affirmative approval. In addition, MCI argues that the negative response obtained by U S WEST indicates that an affirmative approval requirement would not have a significant impact on U S WEST's telemarketing activities because the large portion of customers denying approval would not want to receive subsequent telemarketing calls based on their CPNI in any event. *Id.* As discussed *infra* note 403,

101. The findings of the Westin study do not persuade us differently.[385] In general, the survey results purport to show that a majority of the public believes it is acceptable for businesses, particularly local telephone companies, to use customer records to offer customers additional services when a notice and opt-out mechanism is employed.[386] Contrary to PacTel's assertions, however, we believe that these survey results fail to demonstrate that customers expect or desire carriers to use CPNI to market to them service offerings beyond the existing service relationship. As discussed *supra*, the lack of question specificity, and even the ordering of the questions, make it problematic to rely on these findings.[387] For example, the Westin study does not identify the telephone information at issue, does not illustrate the specific types of information that would be accessed, and does not explain that use of the customer's information can reveal many of the customer's habits and actions.[388] The results of Westin's survey also would appear to conflict with the results of U S WEST's affirmative approval trial, discussed above, which suggest that customers do not wish to be marketed new services. Given the less theoretical nature of a market trial, U S WEST's trial arguably was more likely to yield "true" results than PacTel's opinion survey. Moreover, contrary to U S WEST's trial, the Westin survey did not make clear for what "services" PacTel sought to use the CPNI. Accordingly, customers could very well have interpreted the questions as consistent with the kind of information sharing permitted under the total service approach. That is, customers' apparent support may have been for carrier use of CPNI for the marketing of improved alternative versions of their existing service, not for the marketing of all offerings available from the carrier. Because of this ambiguity, the Westin study does not contradict our view that customers want to be given the opportunity to control their carrier's use of their sensitive personal information for the marketing of additional offerings outside of the customer's existing service relationship, which control is best secured through an affirmative approval requirement.

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however, when customers are engaged in communications with their carrier regarding the servicing of their account, they are more likely to grant approval for the use of CPNI. This further supports our view that customers are able and willing to grant approval, but on their terms, not the carriers'.

[385] Westin study; *see supra* note 224.

[386] *Id.*

[387] *See supra* ¶ ¶ 61-62. As discussed *supra* note 230, similar criticisms apply to CBT's survey, which, some parties claim, demonstrates that customers, especially business customers, do not wish to be burdened with an affirmative prior authorization requirement, but instead expect their carriers to keep them apprised of new offerings. CBT Comments at 8 n.10 and Att. A; GTE Comments at 5-6; USTA Comments at 6; U S WEST Comments at 17.

[388] *See supra* ¶ 61.

102. We reject PacTel's and U S WEST's contention that customers do not expect carriers to seek affirmative approval for the use of information to market services to which they do not subscribe, and that to do so would confuse them.[389] To the contrary, based on the results of U S WEST's affirmative approval market trial, as well as those of a similar trial reported by Ameritech, we believe that, when customers wish to do so, they have no problem understanding a carrier's solicitation for approval and granting consent for the use of CPNI outside the scope of their total service offering.[390]

103. By not mandating a particular form of express approval (*i.e.*, oral, electronic, or written), as discussed *infra*, we also believe Congress has furthered the principle of customer convenience. We are not persuaded that we must permit notice and opt-out based on arguments that an express approval requirement is unduly burdensome to customers, as some parties suggest.[391] The BOCs, AT&T, and GTE argue, for example, that only those customers wishing to restrict carrier access to CPNI would have to respond to CPNI notices, and therefore an opt-out approach would reduce the burden on the majority of customers.[392] USTA and SBC also note that permitting notice and opt-out would reduce the administrative burden on carriers.[393] Ameritech further argues that a notice and opt-out mechanism would insulate customers who fail to respond to CPNI notices from repeated follow-up efforts, while still allowing them to restrict carrier access to or use of CPNI.[394] Contrary to these arguments, we believe that an express approval requirement would not be significantly more burdensome to customers than notice and opt-out. Under either an express or notice and opt-

[389] PacTel Comments at 9; U S WEST Comments at 16, 17 n.42; *see also* U S WEST *ex parte* (filed Sept. 9, 1997) at 14 (oral notification of CPNI rights does not lend itself to easy explanation, and such communications may suggest to the customer that there is something inappropriate about the use of CPNI). PacTel and USTA similarly contend that notice and opt-out minimizes customer confusion. PacTel Comments at 9; USTA Reply at 6.

[390] In the context of inbound telemarketing, 72 percent of customers in U S WEST's trial approved of the use of CPNI for marketing purposes. U S WEST *ex parte* (filed Sept. 9, 1997) at 9. Ameritech similarly reported that it achieved an even higher inbound response rate of about ninety percent. Ameritech *ex parte* (filed Oct. 6, 1997) at Att. B. *See also* Bell Atlantic *ex parte* (filed Sept. 22, 1997) (representing that customers wish to discuss service options when they call Bell Atlantic regarding their service, and that Bell Atlantic generally is able to obtain approval for the use of CPNI in this context).

[391] *See, e.g.*, Bell Atlantic Reply at 7; GTE Comments at 5-6, 9.

[392] AT&T Comments at 15; BellSouth Comments at 3; GTE Comments at 9; SBC Comments at 10-11; USTA Comments at 6.

[393] SBC Comments at 10-11; USTA Comments at 6.

[394] Ameritech Comments at 10-11.

out approach, the customer will be contacted because a notice must be provided.[395] As CPSR points out, the fact that section 222(c)(2) requires that customers provide an "affirmative written request" for the disclosure of CPNI suggests Congress believed that even a written approval requirement was not unduly burdensome to customers.[396]

104. Although we agree that notice and opt-out would produce more customer approvals,[397] we reject the argument that imposing an express approval requirement will "effectively eliminate integrated marketing" and thwart the development of one-stop shopping.[398] While section 222 precludes carriers from jointly marketing certain services through the use of CPNI, nothing in section 222 prevents carriers from jointly marketing services without relying on CPNI, as CPI and Cox point out.[399] Moreover, while the use of CPNI may facilitate the marketing of telecommunications services to which a customer does not subscribe, such use is not necessary for carriers to engage in joint marketing. We thus reject PacTel's contention that an express approval requirement would vitiate section 601(d) of the 1996 Act, which allows carriers to market CMRS services jointly with other telecommunications services, and section 272(g) of the Act, which permits BOC joint marketing of telephone exchange service and in-region interLATA service, under certain conditions.[400] To the contrary, carriers are free to market jointly telecommunications services without using CPNI to the extent such marketing is otherwise permissible under other provisions. In addition, as TRA points out, a customer desiring an integrated telecommunications service offering tailored to its needs simply may give approval to allow its carrier to access CPNI for purposes outside of sections 222(c)(1)(A) and (B).[401] This is true as to sophisticated business as well as residential customers. Indeed, the rules we establish in this order permitting carriers flexibility to secure various forms of approval under section 222(c)(1), in our view, facilitate the furnishing of integrated total service offerings

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[395] *See* discussion of notification *infra* Part V.F.

[396] CPSR Comments at 10.

[397] GTE Comments at 5-6, 9; GTE Reply at 8-9; PacTel Comments at 8-9; U S WEST Comments at 19; *see also* Bell Atlantic Reply at 6-8 (even though carriers engaged in repeated mailings and substantial publicity in connection with the post-divestiture selection of long distance carriers, many customers failed to choose a carrier).

[398] Ameritech Reply at 8; AT&T Comments at 15; AT&T Reply at 12-13; Bell Atlantic Reply at 6-8; BellSouth Comments at 3; GTE Comments at 5-6, 9; PacTel Comments at 8-9; SBC Comments at 10-11; USTA Comments at 5-6; U S WEST Comments at 19; U S WEST Reply at 9-10, 12.

[399] Cox *ex parte* (filed Jan. 27, 1997) at 2 n.4; CPI Reply at 4.

[400] PacTel Comments at 9 & n.18.

[401] TRA Reply at 9.

suited to the customer's needs. Moreover, as discussed *supra*, given that carriers may use CPNI without prior customer approval to market any aspect of a customer's total service, carriers currently retain considerable ability to market jointly telecommunications services.[402]

105. We are not persuaded by U S WEST's contention that an express approval requirement would yield an insufficient number of approvals to justify the expense of conducting solicitation campaigns. MCI reports, to the contrary, "based on MCI's experience and knowledge of telemarketing generally, a 29% positive response rate on outbound calling to a carrier's customer base is fairly successful."[403] In addition, as MCI further observes, U S WEST's negative response rate reflects the difficulty of telemarketing generally, not any inherent difficulty of obtaining affirmative approval specifically. Therefore, we agree that, to the extent the large number of customers failing to give their approval likewise would not want to receive subsequent telemarketing calls based on the use of their CPNI, "U S WEST's own analysis shows that even with the 'opt-out' procedure it advocates, it would not have much better luck telemarketing to those customers."[404] Moreover, even assuming, *arguendo*, that an express approval requirement would make targeted marketing more difficult, we find that such a result would not be inconsistent with customer expectations or desires. Given the new emphasis on customer privacy embodied in section 222, we believe that Congress did not intend for countervailing considerations, such as the promotion of one-stop shopping, to outweigh customers' interest in maintaining the privacy of their sensitive information.

106. Finally, we reject U S WEST's argument that an express approval requirement under section 222(c)(1) would impermissibly infringe upon a carrier's First Amendment rights.[405] U S WEST contends that CPNI is information owned by the carrier that forms the basis for informed speech between U S WEST and its customers or potential customers, and that any restrictions on such "inputs" beyond reasonable time, place and manner restrictions,

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[402] *See supra* ¶ ¶ 64-66.

[403] MCI *ex parte* (filed Oct. 8, 1997) at 4. We further note that in the context of inbound telemarketing, 72 percent of customers approved of the use of CPNI for marketing purposes. In a similar trial, Ameritech reported that it achieved an even higher inbound response rate of about ninety percent. Ameritech *ex parte* (filed Oct. 6, 1997) at Att. B. Thus, affirmative approval in the inbound situation is little barrier to carrier marketing efforts. *See also* Bell Atlantic *ex parte* (filed Sept. 22, 1997) (representing that customers wish to discuss service options when they call Bell Atlantic regarding their service, and that Bell Atlantic generally is able to obtain approval for the use of CPNI in this context).

[404] MCI *ex parte* (filed Oct. 8, 1997) at 4.

[405] U S WEST *ex parte* (filed June 2, 1997) at 4. U S WEST submitted an analysis prepared by Professor Laurence H. Tribe regarding First Amendment issues associated with U S WEST's access to and use of CPNI, and the sharing of that CPNI among affiliated U S WEST companies. *Id.* In general, U S WEST argues that the collection and distribution of CPNI is protected under the First Amendment, and, thus, any regulation of CPNI is governed by free speech principles. *Id.* at att. at 2.

such as affirmative approval requirement for the use of CPNI, thus are unconstitutional.[406] U S WEST also maintains that the communication of CPNI between or among U S WEST corporate entities is a protected speech activity. We disagree that an express approval requirement would impermissibly infringe upon a carrier's First Amendment rights. At the outset, we think there is a substantial question as to whether CPNI restrictions even implicate constitutionally protected "speech." Carriers remain free to communicate with present or potential customers about the full range of services that they offer, and section 222 therefore does not prevent a carrier from engaging in protected speech with customers regarding its business or its products. What carriers cannot do is use confidential CPNI in a manner that is not permitted by the statute. While section 222 may constrain carriers' ability to more easily "target" certain customers for marketing by limiting in some circumstances their internal use of confidential customer information, we question whether that of itself constitutes a restriction on protected "speech" within the purview of the First Amendment.[407] Nevertheless, to the extent that it were concluded that CPNI restrictions under section 222 did affect carrier communications with their customers or unrelated third parties in such a way as to implicate the First Amendment, at most commercial speech would be at issue since any limitations under section 222 relate solely to the economic interests of the speaker and its audience.[408] But any governmental restrictions on commercial speech will be upheld where, as here, the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn.[409] As the Supreme Court has observed, it has never deemed it an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated or conducted in part through language; to the contrary, similar regulation of business activity has been held not to violate the first Amendment.[410]

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[406] U S WEST *ex parte* (filed June 2, 1997) Att. at 3. In particular, U S WEST argues that, because the U.S. Supreme Court has found that regulations relating merely to physical objects essential to the formulation and communication of speech violated the First Amendment, it follows that similar restrictions on intangible inputs such as CPNI similarly would not be constitutionally permissible. *Id.* citing *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 574, 581 (1983) (the imposition of a state use tax on the cost of paper and ink products used in the production of newspapers violates the First Amendment); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-29 (1993) (a prohibition on the use of newsracks to hold commercial handbills where no comparable ban applies to newsracks containing newspapers violates the First Amendment).

[407] *See* MCI *ex parte* (filed July 8, 1997) at 3-4 (arguing that protected commercial speech is not implicated because internal carrier use of CPNI is not equivalent to proposing a transaction or informing the public).

[408] The U. S. Supreme Court has defined commercial speech as speech that "propose[s] a commercial transaction." *Central Hudson Gas and Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (commercial speech informs the public so that it can make a reasoned choice among products or services).

[409] *Central Hudson*, 447 U.S. at 557.

[410] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

107. The U.S. Supreme Court has held that protecting the privacy of consumers, and eliminating restraints on competition, are "substantial" government interests.[411] An express approval requirement directly advances the protection of customer privacy by vesting control over the dissemination of CPNI with the customer, rather than the carrier, and by limiting the ability of incumbent carriers to leverage their control over monopoly-derived CPNI into emerging telecommunications markets. In addition, an express approval requirement is narrowly tailored to achieve these Congressional objectives. Contrary to U S WEST's contention, we further conclude that an express approval requirement would not violate the free speech rights of customers.[412] To the extent a customer wishes to receive information on offerings outside the scope of its total service offering, it simply may grant approval under section 222(c)(1). As we previously noted, to the extent customers are engaged in communications with their carrier regarding the servicing of their account, they are more likely to grant approval.[413] Finally, for the reasons discussed *supra*, we reject U S WEST's contention that an express approval requirement effectively would deprive carriers of the use of their property, and thus would constitute a taking without just compensation.[414]

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[411] *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (holding that the Florida Board of Accountancy's rule prohibiting certified public accountants from engaging in direct, in-person, uninvited solicitation to obtain new clients violated the First and Fourth Amendments because the ban was not reasonably tailored to serve a substantial state interest) ("the protection of potential clients' privacy is a substantial state interest"); *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 663 (1994) ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.") (citations omitted).

[412] U S WEST *ex parte* (filed June 2, 1997) at Att. at 5-10. U S WEST maintains that the rates for opt-in requests are so low that imposing an opt-in rule would effectively prohibit the use and transmission of CPNI, and that such an approach is particularly suspect given that there are less restrictive means of securing approval, *i.e.*, a notice and opt-out mechanism. *Id.* (citing *Martin v. Struthers*, 319 U.S. 141 (1943) (a city ordinance that forbids door-to-door solicitations unless household residents affirmatively request such solicitations is an unconstitutional burden on speech)). U S WEST also suggests that an express approval requirement would be constitutionally suspect because it would infringe on the right of customers to receive information. *Id.* at Att. at 7-8.

[413] *See supra* note 403.

[414] U S WEST Reply at 12. *See supra* ¶ ¶ 42, 43; *see infra* ¶ ¶ 148, 149, 152.

C. Written, Oral and/or Electronic Approval

1. Background

108. The Commission observed in the *Notice* that section 222 neither specifies the procedures that a carrier must use to obtain customer approval, nor addresses whether section 222(c)(1) approval must be written or oral.[415]

2. Discussion

109. While we believe that carriers should be required to obtain express approval for uses of CPNI outside the scope of sections 222(c)(1)(A) and (B), we conclude that carriers should be permitted to obtain such approval through written, oral, or electronic means, as several commenters contend.[416] Allowing carriers to obtain customer approval through any or all of these three approval methods comports with the language and design of section 222, and is consistent with the principles of customer control and convenience that are manifested in section 222.[417] Moreover, this approach gives carriers flexibility without sacrificing customer control over sensitive information. We thus agree with MCI that carriers should be able to use the advanced technologies of their networks, including 800 numbers, 888 numbers, and e-mail, to obtain customer approval, in addition to using various types of written approval, such as billing inserts, that are returned to the carrier.[418]

110. We disagree with parties arguing that section 222 mandates written approval.[419] We find nothing in the language or design of section 222 that limits carriers to obtaining only

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[415] *Notice* at 12526-27, ¶ ¶ 27, 30.

[416] BellSouth Comments at 18-19; GTE Comments at 7; NYNEX Comments at 15; NYNEX Reply at 6; PacTel Comments at 6-7, PacTel Reply at 7; SBC Comments at 12.

[417] BellSouth Comments at 18-19; GTE Comments at 7; NYNEX Comments at 15; NYNEX Reply at 6; PacTel Comments at 6-7; PacTel Reply at 7; SBC Comments at 12.

[418] MCI Reply at 8.

[419] Ad Hoc Comments 7; AICC Comments at 9-11; AirTouch Comments at 6; Arch Comments at 8, 11, Arch Reply at 2; California Commission Comments at 11; California Commission Reply at 9; CFA Comments at 5; CompTel Comments at 3; CompTel Reply at 7; CompuServe Comments at 3-5; CPI Comments at 9; CPSR Reply at 10; CWI Comments at 8; Excel Comments at 5; Frontier Comments at 7-9; ICG Comments at 6; ITAA Comments at 5; ITAA Reply at 8; LDDS WorldCom Comments at 10; LDDS WorldCom Reply at 6-7; NARUC Comments at 3; Texas Commission Comments at 8-10; TRA Comments at 16; TRA Reply at 8; Washington Commission Comments at 5, 8-9.

written approval, despite arguments advanced by some of these commenters.[420] Indeed, contrary to the claims made by AICC and CompTel,[421] we believe that the requirement in section 222(c)(2) that a carrier obtain a "written" request before disclosing CPNI to any person, in contrast to the term "approval" in section 222(c)(1), suggests that Congress did not intend to limit section 222(c)(1) to only written approval.[422] Given that nothing in section 222(c)(1) expressly limits approval to only written means, we conclude that carriers should be given flexibility to secure approval through written, oral or electronic methods.

111. We also reject the contention that section 222(d)(3) of the Act supports a written approval requirement.[423] While section 222(d)(3) contemplates oral approval in creating an exception for CPNI use during an inbound call, section 222(d)(3) also may be interpreted simply to permit a carrier to use CPNI to provide a customer with information for the duration of an inbound call, based on oral approval, even if the customer otherwise has restricted the carrier's use of its CPNI, as Ameritech points out.[424] This exception may be significant, based on the results of U S WEST's approval solicitation trial. U S WEST found that, in the context of inbound calls, 72 percent of customers approved of the use of CPNI for marketing purposes, as opposed to 29 percent in the outbound context.[425] In a similar trial, Ameritech reported that it achieved an even higher inbound response rate of about 90 percent.[426] We agree with U S WEST that, to the extent these findings are valid, they suggest that when customers call their carrier, they are interested in the servicing of their account, and thus are considerably more likely to approve the use of CPNI than when customers -- even these very same ones -- are "cold called" by the carrier. In this way, the inbound

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[420] AICC Comments at 11; CompTel Comments at 7 n.5; CompTel Reply at 6; CPI Comments at 9; Frontier Comments at 9; TRA Reply at 8; Washington Commission Comments at 8-9.

[421] AICC Comments at 10; CompTel Comments at 6-7.

[422] Bell Atlantic Comments at 2; BellSouth Comments at 16, 18-19; DMA Reply at 1, 3-4; GTE Comments at 7; GTE Reply at 4-5; ICG Comments at 6; MCI Comments at 8-9; NTCA/OPASTCO Reply at 3; NYNEX Comments at 15; NYNEX Reply at 6; PacTel Comments at 6-7; PacTel Reply at 7; SBC Comments at 12; Sprint Comments at 4-5; Sprint Reply at 3; TCG Comments at 6-7; Texas Commission Comments at 8; U S WEST Comments at 17 n.44; U S WEST Reply at 8. *See supra* ¶ 92 (discussing meaning of Congress' use of different terms in sections 222(c)(1) and (2)).

[423] *See, e.g.*, AICC Comments at 10-11; CompTel Comments at 7; CPI Comments at 9; Frontier Comments at 9; Washington Commission Comments at 8-9.

[424] Ameritech Comments at 1.

[425] U S WEST *ex parte* (filed Sept. 9, 1997) at 9-10.

[426] Ameritech *ex parte* (filed Oct. 6, 1997) at Att. B.

telemarketing exception in section 222(d)(3) offers a meaningful, specific right, different from the general "approval" exception in section 222(c)(1).

112. We do not believe that permitting outbound oral solicitations will have negative privacy consequences, as some commenters suggest.[427] Because allowing carriers to obtain oral approval does not divest the customer of control over CPNI, but affords the additional benefits of customer convenience, we find that permitting such approval will advance the goals of section 222. We recognize, however, as several parties suggest, that oral customer approval may be more difficult to verify than written approval, because carriers typically would have no physical record that such approval had been given.[428] Nevertheless, we find that any verification problems can be adequately addressed through measures other than an outright prohibition on oral approval under section 222(c)(1). Accordingly, as discussed *infra*, we conclude that a carrier relying on oral customer approval should be required to notify customers of their CPNI rights, and should bear the burden of demonstrating that a customer has granted approval subsequent to such notification pursuant to the rules we adopt in this order.[429] Shifting the burden to such carriers, in addition to establishing minimum notification requirements, as we do herein, also should address any concerns that, if oral approval is permitted, customers will not consider their options due to pressure from telemarketers, that substantially greater FCC and state commission resources will be incurred, or that carriers will engage in "slamming" practices through telemarketing. We believe the notification requirements we adopt will reduce the likelihood that carriers will violate customer privacy by abusing oral approval mechanisms. In addition, as one party suggests, certain mechanisms are currently available that make verbal approvals as readily verifiable as written approvals.[430]

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[427] California Commission Comments at 11; California Commission Reply at 8; CFA Comments at 5; CompuServe Comments at 6; CPI Comments at 3-4; CPSR Reply at 10-11; LDDS WorldCom Comments at 10-11; LDDS Worldcom Reply at 7; NARUC Comments at 3, TRA Comments at 16; TRA Reply at 7-8; Washington Commission Comments at 5, 8.

[428] AICC Comments at 9-10; California Commission Comments at 11; California Commission Reply at 8; CFA Comments at 5; CompuServe Comments at 6; CPI Comments at 9-10; CWI Comments at 8; Frontier Comments at 7-8; LDDS Comments at 10; NARUC Comments at 3; Texas Commission Comments at 8-10; TRA Comments at 16, TRA Reply at 7-8; Washington Commission Comments at 8.

[429] As discussed *infra* Part V.E., because notification is an element of informed approval, we also find it appropriate to place the burden on carriers providing oral notification of CPNI rights to demonstrate that such notification has been given in compliance with our rules.

[430] VoiceLog *ex parte* (filed Nov. 12, 1996).

113. We share the concern that oral approval mechanisms may be subject to greater abuse than written approval mechanisms.[431] To the extent our decision to permit oral approval may result in carrier abuses, including, for example, the overselling of services, as CPSR argues,[432] we find that such a result does not warrant mandating written approval.[433] Assuming the term "oversell" is intended to refer to a situation in which a carrier frequently telephones a customer to solicit section 222(c)(1) approval, we believe that carriers have an incentive not to abuse outbound solicitation mechanisms as a tool for obtaining verbal approval, since such abuse ultimately may result in the loss of the customer. Carriers that make frequent outbound calls to obtain oral approval therefore do so at the risk of losing their customer base.

114. On the other side of the balance, we are not convinced, despite arguments advanced by some parties,[434] that permitting oral and electronic, in addition to written, approval would raise significant competitive concerns. Proponents of written approval generally maintain that any type of non-written approval will result in a greater percentage of approvals, and thereby place small carriers at a competitive disadvantage relative to incumbent carriers, which have the largest amount of, and most useful, CPNI.[435] These parties further contend that any rules we establish should ensure a "level playing field" for

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[431] CPSR Reply at 12-13; *see also* Frontier Comments at 8 (slamming problems militate in favor of written approval. If the Commission allows oral approval, it should establish safeguards similar to those adopted in the context of PIC changes). *Contra* GTE Reply at 8 (Commission should not adopt slamming-like rules, which were designed to address the problem of carrier switching of customers from chosen carrier to one they did not select). CPSR further argues that, with oral approval, consumers will not be permitted to consider their options due to pressure from telemarketers, and that different adults residing in one household may disagree on whether, or to what extent, the privacy of sensitive information should be safeguarded. CPSR Reply at 12-13. CFA argues that, even if such abuses are later discovered, customer privacy, as well as competition, will already have been damaged. CFA Comments at 7. In this regard, Excel and Frontier raise the concern that, because oral approvals are less specific and verifiable, permitting carriers to obtain such approvals will result in disputes that will implicate FCC and state commission resources. Excel Comments at 5; Frontier Comments at 8-9.

[432] To the extent CPSR's concerns regarding "overselling" refer to either the situation in which a carrier makes frequent outbound calls to a customer for the purpose of soliciting oral approval for CPNI use, or where a carrier makes such calls to market services after approval has been obtained, the TCPA would offer additional protections. Specifically, customers may be asked to be placed on "do-not-call" lists pursuant to the regulations we adopted to implement the TCPA, which we believe would apply to marketing generally and to solicitations for approval. *See TCPA Order*, *supra* note 126.

[433] CPSR Reply at 12-13.

[434] AirTouch Comments at 6; CWI Comments at 8, 9 n.7; LDDS WorldCom Comments at 3-4; TRA Reply at 7-8.

[435] AirTouch Comments at 6; CWI Comments at 8, 9 n.7; LDDS Comments at 3-4; TRA Reply at 7-8.

new entrants.[436] Accordingly, these parties argue, because third parties must obtain affirmative written approval to gain access to CPNI pursuant to section 222(c)(2), all carriers, including AT&T, the BOCs, and GTE, similarly should be required to secure written customer approval.[437] Even if our decision to permit oral approval results in a greater number of approvals, because all carriers must obtain such approval to use CPNI outside the scope of section 222(c)(1), no particular class of carriers is placed at a competitive disadvantage in connection with the CPNI use of their own customers.[438] In addition, we find no reason to impose a written approval requirement only on incumbent carriers, while allowing carriers in competitive markets the option of obtaining written, oral or electronic approval, as some parties suggest.[439] Because oral approval constitutes a form of express approval, we believe that permitting incumbent carriers to obtain such approval for uses of CPNI outside the scope of section 222(c)(1) would not allow incumbent carriers to leverage their dominant position in entering new markets.

D. Duration, Frequency, and Scope of Approval

1. Background

115. The Commission sought comment in the *Notice* on whether requirements should be established regarding (1) how long a customer's approval should remain valid; (2) how often carriers may contact a customer in order to attempt to obtain approval, regardless of whether the customer has restricted its CPNI; and (3) whether and to what extent customers may approve of partial access to their CPNI, for example, limited to certain uses or time periods.[440] Commenters set forth differing views as to how long approval should remain valid. Some parties argue, for example, that approval should remain valid until the customer indicates otherwise, while others contend that approval should be renewed periodically, or should be valid only for the duration of a transaction. Parties similarly argue for differing limitations on how frequently a carrier may contact a customer to solicit approval, ranging from one year from the date of solicitation, to no limitation at all.

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[436] CompuServe Comments at 3, 5-6; CPSR Reply at 10; ITAA Comments at 4-5; ITAA Reply at 6; TRA Reply at 7-8.

[437] CompuServe Comments at 3, 5-6; CPSR Reply at 10; ITAA Comments at 4-5; TRA Reply at 7-8.

[438] Indeed, to the extent section 222 applies to *all* carriers, the burden imposed on small carriers by a written approval requirement may outweigh any benefit such carriers enjoy by subjecting incumbent carriers to more onerous approval requirements.

[439] *See, e.g.*, AirTouch Comments at 6 n.8; Arch Comments at 9-10; Frontier Comments at 7 n.13; ICG Comments at 6.

[440] *Notice* at 12528, ¶ 33.

2. Discussion

116. We conclude that approval obtained by a carrier for the use of CPNI outside of section 222(c)(1), whether oral, written, or electronic, should remain in effect until the customer revokes or limits such approval, as some parties suggest.[441] We find that this interpretation is consistent with the language and design of section 222. In particular, as PacTel notes, the language of section 222(d)(3) stating that carriers may "provide inbound telemarketing, referral, or administrative services to the customer *for the duration of the call*" suggests that Congress expressly limited the duration of approval where it wanted to so specify, and thus the absence of similar language in section 222(c)(1) evidences that Congress did not limit as a statutory matter the time period within which customer approval remains valid.[442] We also find that, so long as a customer is informed of its CPNI rights prior to granting approval, permitting such approval to remain effective until it is revoked or circumscribed does not infringe on a customer's privacy interests. We thus do not require carriers to renew customer approval periodically, for example, annually[443] or semi-annually,[444] or to presume that customer approval is valid only for the duration of the transaction, if the customer has not otherwise specified the time period during which the approval remains valid.[445] Requiring customers who have provided section 222(c)(1) approval to renew such approval periodically would be inconsistent with the focus on customer convenience in section 222, and would not provide any significant additional privacy protections given the notification requirements we adopt in this *Order*.

117. We decline to establish at this time a restriction on the number of times a carrier may contact a customer to obtain approval for the use of CPNI outside of section 222(c)(1), despite arguments raised by some parties.[446] As PacTel points out, section 222 does not expressly establish a limit on how often a carrier may contact a customer in order to obtain section 222(c)(1) approval.[447] We also find that such a restriction

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[441] Ameritech Comments at 11; Arch Comments at 11-12; AT&T Comments at 16; AT&T Reply at 15; Bell Atlantic Reply at 2; CBT Comments at 8; CompTel Comments at 7; GTE Comments at 6; MCI Comments at 12; PacTel Comments at 10-11; PacTel Reply at 7-8; SBC Comments at 11; SBC Reply at 11; Sprint Comments at 6; USTA Reply at 7.

[442] PacTel Comments at 10-11; PacTel Reply at 7-8.

[443] Ad Hoc Comments at 7.

[444] TRA Comments at 16; TRA Reply at 13.

[445] CFA Comments at 8.

[446] AirTouch Comments at 12; Arch Comments at 11-12.

[447] PacTel Comments at 11.

is unnecessary at present because carriers likely will not seek to jeopardize the good will of their customers, through repeatedly attempting to obtain their approval, given the potential that irritated customers would go elsewhere.[448] In addition, as MCI points out, the rules we adopted pursuant to the TCPA, including the requirement that telephone solicitors maintain "do-not-call" lists, provide customers with a mechanism by which they may halt unwanted telephone solicitations.[449] To the extent our assumption that competitive marketplace forces will regulate a carrier's actions proves to be incorrect, however, or carriers engage in outbound solicitations to such an extent that intrudes upon customer privacy, we can reevaluate this conclusion in the future.

118. Finally, we note that section 222(c)(1) is silent on the issue of whether a customer may grant a carrier partial use or access to CPNI outside the scope of section 222(c)(1).[450] We conclude that allowing a customer to grant partial use of CPNI is consistent with one of the underlying principles of section 222 to ensure that customers maintain control over CPNI. A customer could grant approval for partial use, for example, by limiting the uses made of CPNI, the time period within which approval remains valid, and the types of information that may be used. Moreover, we believe that section 222 affords customers the right to authorize partial use of CPNI in the context of section 222(d)(3), which allows a carrier to provide any inbound telemarketing, referral or administrative services for the duration of the call to a customer based on oral approval. In this situation, therefore, a carrier could obtain partial use by virtue of its ability to view customer records for a limited duration, notwithstanding the customer's restriction of CPNI use.

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[448] CompTel Comments at 7-8; PacTel Comments at 11.

[449] MCI Comments at 12. The Telephone Consumer Protection Act of 1991 (TCPA), amended Title II of the Communications Act of 1934, by adding new section 227. 47 U.S.C. § 227. In general, the TCPA imposes restrictions on the use of automatic telephone dialing systems, of artificial or pre-recorded voice messages, and of telephone facsimile machines to send unsolicited advertisements. *See* 47 U.S.C. § 227(b)(1)(A)-(C). The TCPA also required that the Commission consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements. *See* 47 U.S.C. § 227(c)(1)-(4). In implementing the TCPA, the Commission adopted rules requiring, *inter alia*, that commercial telemarketers maintain lists of customers who do not wish to be called, and develop written policies for maintaining such lists. *See* 47 U.S.C. § 64.1200(c)(2)(i), (ii), (iii), (vi).

[450] *See* 47 U.S.C. § 222(c)(1).

E. Verification of Approval

1. Background

119. In the *Notice*, the Commission proposed that, to the extent oral approval is permitted under section 222(c)(1), carriers choosing to obtain oral approval should bear the burden of proof associated with such a scheme in the event of a dispute.[451] The Commission stated that such carriers would be required to show through credible evidence that they have obtained the required customer authorization prior to granting access to CPNI for purposes that otherwise would be unlawful.[452] Parties present differing views as to whether carriers should bear the burden of demonstrating oral approval.

2. Discussion

120. We conclude that a carrier relying on oral approval under section 222(c)(1) should bear the burden of demonstrating that such approval has been given in compliance with the rules we adopt in this order, as a number of parties contend.[453] In general, we find that shifting the burden to such carriers will make it easier to verify oral approval.[454] While section 222 does not expressly require that carriers bear the burden of demonstrating oral approval as PacTel points out,[455] we find that shifting the burden in this manner is consistent with the intent of section 222 to protect the confidentiality of sensitive customer information. Shifting the burden is justified, given the potential for abuse of oral approval mechanisms that could lead to unauthorized dissemination of CPNI.[456] In addition, if we were to require a complaining party to bear the burden of demonstrating that it had not granted oral approval, carriers may not have an incentive to develop verification processes that are adequate to protect customer privacy. We also conclude that shifting the burden to carriers relying on oral approval strikes an appropriate balance in permitting a less rigorous mechanism than written approval.

121. Because carriers must bear the burden of demonstrating that they have obtained oral approval under section 222(c)(1), we find it unnecessary to mandate specific verification

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[451] *Notice* at 12528, ¶ 32.

[452] *Id.*

[453] California Commission Comments at 11; California Commission Reply at 9; CWI Comments at 8; MCI Comments at 11; Sprint Comments at 5; Sprint Reply at 3.

[454] *See supra* ¶ 112.

[455] PacTel Comments at 6; PacTel Reply at 8.

[456] *See* discussion of potential abuses of oral approval mechanisms *supra* ¶ ¶ 112-113.

mechanisms at this time. We believe that carriers will have an incentive to develop on their own processes to show that they have obtained approval in order to satisfy this burden.[457] We note, however, that while carriers may use any method of verification that they see fit, certain methods may carry greater weight than others in determining whether a carrier has satisfied its burden. In general, we agree with those commenters arguing that a carrier relying on oral approval should be able to meet its burden by, for example, audiotaping customer conversations,[458] or by demonstrating that a qualified independent third party operating in a location physically separate from the carrier's telemarketing representative has obtained customer approval under section 222(c)(1) subsequent to adequate notification of its CPNI rights, and has confirmed the appropriate verification data, *e.g.*, the customer's date of birth or social security number.[459] In contrast, we would likely not consider the mere absence of any CPNI restriction in the customer's database or other account record sufficient to verify that a customer has given express approval in accordance with section 222(c)(1), despite SBC's suggestion.[460] In addition, because carriers are required under our rules to notify customers of their CPNI rights prior to soliciting approval, we do not require them to send follow-up letters to customers confirming approval, contrary to some parties' contentions.[461]

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[457] PacTel Comments at 6; PacTel Reply at 8.

[458] Bell Atlantic Comments at 2, 9; MCI Comments at 11; TRA Comments at 16. We note that, to the extent required by other laws or rules, carriers choosing to audiotape customer conversations must announce to the customer that the conversation is being taped.

[459] California Commission Comments at 12; CWI Comments at 8; MCI Comments at 11; *see also* AirTouch Comments at 9-11 (any approval obtained by carrier under section 222(c)(1), whether written, oral or electronic, must confirm subscriber billing name and address, as well as each telephone number covered by the approval, and must acknowledge that customer is aware of its right to restrict access to CPNI, but nevertheless authorizes release of CPNI to carrier, its affiliates, and potentially unaffiliated third parties; approval, if written, must be signed and dated by subscriber or any authorized representative). We adopted a similar requirement in the context of PIC change verifications. *See* 47 C.F.R. § 64.1100(c). One variation on these two verification mechanisms that also may allow a carrier to meet its burden, suggested by VoiceLog, is the use of an independent recording service bureau, which audiotapes and maintains scripted requests for oral approval, as well as customer responses to those requests. VoiceLog *ex partes* (filed Sept. 3, 1996 and Nov. 12, 1996). VoiceLog states that the use of a recording service bureau enables a carrier to set up a three-way call between the customer, the carrier and the recording system. According to VoiceLog, the system plays an announcement that the conversation will be recorded and then begins recording, at which point, the carrier's telephone representative explains the customer's rights with regard to CPNI use, and asks for the customer's permission to use CPNI. VoiceLog *ex parte* (filed Sept. 3, 1996) at 1.

[460] SBC Comments at 12; SBC Reply at 10.

[461] California Commission Comments at 12; CWI Comments at 8.

122. Although we require carriers to certify that they are in compliance with our CPNI requirements,[462] such certifications, standing alone, would not be adequate to satisfy a carrier's burden of demonstrating oral approval, despite AirTouch's contention.[463] Allowing carriers to satisfy their burden through electronic or written entries obtained outside of the independent third party verification process, or merely by certifying that they are in compliance with our rules, would undermine the intent of section 222 to protect the confidentiality of sensitive customer information, since permitting carriers to do so could potentially result in abuses that lead to the unauthorized use or dissemination of CPNI.

123. Finally, we require that carriers maintain records of notification and approval, whether written, oral, or electronic, and be capable of producing them if the sufficiency of a customer's notification and approval is challenged.[464] Maintenance of such records will facilitate the disposition of individual complaint proceedings. We thus require that carriers maintain such records for a period of at least one year in order to ensure a sufficient evidentiary record for CPNI compliance and verification purposes.[465] In any event, carriers generally will have an incentive to maintain such records for evidentiary purposes in the event of a dispute with a customer or other "person" under section 222(c)(2). This is true particularly in the case of oral approvals (including oral notification), which carriers bear the burden of demonstrating have been given in accordance with our rules.

F. Informed Approval Through Notification

1. Background

124. Section 222 of the Act does not expressly require that carriers notify customers of the privacy protections afforded by section 222 if they wish to use CPNI for marketing purposes beyond sections 222(c)(1)(A) and 222(c)(1)(B).[466] The Commission tentatively concluded in the *Notice* that carriers seeking approval for CPNI use within the meaning of section 222(c)(1) should be required to notify customers of their right to restrict carrier use

[462] *See infra* Part VIII.D. for a discussion of additional CPNI safeguards.

[463] AirTouch Comments at 12.

[464] Airtouch Comments at 12. AirTouch argues further that LECs should be required to maintain copies of solicitation and consent forms in a file available for public inspection. *Id.*

[465] *See* ITAA Comments at 5 (urging adoption of specific requirement as to how long carriers must maintain records of notification and approval).

[466] *See* 47 U.S.C. § 222.

of, or access to, CPNI.[467] The Commission reasoned that customers must know that they have the right to restrict carrier CPNI use, before they can waive that right.[468]

125. Under the *Computer III* rules, AT&T, the BOCs, and GTE are required to notify their multi-line business customers annually of their right to restrict before using CPNI to market enhanced services.[469] In addition, the BOCs and GTE, but not AT&T, are required to notify their multi-line business customers annually before using CPNI to market CPE.[470] These carriers, however, are not subject to a general obligation to notify residential or single-line business customers of their right to restrict carrier CPNI use prior to marketing enhanced services or CPE. In November 1996 and in December 1997, the Common Carrier Bureau and the Policy and Program Planning Division, respectively, waived these annual notification requirements pending our action in this proceeding.[471]

126. One party, BellSouth, contends that we need not require telecommunications carriers to notify customers of their CPNI rights.[472] All other commenters generally agree with our tentative conclusion that telecommunications carriers should be required to notify customers because, absent a notification requirement, customers will be unaware of their CPNI rights.[473] A number of parties argue further, however, that carriers should be required to provide this notification only if they wish to use, disclose or permit access to CPNI beyond the purposes specified in sections 222(c)(1)(A) and (B).

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[467] *Notice* at 12526-27, ¶ 28.

[468] *Id.*

[469] *See Computer III Phase II Order*, 2 FCC Rcd at 3093-97 ¶ ¶ 141-174; *GTE Safeguards Order*, 9 FCC Rcd at 4943.

[470] *See BOC CPE Relief Order*, 2 FCC Rcd at 144 ¶ ¶ 55-70, *supra* note 34.

[471] *Petition for Exemption from Customer Proprietary Network Information Notification Requirements*, Order, 12 FCC Rcd 15134 (1996); *In the Matter of Waiver from Customer Proprietary Network Information Notification Requirements*, CCB Pol 97-13, DA 97-2599 (rel. Dec. 16, 1997).

[472] BellSouth Comments at 13.

[473] *See, e.g.*, Bell Atlantic Comments at 10-11; CompTel Comments at 11.

2. Discussion

127. Although section 222 does not expressly require notification of a customer's CPNI rights, we conclude that telecommunications carriers should be required to notify customers of their right to restrict carrier use of CPNI.[474] We believe that notification of a customer's CPNI rights is an element of informed "approval" within the meaning of section 222(c)(1). Thus, because section 222(c)(1) by its terms requires express approval for carrier uses of CPNI beyond the scope of the existing service relationship, carriers likewise must provide notification for the use of CPNI beyond the scope of the existing service relationship.[475] Although section 222 does not specifically impose this obligation on carriers as BellSouth points out,[476] we believe that such a requirement is consistent with Congress' intent to safeguard the confidentiality of sensitive information, and to vest control over such information with the customer. We therefore require carriers to provide notification if they wish to use, disclose or permit access to CPNI beyond the purposes specified in sections 222(c)(1)(A) and (B); at this time, however, we make no decision on whether notice is required for use of CPNI within the scope of sections 222(c)(1)(A) and (B).[477]

128. More specifically, we agree with the majority of commenters that customers must be made aware of their CPNI rights before they can be deemed to have "waived" those rights. Requiring notification will not cause confusion to customers as BellSouth suggests,[478] but rather will ensure that customers either grant or deny approval in an informed fashion.

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[474] *See, e.g.*, Ad Hoc Comments at 7; Bell Atlantic Comments at 10; CompTel Comments at 11; CPI Comments at 10; DMA Reply at 2; Excel Comments at 5; GTE Comments at 3; ITAA Comments at 5-7; LDDS Worldcom Comments at 9; NYNEX Comments at 12-13; TCG Comments at 6; Washington Commission Comments at 7-8.

[475] *See, e.g.*, AICC Comments at 10; Ameritech Comments at 7; AT&T Comments at 3; California Commission Comments at 10-11; CPSR Reply at 8; CWI Comments at 3; MCI Comments at 9; SBC Comments at 10-11; Sprint Comments at 4-5; TCG Comments at 6-7; Texas Commission Comments at 11-12; TRA Comments at 15-16; TRA Reply at 4, 11; U S WEST Comments at 21-22.

[476] BellSouth Comments at 13.

[477] Because the *Notice* did not seek comment on the issue of whether a customer has the right to restrict carrier use of CPNI *within* the scope of sections 222(c)(1)(A) and 222(c)(1)(B), our decision here is limited to the circumstance identified in the *Notice*, *i.e.*, where a carrier seeks approval for CPNI use *outside* of section 222(c)(1). The issues of whether, and what form of, notice for restricting a carrier's section 222(c)(1)(A) and (B) uses of CPNI may be required are discussed in our *Further Notice of Proposed Rulemaking infra* Part IX

[478] *Id.* at 15.

Moreover, we find that a notification requirement would provide customers maximum control over carrier use of CPNI, and thus would further the objectives of section 222.[479]

129. We reject BellSouth's contention that customers reasonably expect businesses with whom they have a pre-existing relationship to use CPNI to offer new services, and that therefore carrier use of CPNI for the development and marketing of services should be deemed to be permitted or invited, in the absence of specific notification to the customer.[480] As we conclude elsewhere in this order, we find that a customer's expectation, and implied approval, for the use of CPNI for marketing purposes extends only to offerings within the customer's total service relationship with the carrier. Consequently, specific notification of the customer's CPNI rights, as a component of informed "approval" under section 222(c)(1), is warranted for uses of CPNI outside the customer's total service offering.

G. Form and Content of Notification

1. Background

130. The Commission sought comment in the *Notice* on whether it should allow notification to be given orally and simultaneously with a carrier's attempt to seek approval for CPNI use, or whether it should instead require advance written notification.[481] The Commission further sought comment on what is the least burdensome method of notification that would meet the objectives of the 1996 Act, and noted that, under *Computer III*, AT&T, the BOCs and GTE are required to provide to multi-line business customers written notification of their CPNI rights.[482] The Commission also sought comment on whether it needed to specify the information that should be included in the customer notification, and, if so, the disclosure requirements that it should adopt.[483]

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[479] CompTel Comments at 11.

[480] BellSouth Comments at 12-14 (pointing out that, in implementing the TCPA, we did not require companies engaged in outbound telephone solicitations to inform customers of their right to be placed on "do-not-call" lists, but instead, provided for notification through a consumer alert and industry bulletin).

[481] *Notice* at 12526-27, ¶ 28.

[482] *Id.*

[483] *Id.*

131. A number of commenters, advocating prior written notification, argue that such notification would help to ensure customer understanding and uniformity among carriers.[484] Other parties maintain that carriers should be permitted to give oral notification.[485] Still other commenters generally contend that we should require written notice for dominant telecommunications carriers, but permit oral notice for other carriers, including small carriers or carriers in competitive markets.[486] Several parties also maintain that carriers should be given discretion to determine the content of notification.[487] Other commenters assert that we should specify minimum notification requirements,[488] and propose specific content requirements.

2. Discussion

132. *Form of Notification.* We conclude that a carrier should be permitted to provide either written or oral notification, as a number of parties contend.[489] Such notification, for example, may take the form of a bill insert,[490] an individual letter,[491] or an

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[484] Arch Comments at 8, 11; California Commission Comments at 10; CBT Comments at 8; CFA Comments at 6; CPI Comments at 10-11; CPSR Reply at 8; CWI Comments at 5-6; Excel Comments at 4; ITAA Comments at 5, 8; LDDS WorldCom Comments at 9-10; LDDS WorldCom Reply at 5-6; MFS Comments at 11; SBC Comments at 10-11; Sprint Comments at 4; Texas Commission Comments at 11; Washington Commission Comments at 5.

[485] Ameritech Comments at 8-9; AT&T Comments at 16; AT&T Reply at 14-15; BellSouth Comments at 13-16; GTE Comments at 6 n.10; MCI Comments at 10; NYNEX Comments at 14; TCG Comments at 6-7; TRA Comments at 16; U S WEST Reply at 8.

[486] AirTouch Comments at 4; Arch Comments at 8-10; LDDS WorldCom Comments at 11; MobileMedia Reply at 3.

[487] *See, e.g.*, BellSouth Comments at 14, 17-18; NYNEX Comments at 14; PacTel Comments at 12; PacTel Reply at 8; SBC Comments at 10; Sprint Comments at 4-5.

[488] *See, e.g.*, AICC Comments at 10; AT&T Comments at 15; California Commission Comments at 10; CompTel Comments at 11; CPI Comments at 11; CPSR Reply at 8; CWI Comments at 6-7, 9; Excel Comments at 4; ITAA Comments at 6-8; ITAA Reply at 9; LDDS WorldCom Comments at 10; LDDS WorldCom Reply at 9-10; Texas Commission Comments at 9-11; TRA Reply at 11; Washington Commission Comments at 7-8.

[489] Ameritech Comments at 8-9; AT&T Comments at 16; AT&T Reply at 14-15; BellSouth Comments at 13-16; GTE Comments at 6 n.10; MCI Comments at 10; NYNEX Comments at 14; TCG Comments at 6-7; TRA Comments at 16; U S WEST Reply at 8.

[490] BellSouth Comments at 16; California Commission Comments at 10; CWI Comments at 6; DMA Reply at 2; GTE Comments at 3, 6; SBC Comments at 11; Texas Commission Comments at 11-12; U S WEST Reply at 9. We are not persuaded that bill inserts are ineffective based on CPSR's bare assertion that customers routinely discard them. CPSR Reply at 8. To the contrary, based on the California Commission's success in

oral presentation that advises the customer of his or her right to restrict carrier access to CPNI. We conclude that allowing carriers to provide notification through these means will give them flexibility, while ensuring that customers are informed of their right to restrict access to CPNI, consistent with the intent of section 222. In addition, as a number of carriers suggest, allowing carriers to choose between oral and written notification is less burdensome for carriers.[492]

133. We are not persuaded by parties' assertions that oral notification is necessarily less verifiable than written,[493] will result in abuses,[494] create greater disputes and confuse customers,[495] is too difficult to accomplish successfully,[496] or could be used to dissuade customers from releasing CPNI to a competitor.[497] Any verification concerns that may arise where carriers provide verbal notice of CPNI rights can be adequately addressed through measures less restrictive than an outright prohibition on oral notification mechanisms. For example, any verification problems concerning oral notice, like oral approval, may be addressed by requiring carriers to bear the burden of demonstrating that such notice has been given in the event of a dispute.[498] We therefore conclude that a carrier providing verbal notification of a customer's CPNI rights must carry the burden of showing that such notice has been given, in compliance with the requirements we adopt in this order. Shifting the burden to such carriers will ensure that customers are adequately informed of their CPNI rights. We further find that carriers may use any reasonable method for verifying oral notification that adequately confirms that such notification has been given, including, but not limited to, audiotaping customer conversations or using an independent third party verification process. Likewise, any concerns regarding customer confusion or carrier abuse are adequately

using bill inserts as a means of customer notification in the caller ID and other contexts, we conclude that carriers should be permitted to provide notice through bill inserts. California Commission Comments at 10.

[491] *See, e.g.*, BellSouth Comments at 16; CWI Comments at 6; U S WEST Reply at 9.

[492] Ameritech Comments at 8-9; AT&T Comments at 16; BellSouth Comments at 13-16; GTE Comments at 6 n.10; NYNEX Comments at 14; TCG Comments at 6-7; U S WEST Reply at 8.

[493] LDDS WorldCom Comments at 9-10.

[494] TRA Reply at 11.

[495] CWI Comments at 5-6; Excel Comments at 4.

[496] Excel Comments at 4.

[497] *Id.*

[498] *See supra* Part V.E.