Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

COMMENTS OF VERIZON WIRELESS

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SUMMARY

The Commission should adopt a notice and opt-out regulatory framework for CPNI. The opt-out approach is not only much more likely than opt-in to withstand constitutional challenge, it is better policy. This approach would provide consumers with sufficient privacy protection, with individual customers free to exercise their opt-out option and restrict carriers' use of their CPNI. At the same time, an opt-out framework would permit use of the CPNI of customers who have no objection to such usage, enabling carriers to market efficiently.

Adoption of an opt-out framework would also be consistent with repeated actions by Congress and the Commission itself to protect consumer privacy in the telecommunications area and in other contexts. As it formulates its post-*US West v. FCC* CPNI framework, the Commission should give this evidence and precedent significant weight.

Proper statutory interpretation of the term "approval" warrants adoption of a notice and opt-out mechanism. In 1999, Congress enacted Section 222(f), which requires that a customer give his or her "express prior authorization" before a carrier can use or disclose "wireless location information," a new type of CPNI. Congress' decision not to require express prior consent for the use of other CPNI supports an opt-out rule for that type of information.

If the Commission insists on revisiting opt-in, it faces an extraordinarily heavy legal burden to overcome the many constitutional problems with that requirement. The Commission must demonstrate, with clear and convincing evidence, that an opt-in policy satisfies the three prongs of the *Central Hudson* test for restrictions on commercial

speech. With the notice and opt-out alternative still available, the opt-in approach is not sufficiently narrowly tailored. Comparing the two approval mechanisms, the burden would be on the Commission to show that the opt-in approach comes closer than opt-out to representing customers' actual preferences regarding treatment of CPNI. Without compelling evidence to support this proposition, the Commission cannot, constitutionally, impose any obligation beyond opt-out.

Finally, the Commission's TSA policy should be unaffected by adoption of a notice and opt-out mechanism. If a customer exercises his or her opportunity to opt out, the carrier should still be able to use CPNI within the scope of its "total service" relationship with that customer.

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COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby comments on the Commission's further rulemaking proposal in the above-captioned proceeding,[1] in which the Commission asks what form of customer approval it should require for use and disclosure of customer proprietary network information ("CPNI") in the wake of the Tenth Circuit's decision in *U.S. WEST v. FCC*. Given that court's decisive invalidation of the Commission's opt-in framework, the obvious and broadly acknowledged benefits of the notice and opt-out approach, and the widespread application of opt-out principles by Congress and the Commission itself, the Commission's decision in this proceeding should be an easy one: it should move quickly to adopt a notice and opt-out system for carrier use of CPNI.

[1] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, *Clarification Order and Second Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-115 and 96-149 (rel. Sep. 7, 2001).

BACKGROUND

In February 1998, the Commission established a regulatory framework for the use and disclosure of CPNI, pursuant to Congress' 1996 enactment of Section 222 of the Communications Act.[2] The Commission decided that in order for a customer to "approve" of a carrier's use or disclosure of CPNI, that customer must provide his or her affirmative prior consent to such activity, or "opt in."[3] Several carriers challenged this "opt-in" framework as unconstitutional, and in August 1999 the U.S. Court of Appeals for the Tenth Circuit ruled that the Commission's CPNI opt-in requirement violated the First Amendment.[4] Now, following *U.S. WEST v. FCC*, the Commission seeks to establish a new customer approval mechanism for the use of CPNI.[5] The Commission requests renewed comment on the opt-in and opt-out alternatives, asking for parties' views on the privacy and competition ramifications of these options and the effect of the Tenth Circuit decision on this policy choice.

Whatever decision the Commission makes in this proceeding, Verizon Wireless will remain committed to protecting the privacy of its customers. Since its formation, Verizon Wireless has vigorously safeguarded the privacy of all personally identifiable

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[2] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, *Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998) ("*CPNI Order*"); 47 U.S.C. § 222.

[3] The term "opt-out," in contrast, refers to the right of a customer, after receiving notice from the carrier, to prevent that carrier from using that customer's CPNI outside the bounds of the existing customer-carrier relationship.

[4] *U.S. WEST, Inc., v. FCC*, 182 F.3d 1224 (10th Cir., 1999), *cert. denied*, 120 S. Ct. 2215 (Jun. 5, 2000) (*"U.S. WEST v. FCC"*).

[5] In 1999, Congress expanded the definition of CPNI to include "wireless location information," but established a separate opt-in approach for this subset of CPNI. *See* 47 U.S.C. § 222(f); note 34 *infra*. Verizon Wireless' comments herein pertain to the Commission's treatment of all other CPNI.

customer information. Through its Code of Business Conduct, Verizon Wireless requires the highest standard of conduct from employees with access to customer communications and records, including CPNI. The Code includes the following privacy protections:

- The Code classifies as confidential that information which relates to a specific customer or to customers in general, such as terms of customer contracts, types, locations, and quantities of service, calling patterns, and billing information.

- The Code prohibits employees from accessing or removing customer data from company records without proper authority, and directs employees to use personal data on customers only for business purposes and only on a "need to know" basis.

- The Code emphasizes the importance of customer privacy and the protection of confidential information and prohibits employees from disclosing customer information unless for a proper business reason (except as required by law).

- The Code defines "CPNI," states that employees may use CPNI only for certain approved business purposes, and directs employees to contact the Verizon Wireless Legal Department if they have any questions about the use of CPNI.

- The Code establishes that, after termination of employment from Verizon Wireless, former employees are not to use or disclose any confidential information without the prior written consent of the Company (except as required by law).

- The Code directs that confidential information be securely stored – if possible, locked up – and requires that confidential documents contain statements requiring non-disclosure.

Verizon Wireless has taken great strides to establish itself as an industry leader in protecting CPNI, informing its customers of their rights through bill messages, web site information, and advertising. Verizon Wireless has operationalized all CPNI requirements through its call centers, sales, and marketing organizations, and addresses privacy concerns in its dealings with new technology, its vendors, as well as through its

new product approval process. This commitment is integral to all areas of Verizon Wireless' business.

Consistent with this commitment to customer privacy, Verizon Wireless believes that the Commission should adopt a notice and opt-out regulatory framework for CPNI. An opt-out mechanism will provide full privacy protection for customers, while promoting the development of innovative services that yield a variety of benefits for consumers and the public.

DISCUSSION

I. THE FCC SHOULD ADOPT AN OPT-OUT FRAMEWORK FOR USE AND DISCLOSURE OF CPNI

Given the Tenth Circuit's invalidation of the Commission's opt-in mechanism, the Commission faces a daunting legal burden if it attempts to revive that restriction. Rather than waste scarce resources on what would likely be a futile effort, the Commission should move quickly to adopt opt-out rules for carrier use of CPNI. As Verizon Wireless' predecessors and many other carriers argued prior to the Commission's 1998 order, a notice and opt-out framework is not only much more likely than opt-in to withstand constitutional challenge, it is simply better policy.

A. A Policy of Notice and Opt-out Would Protect Consumer Privacy and Promote Competition

In regulating the use and disclosure of CPNI, a notice and opt-out framework is the best approach to protecting consumer privacy while not impeding competition. This approach would provide consumers with sufficient privacy protection, with individual customers free to exercise their opt-out option and restrict carriers' use of their CPNI. An opt-out approach would also eliminate certain carrier practices viewed by some

customers as privacy intrusions. Specifically, in an opt-out environment, carriers would have no need to call customers repeatedly in an effort to obtain affirmative consent for use of CPNI. Broader use of CPNI would also allow companies to engage in more targeted marketing, reducing the probability that consumers would be bothered with information of no interest to them.

While enhancing consumer privacy, an opt-out framework would permit use of the CPNI of customers who have no objection to such usage but who would fail to "opt in" due to a lack of interest or information. With a more efficient internal flow of commercially valuable information, companies could more quickly and effectively market new and innovative telecommunications services. Accordingly, an opt-out framework would do more than opt-in to encourage vibrant competition within and between telecommunications industry segments. To the extent that the Commission still considers competitive issues in this proceeding, this factor should weigh heavily in favor of notice and opt-out.[6]

Verizon Wireless recognizes that an opt-out rule would require that customers receive clear and timely notice regarding their "opt-out" rights. Verizon Wireless agrees that customers should be provided with a means of opting out, such as the "detachable reply card, toll-free telephone number or electronic mail address" suggested by the Commission.[7] The choice of opt-out mechanism, however, should be left to carriers, consistent with carriers' right to communicate with their customers and to select the manner of such communication. Such notice and consent procedures would enable

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[6] In *U.S. WEST v. FCC*, the Tenth Circuit found that the promotion of competition was not one of the legislative purposes of Section 222(c). As a result, the Court minimized any consideration of competition in its First Amendment analysis. *U.S. WEST. v. FCC*, 182 F.3d at 1236-37.

customers to "approve" in a meaningful way a carrier's use and disclosure of CPNI, as required under Section 222(c)(1). Verizon Wireless further concurs that the Commission's existing notification rules are generally sufficient no matter the particular method of customer approval ultimately adopted, and that these rules should remain in effect.[8] The Commission should not establish costly or burdensome notice and consent requirements in conjunction with opt-out (in terms of frequency of notice, volume of notice material, etc.), action that could offset or moot the benefits that opt-out would provide.[9]

B. Evidence Already on the Record in the Commission's CPNI Docket Supports the Adoption of Notice and Opt-out

The likely benefits of a notice and opt-out framework for CPNI were described in materials filed with the Commission prior to the 1998 CPNI Order. In view of the Tenth Circuit's decision, the Commission should give this evidence a fresh look and accord it significant weight as it formulates a post-*U.S. WEST v. FCC* CPNI framework.

Included in this evidence was the Pacific Telesis-sponsored public opinion survey by Dr. Alan Westin,[10] an expert on information policy and privacy. This study, described extensively both in the Commission's rulemaking proceeding and in the Tenth Circuit case, found that consumers trust local telephone companies to use their personal

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[7] *FNPRM* at para. 9.

[8] *See id*.

[9] Verizon Wireless also agrees with the Commission that customers should have thirty days following notification to opt out of the CPNI sharing framework, and that they should retain the right to exercise their CPNI opt-out any time after that thirty-day period. *FNRPM* at para. 23.

[10] *Public Attitudes Toward Local Telephone Company Use of CPNI*: Report of a National Opinion Survey Conducted November 14-17, 1996, by Opinion Research Corporation, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, Sponsored by Pacific Telesis Group ("Westin Survey").

information in a responsible way,[11] that most consumers believe it is acceptable for these companies to communicate with their own customers to offer them additional services, and that a large public majority believes that it is acceptable for local telephone companies to communicate with their customers using CPNI data, especially if an opt-out procedure is available.[12]

The Westin Survey confirmed evidence submitted into the record by Cincinnati Bell Telephone ("CBT"), U.S. WEST, Bell Atlantic, and others regarding customer expectations and CPNI use within the carrier-customer relationship. CBT submitted a study that demonstrated that most local telephone customers expect their carrier to use CPNI to keep them apprised of various service offerings.[13] The U.S. WEST survey showed that telephone customers were very interested in receiving information about packaged cable/telephone offerings,[14] and Bell Atlantic's comments cited to survey evidence indicating that most customers wanted to deal with a single carrier for all of their companies telecommunications needs.[15]

In addition, two expert Executive Branch organizations – the Privacy Working Group of the Clinton Administration's National Information Infrastructure Task Force

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[11] Westin Survey, Questions 2C, 3; Analysis at Item 5, at 5-7 ("the finding that 77% of the American public have medium to high trust in local telephone companies gives strong support to the idea that a voluntary program of notice and opt outs in local company use of customer information for offering additional telephone services would be regarded with confidence and approval by more than three out of four Americans").

[12] *Id.* Questions 7-12; Analysis at Items 7-10, at 8-10.

[13] Comments of Cincinnati Bell Telephone Co., CC Docket No. 96-115, at 7-8 n.12 (June 11, 1996) (citing study by Aragon Consulting Group attached to CBT Comments at Appendix A).

[14] Opening Comments of U S WEST, CC Docket No. 96-115, at 6 (June 11, 1996).

[15] Comments of Bell Atlantic, CC Docket No. 96-115, at 6 (June 11, 1996) (citing to a 1994 NFIB Foundation business survey, "Who Will Connect Small Businesses to the Information Superhighway?", at 22 (Dec. 1994)).

(NIITF)[16] and NTIA[17] -- issued reports in 1995 that supported an *opt-out* framework for the commercial use of CPNI. In particular, NTIA's report urged that telecommunications service providers adopt an opt-in approach for "sensitive" customer information and an opt-out mechanism for "non-sensitive" personal information. NTIA characterized "sensitive" information as that relating to health care, political persuasion, sexual orientation, and personal finances, and found that CPNI as defined in Section 222 was generally "non-sensitive."[18] Accordingly, NTIA concluded that an opt-out framework for CPNI would be entirely consistent with individual privacy and, unlike opt-in, would foster a dynamic marketplace beneficial to consumers.[19] NTIA expressed this view in comments filed in the Commission's CPNI proceeding.[20]

In recent testimony before Congress, privacy experts again expressed support for an opt-out approach for customer information. Testifying in May 2001, Dr. Westin pointed out again that "more than three out of four [consumers] consider it acceptable that businesses compile profiles of their interests and communicate offers to them," as long as they are given an opportunity to opt out.[21] Professor Fred H. Cate of Indiana University School of Law expressed a similar view, testifying that the intra-company sharing of CPNI "enhance[s] customer convenience and service," enabling a customer to

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[16] *See* "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information, A Report of the Privacy Working Group" (Oct. 1995) ("Privacy Working Group Report").

[17] *See* U.S. Department of Commerce, NTIA, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information," (Oct., 1995) ("NTIA Privacy Report").

[18] NTIA Privacy Report at 20, 23, 25 n.98.

[19] *Id*. at 24-25.

[20] Reply Comments of NTIA, at 25-27 (Mar. 27, 1997).

[21] "What Consumers Have to Say About Information Privacy," prepared statement of Dr. Alan Westin before the House Subcommittee on Commerce, Trade, and Consumer Protection, May 8, 2001.

call one customer service number and transact with different affiliates of a single company "as if they were one." According to Professor Cate, such information-sharing benefits consumers by permitting them "to be informed rapidly and at low cost of those opportunities in which they are most likely to be interested."[22]

C. Both the FCC and Congress Have Adopted Notice and Opt-out Mechanisms in a Variety of Contexts

Adoption of an opt-out framework would be consistent with repeated actions by the Commission to protect consumer privacy:

- Prior to the passage of 222(c)(1), the Commission generally allowed carriers to use CPNI to market new services without any showing of customer approval beyond that implied in the existing carrier-customer relationship. In the 1980's, in adopting non-structural safeguards for the marketing of CPE and enhanced services by AT&T, the BOCs, and GTE, the Commission established an *opt-out* CPNI regime for virtually all of its customers.[23] The Commission explained that without the greater flexibility afforded by opt-out, most of these carriers' customers would have had their CPNI restricted and would have been denied the benefits of integrated marketing.[24]

- The Commission maintained this approach in 1995 when it approved AT&T's acquisition of McCaw's cellular operations. There, the Commission permitted AT&T to share CPNI with its new wireless affiliate, as long as customers objecting to such sharing could *opt out*.[25]

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[22] "Privacy in the Commercial World," prepared statement of Fred H. Cate, before the House Subcommittee on Commerce, Trade, and Consumer Protection, May 1, 2001.

[23] *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I Report and Order*, 104 FCC 2d 958 at paras. 264-65 (1986); *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order*, 2 FCC Rcd 143, para. 70 (1987); *Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571, paras. 84-89 (1991) ("*Computer III Remand Order*"). In the absence of prior consent, enhanced service marketing representatives could not use the CPNI of business customers with more than 20 lines. *See Computer III Remand Order* at para. 86.

[24] *Computer III Remand Order* at 7610 n. 155.

[25] *In re Applications of McCaw and AT&T Co.*, 10 FCC Rcd 11786, 11794 (1995).

Congress and the Commission have found that opt-out procedures protect consumer privacy in other telecommunications contexts:

- In 1992, Congress and the Commission, respectively, enacted legislation and implemented rules that permit companies to telemarket to their customers, except to customers who opt out and ask to be placed on a "do not call" list. Congress and the Commission concluded that this *opt-out* policy is consistent with customers' privacy expectations and provides them with adequate protection.[26]

- In 1993, in a proceeding regarding the treatment of the billing name and address ("BNA") of customers with unlisted numbers, the Commission adopted an *opt-out* rule that permitted carriers to share these customers' BNA with unaffiliated telecommunications providers as long as sufficient notification to these customers was provided and these customers did not affirmatively request non-disclosure of BNA.[27]

- Outside of the telecommunications arena, Congress decided just two years ago that a notice and *opt-out* framework is the appropriate approach to regulating financial institutions' use of consumers' financial information. Congress enacted the Financial Services Modernization Act, or the "Gramm-Leach-Bliley Act," to facilitate affiliations between banks, securities, and insurance companies, principally through the sharing of information.[28] To protect consumers, Congress required these financial institutions to provide consumers with the opportunity to "opt-out" to prevent these institutions from sharing personal information with nonaffiliated third parties. In doing so, Congress explicitly rejected the use of an opt-in mechanism.[29]

- Congress' approach to regulating credit information has been similar. The Fair Credit Reporting Act, passed by Congress in 1970 and amended in 1996,[30] permits entities within the same corporate family to share information relating to a

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[26] *See* 47 U.S.C. § 227(a)(3)(B); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8770 (1992).

[27] *BNA Second Recon. Order*, 8 FCC Rcd 8798, 8810 (1993).

[28] Gramm-Leach-Bliley Act, Title V, Pub. L. No. 106-102, 113 Stat. 1338, Section 502 (1999); 15 U.S.C. § 6802.

[29] H.R. Rep. No. 106-74, Section 501 (1999) (stating that "this opt-out requirement does not require an institution to obtain prior consent from its customers prior to making such information available to affiliated or unaffiliated parties, as would be the case under the "opt-in" model that has been followed in Europe").

[30] 15 U.S.C. §1681 (2000).

consumer's creditworthiness as long as they follow a notice and opt-out procedure.[31]

NTIA concluded in its report that CPNI is not as sensitive as the financial and credit information to which Congress has applied notice and opt-out procedures. Given these government findings, and the numerous times that opt-out has been chosen as the method to protect customer privacy interests, there remains no justification for the Commission to apply the more burdensome opt-in restriction to carrier use of CPNI.

II. AN APPROPRIATE STATUTORY INTERPRETATION OF "APPROVAL" PERMITS THE ADOPTION OF A NOTICE AND OPT-OUT MECHANISM

Prior to the *CPNI Order*, advocates of the opt-out approach argued that an appropriate statutory interpretation of "approval" in Section 222(c)(1) would permit the Commission to adopt a notice and opt-out mechanism for CPNI.[32] According to these commenters, Congress' intent to permit notice and opt-out for CPNI was evidenced by the fact that it required only customer "approval" in section 222(c)(1); this language contrasted with Congress' requirement of an "affirmative written request" in section 222(c)(2). The Commission rejected this analysis, concluding instead that use of the term "approval" is more reasonably construed to permit oral, in addition to written, prior approval for carrier use of CPNI.[33]

Verizon Wireless continues to view as incorrect the Commission's 1998 interpretation of "approval" as meaning affirmative prior consent. Any doubt that this interpretation was invalid should in any event be erased by Congress' 1999 amendments to Section 222, including the addition of new Section 222(f). That provision was enacted

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[31] 15 U.S.C. § 1681b(e)(5).

[32] *See, e.g.*, Reply Comments of GTE Service Corporation, CC Docket No. 96-115, at 4-5 (June 26, 1996).

as part of the Wireless Communications and Public Safety Act of 1999, which expanded the definition of CPNI to include "wireless location information." Congress adopted a distinct approval process for sharing of wireless *location* information, requiring that a customer give his or her "express prior authorization" before a carrier can use, disclose, or provide access to this information.[34] This requirement for "express prior authorization" in Section 222(f) establishes an opt-in framework *only* for the use of wireless *location* information, and stands in clear contrast to Congress' decision merely to require customer "approval" for use and disclosure of all other CPNI. If Congress had intended an express prior consent requirement for all CPNI, it would have used similar language in Section 222(c)(1). That Congress did not do so should lead the Commission to abandon its 1998 analysis and instead determine that the term "approval" permits a notice and opt-out framework for CPNI.

III. A REVIVED OPT-IN FRAMEWORK IS UNLIKELY TO SURVIVE FIRST AMENDMENT SCRUTINY

A. To Implement an Opt-in Mechanism, the Commission Would Have to Meet a Heavy Legal Burden

In the *FNPRM*, the Commission's discussion implies that it retains substantial flexibility to revive its opt-in restriction for CPNI, despite the Tenth Circuit's invalidation of this restriction more than two years ago. The *FNPRM* asks for comment "on any potential harms that may arise from adopting either an opt-out or opt-in approach," and on the "relative costs and convenience of CPNI use under both opt-in and opt-out,"

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[33] *CPNI Order* at para. 92.

[34] Wireless Communications and Public Safety Act of 1999 (911 Act), Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286, amending the Communications Act of 1934, 47 U.S.C. §§ 222, 225.

requests that leave the impression that these policy options are equally available to the Commission.[35]

Contrary to this implication, the Commission does not have the discretion to engage in a fresh public interest analysis and simply adopt its preferred policy. Rather, as a result of *U.S. WEST v. FCC*, the Commission is substantially constrained in this proceeding. If the Commission wishes to revisit its opt-in methodology, it faces an extraordinarily heavy legal burden. The Commission must demonstrate, with clear and convincing evidence, that an opt-in policy satisfies the three prongs of the *Central Hudson* test for restrictions on commercial speech – it must show that (i) the government interest is substantial, (ii) the selected opt-in framework advances that interest, and (iii) the opt-in framework suppresses no more speech than necessary to further that interest.[36]

B. No Opt-in Approach Would be Narrowly Tailored Enough to Withstand First Amendment Scrutiny

Even if the Commission were able to demonstrate that an opt-in mechanism materially advances a substantial interest, Verizon Wireless believes that such a restriction would still fail to survive First Amendment review. With the notice and opt-out alternative still available, it is highly unlikely that any court would conclude that an opt-in approach does not suppress more speech than necessary.[37]

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[35] *FNRPM* at paras. 19-20.

[36] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980).

[37] Given the low probability that the Commission would meet the First Amendment's narrow tailoring requirement, it is not necessary for Verizon Wireless in these comments to address the first two parts of the *Central Hudson* test. Verizon Wireless, though, does not concede the Commission's arguments on those points. While the Tenth Circuit assumed satisfaction of these prongs for the sake of its legal analysis, it did so only after expressing considerable doubt about the Commission's position. *U.S. WEST v. FCC*, 182 F.3d at 1235-38. The burden remains on the Commission to make a robust showing on each *Central Hudson* criterion.

The Commission's argument that the opt-in approach is narrowly tailored has of course already been rejected, by the Tenth Circuit in *U.S. WEST v. FCC*. The debate there in large part turned on parties' interpretations of a 1997 consumer survey by U.S. WEST. In that study, adoption of an opt-in mechanism greatly reduced U.S. WEST's ability to utilize CPNI. A mail campaign yielded consents from only 10% of customers, while a telephone campaign led to consents from only 30% of customers. While consent requests made on customers' inbound calls were more successful, only about 15% of customers make such calls in any given year. [38]

The Commission argued that these low consent rates did not evidence an overbroad suppression of carrier speech. Rather, according to the Commission, those customers who chose not to opt in actually valued their privacy and decided that their personal information should not be used beyond their existing service relationship. The Court rejected this view as speculative, positing that the study data instead might "simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally."[39] The Court further stated that, in any case, the Commission had not adequately considered an obvious and substantially less restrictive alternative, the notice and opt-out approach. The Court concluded that this failure demonstrated that the Commission's CPNI rules were not narrowly tailored.[40]

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[38] *See Ex Parte* Letter of U.S. WEST, CC Docket No. 96-115 (Sep. 9, 1997); *Ex Parte* Letter of U.S. WEST, CC Docket No. 96-115 (Oct. 8, 1997); *CPNI Order* at paras. 99-105.

[39] *U.S. WEST v. FCC*, 182 F.3d at 1239.

[40] *Id*. at 1238-39.

Should it decide to pursue the opt-in approach once more, the Commission must demonstrate with clear, convincing, and concrete evidence that opt-in does not suppress more carrier use of CPNI than necessary to protect customers' privacy. Given the notice and opt-out alternative, any such effort by necessity must include a comparison of these two approval mechanisms. In this analysis, the burden would be on the Commission to show that the opt-in approach comes closer than opt-out to representing customers' actual preferences regarding treatment of CPNI; specifically, there must be evidence showing that the percentage of customers who under opt-in would unknowingly and unintentionally *prevent* carriers from using their CPNI is lower than the percentage of customers who under opt-out would unknowingly and unintentionally *allow* carriers to use their CPNI. Without compelling evidence to support this proposition, the Commission cannot, constitutionally, impose any obligation beyond opt-out.

IV. ADOPTION OF AN OPT-OUT MECHANISM SHOULD NOT AFFECT THE COMMISSION'S TOTAL SERVICE APPROACH

In the *FNPRM*, the Commission asks for comment on the interplay between its choice of approval mechanism and the "total service approach" ("TSA") adopted in 1998.[41] Under the TSA, a carrier does not need customer approval to use a customer's CPNI to market discrete services or products that fall within the scope of the "total service" subscribed to by that customer.

The Commission's TSA policy should be unaffected by adoption of a notice and opt-out mechanism. Assuming consistency with the terms of a carrier's notice, if a customer exercises his or her opportunity to opt out, the carrier should still be able to use CPNI within the scope of its "total service" relationship with that customer. The TSA

[41] *FNPRM* at para. 21.

was premised on the finding that customers fully expect a carrier to use CPNI to market services to them that are within the bounds of the existing customer-carrier relationship. Accordingly, Section 222 properly does not restrict carriers in those marketing efforts. It is only when a carrier seeks to market services *outside* those included in the TSA that the issue of customer approval even arises. There is thus no logical basis for reevaluating the scope of the TSA policy.

CONCLUSION

For all of the aforementioned reasons, Verizon Wireless urges the Commission to adopt an opt-out requirement for carriers' use of CPNI outside the TSA.

Respectfully submitted,

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