REPLY BRIEF FOR PETITIONER AND INTERVENORS
INTRODUCTION AND SUMMARY OF ARGUMENT

The opening brief of petitioner and intervenors (collectively, "petitioners") demonstrated that the FCC's construction of Section 222, which addresses customer proprietary network information ("CPNI"), is unreasonable and arbitrary in several fundamental respects: it contradicts Congress' intent in enacting Section 222; represents a sudden and unwarranted departure from prior Commission policy; and is utterly unprecedented among federal laws. In light of the serious constitutional issues raised by the FCC's interpretation of Section 222, the FCC was bound to construe the statute to avoid those constitutional questions. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, the FCC's very efforts to brush off these grave constitutional issues warrants vacating the CPNI rules, because that failure "to give adequate consideration" to constitutional objections to agency action is "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp. v. FCC*, 809 F.2d 863, 865, 874 (D.C. Cir. 1987).

The FCC and its supporting intervenors (collectively, "respondents") mischaracterize the nature of CPNI and distort what is at issue in this case. CPNI is generated, gathered, organized, maintained, and stored by *carriers* in the course of providing services to subscribers. After a customer requests particular services, the *carrier* generates a record of the services. Respondents further confuse the issues of (i) CPNI in the hands of a carrier that has an existing relationship with a customer with (ii) third-party disclosure of CPNI to unrelated, unaffiliated entities that do not have any existing relationship with the customer. Respondents' privacy argument focuses on third-party disclosure and is therefore irrelevant here.

Respondents also claim that CPNI "belongs to" customers. That, too, is erroneous. Although consumers undoubtedly have certain expectations regarding carriers' use of CPNI –

which the record demonstrates petitioners have always respected – CPNI is owned by carriers. Respondents' contrary view is a radical one that, were this Court to embrace it, would turn well-settled property law on its head and would profoundly upset the property rights of mail-order catalogs, credit card companies, and practically any other firm that, as part of its routine business operations, maintains individually identifiable customer information.

Finally, respondents misstate the applicable First and Fifth Amendment principles. They insist that the CPNI rules do not by their express terms dictate what carriers can and cannot say. However, they ignore the direct choking impact of the FCC's rules on intra-corporate communications and also ignore the Supreme Court's repeated teaching that the First Amendment is concerned with the *practical effect* of a regulation on speech. Here, the practical effect of the FCC's rules on carrier-customer communication is devastating.

With respect to the Fifth Amendment, respondents' argument hinges on the mistaken premise that carriers have no reasonable, investment-backed expectation in owning or using CPNI. The CPNI rules should be vacated.

ARGUMENT
STANDARD OF REVIEW

Respondents plead for deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Yet the constitutional questions raised by the *CPNI Order* render such deference wholly inapplicable. *See Edward J. DeBartolo Corp.*, 485 U.S. at 574-77; *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). This Court "review[s] agency action *de novo* to determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997).

A. THE *ORDER* RAISES GRAVE QUESTIONS UNDER THE FIRST AMENDMENT THAT THE FCC WAS REQUIRED TO AVOID.

1. The Communication Of CPNI Is Speech.

Respondents do not deny that CPNI is information, or that the creation, assembly, compilation, and/or communication of information lie at the core of what the First Amendment protects. The strained efforts of CPI to compare CPNI to "postage stamps, sheets of paper," or even a day-care center (CPI Br. at 6) are beside the point. The propriety of the CPNI rules must be judged solely according to the justifications put forward by the FCC, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993), which never relied on such reasoning in the *CPNI Order*. Further, CPI's argument is frivolous on its own terms. CPNI is communicated from one speaker to another within a carrier (*i.e.*, from one employee to another), and also forms the basis for protected expression to customers. If anything, CPNI is far more integral to expression than many of the activities that the Supreme Court has held to be protected under the First Amendment. *E.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion) (nude dancing); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming *arguendo* that sleeping in park is protected expression). Moreover, CPI's analogy proves the very opposite of what CPI appears to believe, for the Supreme Court has consistently applied the First Amendment to regulations falling wholly on *physical objects* like "sheets of paper" when they are essential ingredients in expression. *See Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983). A regulation purporting to govern only the cold type of a printing press can violate the First Amendment as effectively as a classic prior restraint.

2. The CPNI Rules Abridge Speech.

Respondents' primary position is that the *CPNI Order* does not have a constitutionally cognizable impact on speech because the rules "do not prohibit any carrier from soliciting

business from any customer." FCC Br. 26. Yet respondents concede, as the record in this case proves, that "[t]he carriers are almost certainly correct in their expectation that many customers will not give them advance approval" and that "customers would not give affirmative approval for use of their CPNI in a high percentage of cases – regardless of the level of confidence that might have built up over the years of the carrier-customer relationship." FCC Br. 19. Respondents admit (in classic understatement) that "Section 222 might have *some* effect on internal communications within a company." FCC Br. 26 (emphasis added); see also MCI Br. 3. In fact, the FCC has long recognized that "[u]nder a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction . . . . Thus, a prior authorization rule would *vitiate* a BOC's ability to achieve efficiencies through integrated marketing to smaller customers." *Computer III Remand Order*, 6 FCC Rcd. 7571, 7610 n.155 (1991) (emphasis added).

a. <u>Burdens On Intra-Carrier Speech.</u>

The burden on speech cannot be dismissed as "an economic effect." FCC Br. 26. First, the CPNI rules have a prohibitive effect on CPNI-related communications within a telecommunications carrier, and within the carrier's corporate family: employees in different divisions, affiliates, and personnel within the same carrier will not be able to engage in related speech about certain customers because prior affirmative consents will, in the vast majority of cases, be difficult or impossible to obtain. For example, Mary Sue in the landline division is prohibited from talking to Linda May in the wireless division about customer John Jones and his possible interest in receiving information. This impact is precisely the "ban[] on the use of particular types or channels of communication" that respondents admit the First Amendment forbids. MCI Br. 4.

The FCC suggests that "restrictions on internal business communications do not present a substantial . . . First Amendment question," in light of the history of separate subsidiary requirements that have gone unchallenged in the courts. FCC Br. 27. But few, if any, of the FCC's structural separation rules have prevented different members of a corporate family from communicating with each other. Such rules generally require separation of ownership and control, but they neither compel nor induce silence. When separate subsidiary requirements have burdened speech and have been challenged, they have been struck down, as in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), where the Court held unconstitutional a federal statute requiring corporations to make political expenditures only through special segregated funds, as applied to a nonprofit advocacy group. *See id.* at 252-53 (plurality opinion); *id.* at 266 (O'Connor, J., concurring in part and in the judgment).

Moreover, under prior Commission policy, petitioners were authorized to offer customer premises equipment ("CPE"), and enhanced services in some cases, on an integrated basis, without structural separation. Opening Br. 4-10. The previous notice and opt-out options employed by the Commission did not appreciably infringe on the right of carriers to use CPNI for expressive purposes, *id.* at 17 n.42, and thus did not run afoul of First (or Fifth) Amendment rights. The FCC also overlooks new joint marketing opportunities reflected in the Act's separate subsidiary requirements, 47 U.S.C. §§ 272(g) (long distance), 274(c)(2) (electronic publishing), Pub. L. 104-104, § 601(d), 110 Stat. 143 (wireless) which opportunities were barred by pre-Act rules. 47 C.F.R. § 64.702(c)(1).

b. <u>Burdens On Carrier-Customer Speech.</u>

In addition to their effect on speech within a carrier's business, the CPNI rules have a devastating practical impact on carriers' communications with their customers. If prior affirmative consent cannot be obtained, carriers will be forbidden from using CPNI to discuss

with customers information about categories of services and products that the customers may need or desire. The CPNI rules thus prevent individualized or customized speech. This is exactly the kind of limitation on the "mode of carriers' speech" that respondents properly concede is within the First Amendment's ambit. MCI Br. 4. A carrier's ability to resort to "broadcast" speech to all customers on a blunderbuss basis is not an adequate substitute, for "[t]he First Amendment protects [the speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Thus, in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Supreme Court recognized an attorney's First Amendment right to send targeted solicitation letters to potential clients by name. *See also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (CPA's right to engage in in-person solicitation); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (right to disclose alcohol content on beer labels (targeted speech)).

In *Revo v. Disciplinary Bd. of the Supreme Court of the State of New Mexico*, 106 F.3d 929, 935-36 (10th Cir.), *cert. denied*, 117 S. Ct. 2515 (1997), this Court invalidated a state bar rule prohibiting attorney direct mail advertisements to personal injury victims and family members of wrongful death victims, unless the recipient of the solicitation was a relative of the attorney sending the letter or had a prior personal, business or professional relationship with that attorney. That rule was *less* restrictive than the CPNI rules, which interfere even with established, ongoing carrier-customer relationships.

Respondents apparently concede that, if the CPNI rules explicitly barred carriers from engaging in individualized and customized speech, then the First Amendment would be implicated. They take the view that, short of such an express ban, the practical impact of the CPNI rules is not constitutionally cognizable. The Supreme Court squarely rejected that argument in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988), holding that a

financial regulation of professional fundraisers could not be defended as a "merely economic" regulation having "only an indirect effect on protected speech." *Id.* at 789 n.5. The Court therefore struck down a rule limiting a professional fundraiser to a "reasonable" fee, even though by its terms the law did not ban any speech at all. *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-61 (1984); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632-36 (1980). The Court has frequently invalidated other laws that do not by their terms prohibit speech, but simply regulate activities having a connection to expression. *E.g., United States v. NTEU*, 513 U.S. 454, 469 (1995) (striking down a ban on honoraria); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating law preventing criminals from profiting from publishing deals).

In none of these cases did the Supreme Court require an explicit ban on speech before striking down the laws in question. Rather, the Court has always looked to the law's practical effect. For example, respondents put great emphasis on *Martin v. Struthers*, 319 U.S. 141 (1943). CPI Br. 7; MCI Br. 4. But the ordinance invalidated in *Martin* did not expressly prohibit door to door solicitation. Rather, the ordinance made it unlawful "for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door . . . ." 319 U.S. at 142. The solicitor was free to distribute handbills; he or she simply could not ring or knock. In *Meyer v. Grant,* 486 U.S. 414, 424 (1988), the Court struck down a ban on the payment of petition circulators, not a rule restricting what they could say. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), the Court held that even generally applicable tort laws (which did not target speech at all) were unconstitutional as applied to an expressive boycott because of the "incidental effect on First Amendment freedoms." Respondents' argument is thus completely without merit because it ignores the practical effect of the CPNI rules.

c. The CPNI Rules Are Invalid Even If Petitioners' Expression Is Treated As Commercial Speech.

Respondents contend that "[m]arketing is generally considered 'commercial' speech." MCI Br. 5 n.4, apparently seeking to trivialize the carrier-customer speech burdened by the CPNI rules.[1] However, the Supreme Court has held that a restriction on commercial speech is invalid unless the government shows that it "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 142, 143-44 (1994); *see also Revo*, 106 F.3d at 932 ("Protected commercial speech may also be regulated, but only if the government can show that (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.").

Respondents' assertion that this is a deferential, toothless standard is belied by the fact that, under this test, the Court has repeatedly struck down restrictions on commercial speech. *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509-10 (1996) (plurality opinion); *id.* at 1521 (O'Connor, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995); *Ibanez*, 512 U.S. at 142-44 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Edenfield v. Fane*, 507 U.S. at 767-68; *see also Revo*, 106 F.3d at 935-36.

Indeed, the only Supreme Court decision in recent years to uphold a restriction on commercial speech was *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), a 5-4 ruling which

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[1] Intra-carrier speech does not fall within "the core notion of commercial speech -- speech which does no more than propose a commercial transaction," *City of Cincinnati v. Discovery Network, Inc.*, 510 U.S. 407, 422 (1993) (citations omitted), and thus is entitled to full First Amendment protection. Many kinds of fully protected speech, including books providing financial advice, could be said to be "related solely to the economic interests" of the speaker and the listener. CPI Br. 9 n.5. That standard is not the appropriate test here.

upheld a state bar rule prohibiting lawyers from using targeted direct mail to solicit personal injury clients within 30 days of an accident. Unlike this case, *Florida Bar* involved a rule that was supported by extensive evidence and empirical studies. *Id.* at 626-27. Even so, the Court specifically agreed that a claim that the ban was too broad "would have force" but for the absence of "obvious less-burdensome alternatives to Florida's short temporal ban." *Id.* at 633. In concluding that the thirty-day ban was constitutional, the Court said "the palliative devised by the Bar to address these harms is narrow both in scope and in duration." *Id.* at 635. In *Revo*, this Court distinguished *Florida Bar* as a decision of limited application. *See Revo,* 106 F.3d at 935. By contrast, the CPNI rules are broad, not narrow, and perpetual, not temporary; they demonstrably burden far more speech than necessary in light of the proven, obvious and less burdensome opt-out alternative. See Part A-4(b), *infra.*

3. The CPNI Rules Are Not Narrowly Tailored To Any Important Governmental Interest In "Fair Competition."

Respondents contend that the CPNI rules serve the interests of "fair competition," which they accuse petitioners of overlooking. That is untrue. As discussed in detail in petitioners' opening brief (at 7 & n.11, 8 & n.12), the FCC has closely examined this question over the past decade and has repeatedly concluded that a prior affirmative consent rule is *not* needed to protect competition. In fact, the FCC found that such a rule would be *anti*-competitive and would injure consumers. If there was no competitive harm in CPE and enhanced services markets during the period when LECs held exclusive local franchises, it would be passing strange to suppose that there was more risk now that the 1996 Act has eliminated those franchises and has created local competition pursuant to 47 U.S.C. §§ 251-53. Mere speculation that the CPNI rules would serve a competitive purpose is inadequate. As this Court has opined, "we have an obligation to make an independent examination of the whole record in order to make sure that the speech regulation

does not constitute a forbidden intrusion on the field of free expression." *Revo*, 106 F.3d at 932. "The [Government's] burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Id.* at 933-34 (citation omitted).

Moreover, there is nothing in the 1996 Act to suggest that Congress took a different view from the FCC's pre-Act policy. Although, in discussing Section 222, Congress referred to "competitive . . . interests," S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 205 (1996), Congress itself addressed that concern by applying Section 222 to *all* carriers, rather than only to AT&T, the BOCs, and GTE, as had been the FCC's prior policy. Congress itself struck the competitive balance, without otherwise altering the FCC's pre-Act opt-out approach.

Confidential customer information is widely used in other markets (*see* Part A-5, *infra),* even those involving regulated utilities, without any affirmative consent requirements, and without raising any concerns of unfair competition. *See Catlin v. Washington Energy Company*, 791 F.2d 1343 (9th Cir. 1986) (antitrust laws permitted utility to disclose customer list to its merchandising division to sell "vent damper" products, while withholding it from its competitors in the "vent damper" market). The FCC has undertaken no reasoned analysis to justify or even explain its evident conclusion that a different approach is compelled here

4. The CPNI Rules Are Not Narrowly Tailored To Any Important Governmental Interest In "Customer Privacy."

a. Respondents' Argument Rests On A Mischaracterization Of The Nature Of CPNI.

Respondents contend that CPNI relates to "private matters that citizens ordinarily would not be required to disclose to anyone" and involves "private data that customers ordinarily would not surrender to a telephone company or anyone else." FCC Br. 22, 31. However, a carrier

possesses this commercial information *not* because the customer "discloses" it (FCC Br. 22), but because the information represents the company's own record of its transaction with the customer, by means of its providing services to the customer. For example, respondents contend that it is somehow improper for a telephone carrier to know "how much the customer spends on telephone service," FCC Br. 3; but that claim illustrates the illogic of respondents' view. For information as to "how much the customer spends" is another way of expressing the carrier's *revenue*. Surely the carrier is perfectly entitled to record and use such data – indeed, it could hardly function otherwise. *See* Thomas E. McManus, Telephone Transaction-Generated Information: Rights and Restrictions 50 (Harvard Program on Information Resources Policy, May 1990) ("Generally, people and organizations have a right to make records of transactions to which they are a party, and they have control over those records. In a sense, when two parties enter into a contract, each party owns the records he or she keeps in the ordinary course of business.").[2]

A telecommunications carrier does not *receive* or *obtain* from its customers the information contained in its business records of the services provided to customers. Rather, after a customer requests particular telecommunications services, the carrier generates a record of the services actually provided. CPNI represents the *carrier's* record of the subscription for services provided and delivered over its own network. The information is generated, gathered, organized,

[2] Telephone users do not have an expectation of privacy in the numbers they dial, because they "typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." *Smith v. Maryland*, 442 U.S. 735, 743 (1979). Nothing in Section 222 suggests that Congress took a different view.

maintained, and stored by carriers; in no sense is it "provided by" customers, any more than are the sales records maintained by a mail-order catalog to track its inventory and prior transactions.[3]

Respondents are thus incorrect when they refer to the question presented in this case as one of CPNI "disclosure." FCC Br. 10, 22, 31; MCI Br. 7; CPI Br. 12, 15 ("dissemination"). "Disclosure" is generally understood to involve the release of CPNI to an unrelated third party (which has no existing relationship with the customer), not a carrier's own use of the CPNI that the carrier itself has generated.[4] Congress has drawn that distinction in statutes like 47 U.S.C. § 227(a)(3), which *exempts* from the term "telephone solicitation" those calls "to any person with whom the caller has an established business relationship."

In short, all that respondents have shown is that the government has an interest in preventing a carrier like U S WEST from disclosing the information to an unrelated third party such as MCI. But this case involves the quite different question of U S WEST's rights to use its own information itself.[5]

b. <u>The CPNI Rules Fail The Narrow Tailoring Requirement.</u>

Even if there were a material privacy interest in the internal use of CPNI, the FCC's rules would not be narrowly tailored to protecting it. In *Revo*, this Court held that a restriction on

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[3] CPI suggests that, if the information is neither made available to the carrier by the customer, nor received or obtained from the customer, "then the information is not CPNI and its use is not in any way limited by the *CPNI Order*." CPI Br. 16. U S WEST has raised this issue with the FCC. *See Ex Parte* Submission from Kathryn Marie Krause to Dorothy T. Attwood, in CC Docket 96-115 (September 9, 1997), at 2 n.4. A reasonable interpretation of Section 222 could well obviate any challenge to the application of the provision to internal business records.

[4] *See* Pacific Telesis Reply Comments, CC Docket 96-115, filed June 26, 1996, p. 9, n.19 (Section 222(c)(2) "makes plain that the section applies only to 'disclosure' to *third parties*, contrary to the assertion of some, as one cannot 'disclose' information to oneself.").

[5] Respondents' reliance on *Lanphere & Urbaniak v. Norton*, 21 F.3d 1508 (10th Cir. 1994), which involved a claimed third-party right of access to arrest records maintained by the government (not the right of a speaker to use information it has generated itself in order to communicate), is wholly misplaced.

attorney solicitation was not narrowly tailored to the government's asserted interest because "[t]here are several less-burdensome alternatives available to the Board -- alternatives which the Board has not shown would be insufficient to materially address its concerns." *Revo*, 106 F.3d at 935. "While it is true that the 'least restrictive means test has no role in the commercial speech context,' 'the existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.'" *Id.* (internal quotations omitted). Just as the rule in *Revo* was unconstitutional because "[t]he Board ha[d] not shown why subjecting personal injury direct mail letters to a screening process would not protect against misleading potential clients," *id.*, here the CPNI rules are invalid because the FCC has not shown why a notice and opt-out method cannot accommodate any legitimate interests customers may have in the information generated by a telecommunications service provider.

Notice and opt-out is the time-tested and proven regulatory method in the CPNI field and other information-use venues. Over the course of more than a decade, the FCC repeatedly studied this approach and found that it adequately protected consumers. The FCC documented that a prior affirmative consent rule was unnecessary to protect competition or customer privacy and was at odds with efficient carrier operations and with customers' desires for one-stop shopping. Nothing in the 1996 Act suggests that Congress intended the Commission to depart from this aspect of its prior policy. Indeed, notice and opt out procedures are a common way of accommodating consumer interests, particularly in commercial contexts where the supplier and customer have an established business relationship.[6] Fed. R. Civ. P. 23(c)(2) uses notice and opt

[6] *See* 47 C.F.R. § 64.1509 (pay-per-call rules under 47 U.S.C. § 208, which require carriers to give subscribers notice of their rights to block pay per call services, with a lack of response resulting in no block); 47 C.F.R. § 64.1600-1603 (caller ID rules requiring carriers to deliver

out even where there is no prior relationship among class members and grievous personal injury or substantial monetary loss may be at stake.

Furthermore, the FCC has never denied that its CPNI rules will result in *additional* violations of customer privacy and solitude – "the right to be let alone."[7] If carriers are "dumbed down" so that they cannot identify and communicate with individual customers based on their likely interest in receiving information about specific new services, carriers will be forced (in those instances where they do not remain silent) to use blanketed "broadcast-type" telemarketing speech fashioned for an "all customer" audience. Hence, the net effect of the CPNI rules may well be to increase intrusions and decrease privacy.

c. <u>The CPNI Rules Rest On Impermissible Speculation.</u>

At bottom, the FCC's defense of the *CPNI Order* rests on its unsupported view that "[o]bviously" (FCC Br. 29) there must be some customers who would not bother to respond to an opt-out notice, but who nonetheless feel so strongly about their "privacy" that the FCC is entitled to burden carriers' speech (and increase the number of intrusions on *all* customers) in order to protect this imagined set of subscribers. The notion that government must intervene to protect customers who it believes are incapable of responding to an opt-out notice sent to them by first-class mail reflects the kind of paternalistic attitude that the Supreme Court has repeatedly

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calling party number unless caller has opted out by dialing *67 and requiring carriers to provide notice to customers); 16 C.F.R. § 425.1 ("negative option plans," such as those used by book and record clubs); 16 C.F.R. § 435.1 (FTC requirement that, if mail or telephone order merchandise is delayed, the seller must give notice of shipping delay and permit buyer to cancel or opt out); 12 C.F.R. § 226.9 (Federal Reserve Regulation Z, which requires credit card provider to give notice of changes in terms and annual renewal fees, with card holder having option to "opt-out" of further use of the card).

[7] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The FCC itself has treated unwanted solicitations as an invasion of privacy. *See BNA Third Order on Reconsideration*, 11 FCC Rcd. 6835, 6848-49 ¶ 23 (1996); *In the Matter of Rules and*

rejected as a justification for restrictions on commercial speech. *44 Liquormart*, 116 S. Ct. at 1507 (principal opinion); *Edenfield v. Fane*, 507 U.S. at 767; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

The FCC's argument is based on nothing but "mere speculation or conjecture." *Edenfeld v. Fane*, 507 U.S. at 770, and "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing*, 514 U.S. at 490. *See also Revo*, 106 F.3d at 933-34. The FCC has adduced no empirical evidence to support its supposition. In fact, as noted in petitioners' opening brief (at 4-9), the FCC has repeatedly concluded that customer privacy interests do *not* necessitate a prior affirmative consent requirement in the context of existing carrier-customer relationships: "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed invited or permitted by a subscriber in light of the business relationship."[8] The evidence in the record confirms this conclusion. Petitioners' Opening Brief at 12-15, 18-20.

5. **<u>The CPNI Rules Are Unprecedented.</u>**

Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752, 8753 (1992).

[8] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd. 8752, 8770 ¶ 34 (1992); *see also In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd. 1150, 1163 ¶ 98 (1988) ("most of the BOC network service customers . . . would not object to having their CPNI made available to the BOCs to increase their competitive offerings made to such customers."); *In the Matter of the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking*, 7 FCC Rcd. 2736, 2738 ¶¶ 13-14 (1992) ("If a party has chosen to do business with a particular caller, a contact by that caller to offer additional products or services is not as intrusive as a call from a business with whom the called party has no relationship. . . . The Commission tentatively concludes that the privacy rights the [Telephone Consumer Protection Act] intends to protect are not adversely affected when the called party has or had a voluntary business relationship with the caller.").

Respondents claim that accepting petitioners' constitutional objection would necessarily call into question a host of other statutes regulating commercial information. The opposite is true. The CPNI rules are utterly unlike any other federal statute or regulation, and upholding them would create a dangerous precedent for government interference in a company's relationship with its customers and its ability to engage in intra-corporate speech.

In a futile attempt to find *any* precedent for the CPNI rules, the FCC cites the example of "negative option solicitations." FCC Br. 19 n.51. Yet that example proves the opposite of what the FCC claims. The Federal Trade Commission has reaffirmed its rule permitting such arrangements in ongoing business relationships,[9] stressing that the system "continues to be of value to consumers and firms, and is functioning well in the marketplace at minimal cost." 63 Fed. Reg. at 44555. The FTC twice referred to the very example of encyclopedia sales cited by the FCC. *See id.* at 44559 (specifically referring to "the monthly shipment of volumes of an encyclopedia or a book series"); 44557 n.8. The FTC found that clear and conspicuous disclosure in notice and opt-out forms, as well as the ability to cancel (or change one's mind), were sufficient to establish the fairness of an opt-out model. *Id.* at 44558. Petitioners have long complied with these conditions.

MCI cites a series of statutes which simply confirm that the *CPNI Order* is badly out of step with legislative approaches in other contexts. MCI Br. 7 n.6. MCI's examples involve third-party disclosures, not use of the information by the company collecting it. Further, the statutes generally *allow* third-party disclosure, sometimes using an opt-out process. For instance, the Fair Debt Collection Practices Act of 1977 *permits* debt collectors to disclose a debtor's financial

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[9] *See Trade Regulation Rule Regarding Use of Negative Option Plans by Sellers in Commerce*, 63 Fed. Reg. 44555, 44556 (Aug. 20, 1998) ("A negative option allows a seller to interpret the

situation to credit reporting agencies. 15 U.S.C. § 1692c(b). Under the 1996 Consumer Credit Reporting Reform Act, credit reports *may* be distributed for a "legitimate business need" in connection with a "business transaction that is initiated by the consumer" or "to review an account to determine whether the consumer continues to meet the terms of the account." 15 U.S.C. § 1681b(a)(3)(F). Credit reporting agencies *may* furnish consumer credit information for marketing credit or insurance opportunities to consumers, so long as the agency establishes a toll-free number so that consumers can call and opt-out by having their names removed from lists for direct marketing purposes. 15 U.S.C. § 1681b(c)(5).

The Electronic Funds Transfer Act of 1978, 15 U.S.C. §§ 1693-1693r, establishes mandatory guidelines for the relationship between consumers and financial institutions in connection with electronic funds transactions, but does *not* restrict the use or disclosure to third parties of information about consumer transactions. Nor does it restrict the gathering of personal information or limit the duration of storage of transaction records. The Electronic Communications Privacy Act, 18 U.S.C. § 2703, establishes procedures for law enforcement access to certain electronic records, but *permits* "a provider of electronic communication service or remote computing service [to] disclose a record or other information pertaining to a subscriber to or customer of such service . . . to any person other than a government entity." § 2703(c). The Cable Communications Policy Act leaves cable operators *free* to use subscriber information internally and obliges them to secure affirmative consent only when releasing the information to unaffiliated third parties. 47 U.S.C. § 551. MCI's assertion that the Cable Act "creates an 'opt-

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failure of a consumer to reject goods or services as the acceptance of a sales offer, when, under traditional contract law, an affirmative response accepting the offer would be necessary.").

in' scheme much like that set out in the CPNI Order" (MCI Br. 7 n.6) is simply wrong.[10] The FAA regulations cited by MCI, 14 C.F.R. § 243.9 (MCI Br. 7 n.6), govern only passenger manifest information that airlines are required to collect by FAA rules (*e.g.*, for notifying next of kin in the event of aviation disasters). The regulations do not restrict airlines' ability to use or disclose frequent flier records or other information obtained by airlines in the usual course of business.[11]

The fact remains that there is *no federal statute anywhere* in the U.S. Code that remotely resembles the *CPNI Order*. The FCC failed to appreciate the unique nature of its rules. Surely, Congress would have spoken more clearly in Section 222 if it had meant to authorize such a radical departure from prior legislative approaches and commercial practices.

B. THE *ORDER* RAISES GRAVE QUESTIONS UNDER THE FIFTH AMENDMENT.

1. A Carrier Is Not A Mere "Custodian" Of CPNI.

[10] The statute provides that "a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by *a person other than the subscriber or cable operator*." 47 U.S.C. § 551(c)(1) (emphasis added). The statute specifically permits a cable operator to disclose subscriber information when "necessary to render, or *conduct a legitimate business activity* related to, a cable service or other service provided by the cable operator to the subscriber." 47 U.S.C. § 551(c)(2)(A) (emphasis added).

[11] MCI also cites a variety of state statutes regulating disclosures of nonpublic customer information by banks with respect to the marketing of insurance products. MCI Br. 7 n.6. Some of the statutes restrict only the disclosure of information to third parties and do not prohibit the use of the information by the bank itself. *E.g.*, N.J. Stat. Ann. § 17:16K-3; Conn. Gen. Stat. § 38a-775(d). Other statutes impose a limited restriction with respect to insurance products, an area where states have found such rules necessary to prevent deceptive marketing practices. The rules do not affect the ability of banks to use the nonpublic information at issue for any other business purpose, and the rationale behind them is inapplicable here. In short, *none* of the statutes is remotely comparable to the CPNI rules, and *none* of them supports respondents' argument.

The FCC contends, without citation, that a telephone company holds CPNI merely as a "custodian" for its customers, "for the limited purposes of performing its services as a telephone company." FCC Br. 23. But no respondent cites, let alone addresses, the Supreme Court's holding that even a public utility (let alone a local telephone company, which by federal law cannot hold a local franchise and is subject to competition, 47 U.S.C. §§ 251-253) does not stand in a fiduciary relationship with its customers. "The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31 (1926). "Customers pay for service, not for the property used to render it. . . . By paying bills for service, they do not acquire any interest, legal or equitable, in the property used for the convenience or in the funds of the company." *Id.* *See also Simpson v. U S WEST Communications*, 957 F. Supp. 201, 206 (D. Or. 1997) ("as a matter of law, . . . a telephone company is not in a 'fiduciary relationship' with its customers").[12]

Furthermore, confidential customer information, including records of customer purchasing habits, has long been deemed protected commercial property. *See, e.g., DeVries v. Starr*, 393 F.2d 9, 13 (10th Cir. 1968) (confidential customer list is a trade secret); Restatement (Third) of Unfair Competition § 42, comments (e) and (f) (1995) (business information such as customer lists are protected property); Melvin F. Jager, Trade Secrets Law § 3.03[2][c], at 3-45 (1998) ("customer identities and related information can be a company's most valuable asset"); Edward C. Wilde & Gary A. Nye, *The Customer List as Trade Secret*, 2 Intellec. Prop. Law 135, 139 (1994) ("personal information concerning customers constitutes protected confidential

[12] The Supreme Court rejected a much more modest position than that advanced by the FCC here, in holding that the "extra space" (up to one ounce for first-class mailing) in public utility billing inserts could not be appropriated by a state public utility commission and used to force a utility to distribute the messages of a pro-consumer group. *Pacific Gas & Electric Co. v. Public*

information").[13] Indeed, cases from virtually every state confirm the property interest in confidential customer information.[14]

Utilities Comm'n, 475 U.S. 1, 17-18 (1986) (plurality opinion). *See also id.* 22 n.1 (Marshall, J., concurring in the judgment).

[13] *See, e.g., Sigma Chemical Company v. Harris*, 794 F.2d 371, 374 (8th Cir. 1986) (company records of customer purchasing habits were protected trade secrets); *Zoecon Indus. v. The American Stockman Tag Co.*, 713 F.2d 1174, 1179-80 (5th Cir. 1983) (memorandum containing the names, addresses, and purchasing characteristics of a business's customers is a trade secret under Texas law); *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1331 (9th Cir. 1980) (Kennedy, J.) (salesman's experience with plaintiff's customers, their buying habits, purchasing history, and other special considerations raised issue of fact as to whether knowledge of salesman constituted protectable trade secret); *W.R. Grace & Co. v. Hargadine*, 392 F.2d 9, 16 (6th Cir. 1968) ("customer books and customer service information materials . . . clearly belonged to" the manufacturer that compiled them); *All West Pet Supply Co. v. Hill's Pet Prods. Div.*, 840 F. Supp. 1433, 1438 (D. Kan. 1993) (customer purchasing patterns, sales volumes, and payment histories could qualify as trade secrets).

[14] *Tyler v. Eufaulo Tribune Pub. Co.*, 500 So.2d 1005 (Ala. 1986); *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 602 (Ct. App. Ariz. 1986); *Allen v. Johar, Inc.*, 823 S.W.2d 824, 827 (1992); *Reid v. Massachusetts Co.*, 318 P.2d 54, 60 (Cal. App. 1957); *R&D Bus. Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo. 1993); *Holiday Food Co. v. Munroe*, 426 A.2d 814 (Conn. 1982); *Delmarva Drilling Co. v. American Well Sys., Inc.*, No. 8221, 1988 WL 7396 (Del. Ch. Jan. 28, 1988); *Unistar Corp. v. Child*, 415 So.2d 733, 734 (Fla. App. 1982); *Avnet, Inc. v. Wyle Labs, Inc.*, 437 S.E.2d 302 (Ga. 1993); *Stampede Tool Warehouse, Inc. v. May*, 651 N.E. 209, 214 (Ill. App.), *review denied*, 657 N.E.2d 639 (1995); *Ackerman v. Kimball Int'l*, 652 N.E.2d 507, 509 (Ind. 1995); *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 228 (Iowa 1977); *Koch Eng'g Co. v. Falconer*, 610 P.2d 1094, 1104 (Kan. 1980); *Wright Chem. Corp. v. Johnson*, 563 F. Supp. 501 (M.D. La. 1983); *Space Aero Prods. Co. v. R.E. Darling Co.*, 208 A.2d 74 (Md.), *cert. denied*, 382 U.S. 843 (1965); *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 926 (Mass. 1972); *Chem Trend, Inc. v. McCarthy*, 780 F. Supp. 458 (E.D. Mich. 1991); *Surgidev Corp. v. Eye Tech, Inc.*, 828 F.2d 452, 455-46 (8th Cir. 1987) (Minn. Law); *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18-19 (Mo. 1966); *Cudahy Co. v. American Labs., Inc.*, 313 F. Supp. 1339, 1343-44 (D. Neb. 1970); *Home Gas Corp. v. Strafford Fuels, Inc.*, 534 A.2d 390 (N.H. 1987); *Mailman, Ross, Toyes & Shapiro v. Edelson*, 444 A.2d 75, 78 (N.J. Ch. Div. 1982); *Salter v. Jameson*, 736 P.2d 989, 991 (N.M. App. 1987); *McLaughlin, Piven, Vogel, Inc. v. W.F. Nolan & Co.*, 498 N.Y.S.2d 146 (2d Dept. 1986); *Drouillard v. Keister Williams Newspaper Serv.*, 423 N.E.2d 324, 327 (N.C. App. 1992); *Advanced Bus. Tels., Inc. v. Professional Data Processing, Inc.*, 359 N.W.2d 365, 367-68 (N.D. 1984); *Consumer Direct, Inc. v. Limbach*, 580 N.E.2d 1073, 1075 (Ohio 1991); *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838, 842 (Pa. 1957); *Paramount Office Supply v. MacIsaac, Inc.*, 524 A.2d 1099, 1011 (R.I. 1987); *1stAm. Sys., Inc. v. Rezatto*, 311 N.W.2d 51, 58-59 (S.D. 1981); *One Stop Deli, Inc. v. Franco's, Inc.*, 1993 U.S. Dist. Lexis 17295 (W.D. Va. 1993); *B.C. Ziegler & Co. v. Ehren*, 414 N.W.2d 48, 50 (Wis. App. 1987); *Ridley v. Krout*, 180 P.2d 124, 131 (Wyo. 1947).

The FCC's contrary view, if permitted to stand, would work a revolution not only in the telecommunications industry, but in many other sectors of American commerce, including credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and other companies that maintain individually identifiable customer information as a valued part of their routine business operations. *See* Brief of Amicus Information Industry Association. It is settled law that such information belongs to the companies that generate, compile, and maintain it, and it is nothing short of astonishing for respondents to suggest otherwise.

Hence, petitioners have plainly established a reasonable, investment-backed expectation in their ability to use CPNI for productive purposes. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court held that state law creates a property right in trade secrets for purposes of the Fifth Amendment. *Id.* at 1003-04. The Court opined that, if the federal government could "'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." *Id.* at 1012. *See also Preseault v. ICC*, 494 U.S. 1, 22-23 (1990) (O'Connor, J., joined by Scalia and Kennedy, JJ., concurring) (federal regulatory program works a taking if it upsets state-law property rights).[15]

2. <u>The Commission's Prior Practice Refutes Its Argument.</u>

The FCC contends that its assertion that CPNI belongs to customers rather than carriers is nothing new. But none of the respondents denies that the *CPNI Order* reflects a radical departure from prior Commission policy. The most the Commission can muster to justify its turnaround is an offhand reference in the *AT&T CPE Relief Order*, 102 F.C.C.2d 655 (1985).

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[15] Respondents argue that *Ruckelshaus* is inapplicable because there is no comparable federal statute here guaranteeing the right to use CPNI. But state law supplies the relevant property right. *See Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1930 (1998). And here no pre-existing federal program comparable to the pre-1978 pesticide program in *Ruckelshaus* calls into question petitioners' property interest.

However, that Order undermines rather than supports the FCC's position. Despite its reference to ownership, the Order permitted AT&T to use CPNI for all legitimate business purposes. In the *AT&T CPE Relief Order*, the Commission *allowed* data collected in AT&T's telephone operations to be shared with personnel in a different AT&T division, which sold CPE (such as telephones) to consumers. The only constraint imposed by the Commission was a notice and opt out requirement - the very regulatory option that the FCC has rejected in this context and that petitioners are willing to accept.

Far from restricting AT&T's use of the commercial information, the FCC explained that "AT&T's CPE sales personnel will . . . have a legitimate need for access to customer proprietary information dealing with network services. *Id.* at 693. The FCC rejected the arguments of AT&T's competitors that they were entitled to access to information on the same terms and conditions: "given that AT&T's CPE sales personnel will have access to all customer proprietary information under this plan, providing equivalent access to all CPE vendors would require AT&T to make all its large customers' information public. Since this information belongs to the customers, and many may not want it to be made public, this approach is also unacceptable." *Id.*

Thus, the FCC considered the customers' interest in the information only in the context of rejecting an obligation that would have required AT&T to disclose its commercial information to unaffiliated third parties. The FCC saw no privacy or customer ownership issues in AT&T's own use of the data – even use by a different division of AT&T. The *AT&T CPE Order* thus strongly supports petitioners' position here.

3. <u>The Rules Raise Serious Takings Issues.</u>

Respondents contend that this is merely a case where the government has affected the value of property by regulation. Respondents implicitly concede that a regulation is invalid if, in the words of Justice Holmes, it "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,

415 (1922). But respondents insist that whether a taking has occurred depends on "the character of the [government's] action and its purported economic impact." MCI Br. 15. There are two flaws in respondents' argument.

First, the CPNI rules do not simply prevent carriers from using CPNI. They also purport to transfer ownership of it to customers, in whom the rules vest the power of prior affirmative consent. Respondents' do not deny that "a law that takes property from A. and gives it to B.," *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2146 (1998) (plurality opinion) (citation omitted), is a classic form of taking, regardless of the economic impact on the owner A. *See* MCI Br. 17 (laws which "transfer ownership interest to . . . third parties").

Second, respondents are wrong to argue that "this *Court* must weigh the 'public and private interests' affected by the *CPNI Order*." CPI Br. 25 (emphasis added). The *FCC*, not this Court in the first instance, has the responsibility of examining the economic effect of the CPNI rules, their impact on petitioners' investment-backed expectations, and the remainder of the factors cited by respondents. The FCC has the obligation to engage in a reasoned analysis of the takings issue. It has the duty to construe Section 222 to avoid a takings question. It is forbidden from adopting regulations that "directly implicate[] the Just Compensation Clause of the Fifth Amendment." *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). The FCC discharged none of those duties here. Instead, the Commission – no doubt heavily influenced by its faulty theory that carriers have no ownership interest at all in CPNI -- brushed off petitioners' takings claim with the blithe assertion that, under the CPNI rules, carriers would still be able to use CPNI for certain limited purposes. *Order* ¶ 43. Even the cases on which respondents rely most heavily warn that "Resolution of each case . . . ultimately calls as much for the exercise of

judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Here, the FCC has exercised no such judgment, and the rules should be vacated on that basis.[16]

C. THE *ORDER* REFLECTS AN IMPERMISSIBLE CONSTRUCTION OF SECTION 222.

In light of the serious constitutional issues raised by the CPNI rules, they must be vacated. Even apart from those constitutional concerns, however, the CPNI rules cannot stand. The FCC construed Section 222(c)(1) in a manner at odds with congressional intent and with the Commission's own long-standing position that requiring prior CPNI authorizations from customers was impracticable, unnecessary, and counterproductive. There is no indication that Congress in the 1996 Act sought to depart so dramatically from this longstanding regulatory practice, or to authorize the FCC to create a special rule for telecommunications carriers utterly unprecedented in American industry. Petitioners' opening brief demonstrated, without rebuttal, that, in light of the significant differences between Section 222 and earlier legislative proposals, Congress plainly did *not* mandate affirmative consents from customers. Opening Br. 44.

"Even under the deference mandated by *Chevron*, 'legislative regulations are [not] given controlling weight [if] they are arbitrary, capricious, or manifestly contrary to the statute.'" *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 835 (10th Cir. 1997) (alterations in original), *aff'd en banc on other grounds*, 1998 WL 404549 (10th Cir. July 20, 1998). "No deference is warranted if the interpretation is inconsistent with the legislative intent reflected in the language and structure of the statute or if there are other compelling indications that it is

[16] The FCC contends that petitioners have no significant "unrecovered investment in the data" because "[m]ost of the relevant costs . . . in all likelihood would have been expensed for ratemaking purposes." FCC Br. 34. But the value of CPNI to carriers is not represented simply by the administrative costs of collecting it. The FCC has recognized that "CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to

wrong." *Mountain Side Mobile Estates Partnership v. Secretary of Housing & Urban Dev.*, 56 F.3d 1243, 1248 (10th Cir. 1995) (citation omitted). The FCC's *CPNI Order* fails this test.

CONCLUSION

The petition for review should be granted; the *CPNI Order* and accompanying rule amendments to 47 C.F.R. §§ 64.2005 and 64.2007 should be vacated; and the matter should be remanded to the FCC for further consideration.

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October 15, 1998

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maximize customer response." *Order* at ¶ 22. *See also Phillips*, 118 S. Ct. at 1933 (possession and control of property are valuable rights regardless of economically realizable value).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-9518

U S WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

BELLSOUTH CORPORATION. and
SBC COMMUNICATIONS INC., *et al.*,

Intervenors.

CERTIFICATE OF SERVICE

I, Kathryn Marie Krause, on this 15th day of October, 1998, do hereby certify that two copies of the foregoing **REPLY BRIEF FOR PETITIONER AND INTERVENORS** were caused to be served, via first-class United States mail, postage prepaid, upon each of the following persons:

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I, Kelseau Powe, Jr., do hereby certify that I have caused an original and four copies of the foregoing **COMMENTS OF QWEST SERVICES CORPORATION** to be filed with the FCC, a hardcopy and diskette to be served on Ms. Janice Myles and a hardcopy and diskette to be served on the FCC's copy contractor, Qualex International.

Kelseau Powe, Jr.

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