

APPENDIX D

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4

5 **BEFORE THE ARIZONA CORPORATION COMMISSION**

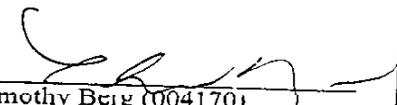
6 IN THE MATTER OF DISSEMINATION OF
7 INDIVIDUAL CUSTOMER PROPRIETARY
8 NETWORK INFORMATION BY
9 TELECOMMUNICATIONS CARRIERS.

DOCKET NO. RT-00000J-02-0066

**QWEST CORPORATION'S NOTICE OF
FILING REPLY COMMENTS RE: CPNI**

10
11 NOTICE IS GIVEN that Qwest Corporation files herewith their Reply Comments
12 regarding Customer Proprietary Network Information .

13 DATED this 29th day of April, 2002.

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16 By 

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I. General Remarks

Pursuant to procedural order dated February 15, 2002 in this proceeding, Qwest respectfully submits these reply comments in response to submissions of other parties. Qwest reiterates that it takes the matter of customer privacy seriously. It has a long tradition of treating the content of customer conversations confidentially, as well as the transactional information associated with telecommunications services. In its opening comments, Qwest argued that customer interests in protecting the privacy of Customer Proprietary Network Information ("CPNI") were adequately addressed through a businesses' use of an opt-out CPNI approval process. It stressed that government efforts to impose an opt-in approval regime were most certain to fail under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Even if the review were to be undertaken by the Ninth Circuit rather than the Tenth, the Arizona Corporation Commission ("ACC") would be unable to prove that an opt-in CPNI approval mandate directly and materially advanced compelling government interests in a narrowly-tailored manner.¹

Other commenting parties share Qwest's concerns regarding the lawfulness of a government-mandated opt-in CPNI approval regime. Those commentors confirm that constitutionally-protected speech interests are at stake in this proceeding and that government regulation of CPNI use must be crafted in a manner that accords with constitutional jurisprudence. They argue that only an opt-out CPNI approval mandate

¹ *United Reporting Publishing Corp. v. Los Angeles Police Dept.*, 146 F.3d 1133 (9th Cir. 1998) ("*United Reporting*"), *rev'd sub nom Los Angeles Police Dept. v. United Reporting Company*, 528 U.S. 32 (1999), (holding that a statute seeking to limit the release of arrestee records failed to directly and materially advance the government's interests in protecting the arrestee's privacy). *And see* Qwest at 7.

will withstand constitutional scrutiny.² Moreover, like Qwest, these carriers argue that an opt-out approach reflects sound public policy and provides appropriate customer choice regarding CPNI use.

Consistent with constitutional protections afforded Qwest's customers and its business operations, as well as prior FCC statements regarding the preemptive effect of federal law in this area, Qwest urges the ACC to refrain from enacting any state-specific CPNI rules at this time. The ACC will be free to revisit the matter when the FCC issues its Order, ruling on those matters addressed by the Tenth Circuit Court of Appeals.

Below, Qwest responds to certain filed remarks with which it takes issue in order to provide the ACC with a complete record on these matters of importance.

II. Response to AT&T Arguments

Qwest has two comments directed to AT&T's filing. First, Qwest addresses AT&T's assertion that it has secured affirmative CPNI approvals and questions whether such characterization is appropriate with respect to all the referenced approvals. Second, Qwest opposes AT&T's argument that a BOC Section 272 affiliate should be treated as an unaffiliated third party with respect to CPNI approval processes and CPNI use.

A. Affirmative Approval Assertions

AT&T makes clear its belief "that an opt-out notice is equally effective [as an opt-in one] in protecting customer privacy interests" and that "an opt-in policy is not sufficiently and narrowly tailored to overcome First Amendment concerns."³ While that

² See AT&T at 3-4; Sprint at 1-5. Compare WorldCom at 3-4 (limiting comment on the Tenth Circuit decision but expressing skepticism that the ACC could craft an opt-in CPNI approval regime that would withstand challenge on constitutional and preemption grounds).

³ AT&T at 4.

is the AT&T position from a legal and policy perspective, in response to a direct question from the ACC regarding whether a company uses an opt-in or opt-out policy (Question 1.a), AT&T advised that it used an opt-in oral CPNI approval process beginning in 1996, involving “orally poll[ing] 27 millions residential customers at a cost of \$70 million. Overall, 24 million, or 85.9%, of these customers gave their CPNI approval.”⁴ These assertions are similar to those made by AT&T in its 1998 “Petition for Reconsideration and/or Clarification,” filed with the FCC.⁵ At that time, Qwest challenged the assertion that all the approvals were “affirmative” in the sense most persons would understand that term.⁶

⁴ *Id.* at 2.

⁵ “AT&T Petition for Reconsideration and/or Clarification,” *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115, filed May 26, 1998. A copy of the relevant pages (pp. 18-22) of the AT&T filing are attached as Attachment B. There AT&T claimed that “[f]rom May through February 1998, AT&T has asked 27.9 million customers for permission to use [CPNI and that] [o]verall, 24 million of these customers, or 85.9% gave their approval, while 3.9 million (14.1%) declined to give approval.” *Id.* at 20.

⁶ “With respect to wireline customers, it appears that AT&T relies on what it describes as express verbal approval. [Cite omitted.] With respect to wireless customers, however, the **express nature of the approval is less clear**. For example, AT&T references language in its service contracts which describes its CPNI uses, including the ‘sharing of service usage information with other divisions of AT&T, unless the customer notifies AT&T Wireless Services in writing.’ [Cite omitted.] This reads very much like a ‘notice and opt out’ approval mechanism. Similarly, while AT&T references a ‘written agreement’ between itself and its business customers, it nowhere explicitly states that the agreement must be signed by the customer (*i.e.*, written approval). Rather, AT&T indicates that the contract can be ‘executed’ either ‘by signing the contract or using the service.’ [Cite omitted.] While the former action would result in an express written consent . . . , the latter would not, since it -- like the prior example -- would be in the nature of a notice and opt-out approach.” See “Support and Opposition of U S WEST, Inc. to Various Petitions for Reconsideration and/or Clarification,” *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer*

In its comments before the ACC, AT&T provides no further elucidation of its approval process than it did before the FCC. Before the ACC relies on AT&T's representations as evidence that "CPNI affirmative approvals can be secured," it should make further inquiry into the facts of the AT&T's approval-process. It appears that some of the approvals were more in the nature of notice and opt-outs.⁷ There is a substantial possibility that the ACC would not agree with what AT&T considers "affirmative" approvals.

In contrast to AT&T's assertion that it was able to secure 20+million affirmative approvals from its customers stands Qwest's-filed results from its statistically-valid trial demonstrating that affirmative CPNI approvals cannot be secured in any large numbers. (Attachment 4 to Qwest's Opening Comments submitted in this docket).⁸ That study, from which extrapolations and predictions can fairly be made, shows that it is essentially impossible to secure sufficient opt-in CPNI approvals, with the consequences being that

Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115, filed June 25, 1998 at 15, n.36 (emphasis in original), pertinent pages included here as Attachment C.

⁷ For example, the language AT&T uses to discuss the wireless customer consents it secured sound similar to that which Sprint acknowledges is an opt-out approach, utilizing a "Terms and Conditions" document. Sprint at 2.

⁸ Sprint argues that it would be easier for incumbent carriers to secure CPNI approvals than for new entrants because an incumbent "is more likely to receive calls." Sprint at 3. Sprint is undoubtedly correct as to the raw numbers of calling individuals. But, that does not really address the issue of securing approvals from a customer base of millions of customers or the percentage of approvals secured. Nor does it take into account that the large percentages of approvals secured an **inbound calling** context (because customers have telecommunications needs/services on their minds and are engaged) represent – at least for the Qwest incumbent – only 10 to 15% a year of a carrier's customers and some are repeat callers. In an opt-in CPNI approval process, this leaves incumbents with 85% of their customer base in "no CPNI use" status, an unacceptable result.

CPNI cannot be used. Speech within the corporation is depressed, and the carrier's speech with customers is uneducated. In such circumstances, the opt-in approach to CPNI approvals is contrary to constitutional free speech principles and sound public policy.

B. Prohibiting CPNI Sharing With BOC Long Distance Affiliate

AT&T claims that a BOC's long distance affiliate, and potential customers of a BOC's local and long distance package, should not enjoy the benefits of informed, constitutionally-protected speech accomplished through affiliate sharing of CPNI.⁹ AT&T's argument is two-fold: If a BOC seeks to share its CPNI with a Section 272 Affiliate through an opt-out process, a BOC must notice a customer that it will share CPNI with unaffiliated entities as a result of that opt-out notice, as well. If the BOC wants to avoid this result (*e.g.*, opt-out for sharing with the Section 272 affiliate and others), the BOC must use an opt-in CPNI approval process for sharing with its affiliate and others.

AT&T's argument amounts to a plea that the CPNI approval process be uninfluenced by the ongoing carrier relationship of the BOC and its customers. AT&T's position before the ACC suffers from the same infirmities it did before the FCC.¹⁰ The

⁹ AT&T argues that BOCs "should not be permitted to share with or use for the benefit of their section 272 affiliates their local customer CPNI on a preferential basis. In other words, CPNI must be made available to unaffiliated carriers on the same basis as to the BOC affiliate (whether opt-in or opt-out)." AT&T at 2.

¹⁰ As AT&T's attachment shows, AT&T has made its arguments to the FCC. And, Qwest has filed responsive arguments in opposition to AT&T's rhetoric. For a full record, Qwest here attaches its advocacy on this issue as it has been presented most recently to the FCC. See "Comments of Qwest Services Corporation" at Section IV, pp. 22-28 (filed Nov. 1, 2001) (Attachment D) and "Reply Comments of Qwest Services Corporation" at Section III, pp. 19-23 (filed Nov. 16, 2001) (Attachment E), *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications*

argument is anti-consumer, anti-competitive and anti-constitution. In short, AT&T's advocacy is at odds with good law and sound public policy.

AT&T's position would hurt consumers and their privacy interests. Moreover, it would add to their purchase costs were it adopted. It is generally conceded that the primary consumer "privacy" concern is with sharing CPNI with entities unaffiliated with the carrier collecting and generating the information.¹¹ Thus, establishing a sharing mechanism that treats a carrier's affiliate the same as an unaffiliated entity would compromise those customer expectations. Surely the ACC would not act in such manner.

Additionally, AT&T's arguments would deprive consumers of the benefits that inure to their favor when businesses maximize information flows and the efficiencies associated with them.¹² AT&T would have the government act in a manner that would

Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115. Attachment A to this filing has a "status report" on this issue before the FCC. It is before the FCC where this issue should be resolved.

¹¹ According to "Privacy On & Off the Internet: What Consumers Want," conducted by Harris Interactive, with Dr. Alan F. Westin acting as Academic Advisor. ("2002 Harris Survey"), "Consumers are most concerned about the threat of their personal information falling into the hands of individuals or companies who have no relationship to them. Consumers indicate that selling personal information to third parties (75%) is by far their greatest concern." Westin Commentary at 31.

¹² In its opening Comments, Qwest advised that the FCC and federal district courts had articulated positions supporting the use of CPNI within a corporate enterprise, asserting that such use promoted the interests of consumers and competition. Qwest at 1-8. As characterized by the District Court of Appeals for the D.C. Circuit, arguments opposing CPNI use within a carrier's corporate enterprise are grounded not in arguments that the use of CPNI will "hurt competition or otherwise adversely affect the public interest, but instead that it will hurt [those arguing for a restriction on use] by increasing the sting of competition [such entities] will face from the . . . company [using the CPNI]. We agree with the Commission . . . that AT&T/McCaw's ability to market its services directly to the customers of other carriers [using CPNI] . . . should lead to lower prices and

interfere with acknowledged consumer benefits associated information sharing within a corporate enterprise (benefits AT&T itself wants to take advantage of through an opt-out CPNI approval process). Moreover, the kind of consumer and competitive benefits referenced by carriers, regulators and courts alike are not dependent on the sharing of information by the one lawfully in possession of the information with other non-affiliated entities.¹³

AT&T's argument, were it adopted, would impede competition not promote it. It would hamstring a new entrant (the BOC) seeking to provide interexchange long distance services when long-standing, name-brand providers with substantial, rich customer information use all of their CPNI to sell both local and long distance services.¹⁴ No good reason exists for the ACC to act as AT&T proposes and to do so would impede the BOC's ability to use CPNI to provide its customers with the best product mix at the best price for those customers. Such action would only frustrate consumer welfare and the benefits of competition.

Finally, AT&T's arguments ignore fundamental constitutional principles regarding BOC to Section 272 affiliate speech and BOC/Section 272 affiliate to customer

improved service offerings." *See SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1494-95 (D.C. Cir. 1995).

¹³ *See Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1345 (9th Cir. 1986).

¹⁴ IXC's have touted the significant volume of CPNI at their disposal – to be used by them in crafting either interexchange or local service offerings. *See Letter from Elridge A. Stafford, Federal Regulatory, U S WEST to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, dated Jan. 27, 1998, Attached Slides at 10 (Attachment F)* "IXC CPNI is no less valuable than LEC CPNI: -- AT&T boasts: "We now have a database with information about nearly 75 million customers. We know their wants, needs, buying patterns, and preferences." -- MCI claims databases that contain more than 300 million sales leads and up to 3,500 fields of information about 140 million customers and prospects."

speech. AT&T encourages the ACC to take action that would unlawfully condition Qwest's exercise of its free speech rights. As Professor Lawrence Tribe advised the FCC, a government mandate that a BOC treat its own affiliate as a stranger for speech purposes (e.g., sharing CPNI between affiliates) or that it treat all other entities as if there were affiliates puts Qwest in an untenable position. The former decision acts as an "involuntary waiver" of the company's speech rights, and the derivative speech rights of its customers, to the detriment both. The latter action would compromise a BOC's customers' privacy expectations. The courts have held that the government cannot lawfully force persons into such a position.¹⁵

AT&T invites the ACC to intervene in a matter that has been fully vetted at the FCC through at least two separate dockets and more than four rounds of filings. Beyond preemption considerations, the ACC should decline to adjudicate this issue because to do so would be unsound from a matter of law and policy. The consumer and speech benefits associated with CPNI use should not be dampened by restrictions on a carrier's sharing of such information with a particular "type" or "category" of affiliate. For these reasons, the ACC should reject AT&T's arguments that if a BOC shares CPNI with its Section 272 affiliate pursuant to an opt-out notification that unaffiliated entities should also become third-party beneficiaries of that approval process; or, alternatively, that a BOC's affiliate should be treated as if there were no affiliation. Such a ruling would be contrary to

¹⁵ Attachment G (Letter from Kathryn Marie Krause, Senior Attorney, U S WEST to Mr. A. Richard Metzger *et al.*, June 2, 1997 (attaching Letter to Mr. Richard Metzger *et al.* from Laurence H. Tribe, June 2, 1997, at pp. 12-14, citing to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)); and *Dolan v. Trigard*, 512 U.S. 574 (1994)); Attachment H (Letter from Kathryn Marie Krause, Senior Attorney, U S WEST to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, Sept. 10, 1997 (attaching Letter to Mr. Richard Metzger *et al.* from Laurence H. Tribe, Sept. 10, 1997, at p. 6)).

consumer welfare and privacy expectations and is not compelled by any sound legal or policy principle.

III. Residential Utility Consumer Office (“RUCO”) Comments

RUCO argues that the Tenth Circuit opinion is just wrong, and that it creates an “unnecessary conflict between individual privacy and allegedly protected ‘speech.’”¹⁶ It urges the ACC to adopt the logic of dissenting opinion. The ACC should reject the RUCO’s arguments since they are not well grounded in law and they do not promote sound competitive or public interest policy.

RUCO seeks ACC interference with telecommunications carriers and their use of CPNI and to support its entreaty it cites to other state statutes involving releases of information to entities unaffiliated with the holder of the information.¹⁷ The context has little to do with carriers’ use of CPNI and raises different privacy “concerns” than does a business’ internal use of information lawfully within its possession. Even by analogy,¹⁸

¹⁶ RUCO at 1.

¹⁷ *Id.* at 3-4 (citing to statutes dealing with: release of a professional’s residential address and telephone number by any professional board; release of a peace officer’s identification information, including name and address by state or county officials; release of information about judges, police officers, domestic violence victims or others benefiting from a restraining order; collection or disclosure of social security, credit card or other financial information when collected for judicial purposes; release of information associated with vehicle title or registration records).

¹⁸ See e.g., *id.* at 4 (arguing that “by analogy” the existence of the Arizona Constitutional provision protecting privacy supports the argument that carriers should have to secure affirmative approval to use CPNI); *Id.* at 7 (arguing that carriers should be subject to damages for “tortuous [sic] dissemination of CPNI,” referencing again the Arizona Constitution). Both arguments must be rejected. The Arizona courts have construed the Arizona Constitutional provision on privacy to be confined to state interference with privacy, not private ones (Qwest Opening Comments at 9). An extension of this clear judicial precedent would be inappropriate. Additionally, it is clear that the internal use of CPNI for ordinary business purposes does not constitute a tort under Arizona law. *Id.* Similarly, RUCO’s reference to the law of contracts is misplaced as an argument by analogy. RUCO at 5. First of all, the statute of frauds does not apply to the relationship

such statutes are inapposite to a carrier's use of CPNI within its corporate enterprise, even from a policy or analogy perspective. Moreover, evidence submitted or referred to by RUCO is not the kind of evidence necessary to sustain a government mandate directed toward a particular set of businesses.

Generalized concerns regarding "privacy,"¹⁹ even if those concerns are escalating,²⁰ will not support an opt-in CPNI approval regime.²¹ To sustain a CPNI opt-

between Qwest and its customers since the contract can be (and is generally) executed and acted upon within a year. Qwest generally enjoys a month- to- month relationship with its customers pursuant to tariffed terms and conditions. Second, even the law of contracts acknowledges the binding nature of an agreement accomplished pursuant to inaction when the totality of the facts and circumstances support such a conclusion. Restatement (Second) of Contracts § 69 (1979).

¹⁹ For example, "Arizona law recognizes that some people with an ax to grind will access and use personal information to harass or harm others and their families." RUCO at 3. As the Tenth Circuit stated, the government cannot satisfy the *Central Hudson* test by "merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served." *US WEST v. FCC*, 182 F.3d at 1235.

²⁰ In information Qwest provided in its opening submission, there was a description of the population according to a privacy "orientation." See Attachment 14 to Qwest Opening Comments. The attachment referenced privacy "fundamentalists," "pragmatists" and "unconcerneds." The figures associated with these classes of individuals have changed since the date of the document submitted. According to Harris Survey 2002, privacy "fundamentalists" now constitute about 34% of the population (rather than the 24% figure earlier referenced). The recent data also shows a shift in the Unconcerned category (dropping since 1996 from 12% to 8%) with the movement going to the pragmatists (now at 58%). In addition to this "privacy population framework," this survey also confirms that informational privacy varies considerably by age, gender, education and income. *Id.* at 32-34.

Dr. Westin postulates that these shifts are due to four major factors: First, "[t]he most obvious answer is the continued critical mass media treatment in 2000-2001 on consumer profiling, target marketing, and business information-sharing practices, especially on the Internet. This steady drumbeat shaped and intensified average-consumer concerns, especially for financial and health information uses." Westin Commentary at 23. Second, "the widely-reported rise in identifying theft/fraud, through capture of consumer personal data and weaknesses in some company information-security systems." *Id.* (Compare the RUCO reference to identity theft at 3). Third, "the movement of consumer privacy in 1999 and 2000 onto the mainstream national and local political agenda as a

in approval regime, the ACC must be able to articulate a consumer's privacy interest in CPNI *vis-à-vis* its serving carrier and that would warrant government action. While consumers undoubtedly have a privacy interest in CPNI, it is not clear that the government needs to become unduly involved in the carrier-customer relationship in order to assure that the consumer's interests are handled responsibly.

RUCO points to a carrier's accumulation of call detail information as warranting government intervention.²² It claims that the "potential harm [to the consumer] is much broader than potential embarrassment."²³ Yet, RUCO fails to articulate or prove the harm, as required under constitutional principles.²⁴

first-tier social concern." *Id.* And, fourth, "the increased lack of public trust in American business that took place . . . in the late 1990's and 2000-2001." *Id.* at 24.

Of these factors, only the latter can be related in any direct way to the behavior of carriers or their customers. And, with respect to telecommunications carriers themselves, the most recent survey contains little specific information about them, other than they are in the middle of the pack in terms of companies that consumers believe need to establish effective privacy policies. Westin Commentary at 65-66. Concerns about privacy, stemming from general environmental factors, and generalized desires for the establishment of privacy policies (which Qwest and other carriers have) cannot form the foundation for depression of constitutional rights and protections.

²¹ *US WEST v. FCC*, 182 F.3d at 1235.

²² RUCO at 2.

²³ *Id.* at 4.

²⁴ "In the context of a speech restriction imposed [by the government] to protect privacy [of telecommunications customers] by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment or misappropriation of sensitive personal information for the purposes of assuming another's identity." *US WEST v. FCC*, 182 F.3d at 1235. The Tenth Circuit found that an opt-in CPNI approval regime failed this element of *Central Hudson* (*i.e.*, the specific articulation of a governmental interest) because "[w]hile protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, [it had] no indication of how it may occur in reality with respect to CPNI." *Id.* at 1237.

RUCO wants the ACC to restrict truthful information lawfully generated and retained by carriers providing telecommunications services. In seeking that restriction, it ignores the fact that call detail was a type of CPNI considered by the Tenth Circuit when it, nonetheless, struck down the FCC's opt-in CPNI approval regime.²⁵ That Court found that an *opt-out* CPNI approval regime most likely addressed any customer privacy concerns because individuals that objected to the use of such information could protect themselves by "opting-out."

Plainly, the communication of call detail information (time of day, day of week, repeat calls to certain numbers) within a corporate enterprise is as much speech as telling an affiliate that "Susan has 7 lines – 3 more than she had last week and 6 more than she had last month." Use of this information by a carrier in the context of the individual associated with the call detail has not been demonstrated to be highly offensive across a broad base of telecommunications consumers, even though the information might be a reflection that Susan (a) is starting a highly lucrative (but maybe legally questionable) "calling parlor" for those wanting to make overseas 900 calls or (b) just needs a lot more telephone lines for reasons no one cares about. Moreover, the inclusion of this

²⁵ "Given the sensitive nature of some CPNI, such as when, where, and to whom a customer places calls," Congress afforded CPNI the highest level of privacy protection under § 222." *US WEST*, 182 F 3d at 1229, n. 1. The court was comparing § 222(c) with other subsections of § 222, such as the provisions dealing with aggregated information. The Court was commenting on the fact that, in the former case, customer "approval" was necessary before a carrier could use CPNI; whereas with respect to aggregate information, no such "high[] level of privacy protection" was provided for in the statute. Nor was such protection required in the case of subscriber list information (SLI), as the Court observed. By describing this legislative framework, the Tenth Circuit was not validating a substantial state interest in protecting people from disclosure of such information, particularly not if the disclosure were pursuant to customer approval. Nor did the Court say anything that would suggest that call detail information would warrant a different type of approval process than appropriate for individually-identifiable CPNI generally.

information in databases “used” for other than direct marketing purposes – such as information accumulated for modeling or other purposes that might be used to create marketing strategies for customers who do want to hear from telecommunications carriers – poses no “privacy threat” to any individual. Indeed, as the material submitted to the ACC previously demonstrates, all the above communications and potential information uses create benefits to consumers and businesses in the form of lower product development and marketing costs as well as the proliferation of products and services that can satisfy consumers’ telecommunications and related service needs.

RUCO’s suggestion that carriers “convert” call detail information into identification information (such that a pizza company was called or a health care or insurance provider)²⁶ is not supported by sworn statement or any evidence that Qwest is aware of in this or the federal record. Qwest has committed not to use or share 7 or 10-digit call detail (whether associated with local calls, such as measured service, or toll calls) within its corporate enterprise for marketing purposes. Thus, there is no current demonstrable “privacy” concern or harm associated with its use of this information. Although other carriers might not be willing to withhold use of this information, the fact that the information has been used in the past and has not raised or demonstrated privacy issues of any magnitude calls into question the notion that there is a substantial privacy threat associated with internal use of call detail.

Moreover, a CPNI opt-in approval regime with respect to call detail will not be sustainable if (a) it does not materially and directly advance a compelling government

²⁶ RUCO at 2.

interest in privacy,²⁷ in (b) a narrowly tailored manner. The existence of other privacy protections, either self-imposed or governmental, must be taken into account in making the determinations about advancement of the government objective and its narrow tailoring. The fact that carriers already have internal systems and practices to protect customer privacy (which would be embellished through an opt-out notification), and that government mandates already exist to “protect” individuals from unwanted marketing contacts (*e.g.*, Do Not Call Lists and marked directories) cannot be ignored by the ACC as it considers the adoption of broad speech-stultifying CPNI mandates as a mechanism to protect consumer privacy. Nor can the fact that individuals are well positioned to act to protect their own interests already and evidence exists that they do so in line with their own individual privacy “concerns.”²⁸ In light of these facts, government mandates that are broad rather than narrow and do indirectly (through the control of information exchanges) what can more easily be done quite directly (controlling marketing contacts through Do Not Contact activity).

It is not difficult to imagine a less constitutionally-invasive government regulation that would curb the kind of information “matching” what RUCO describes as privacy invasive. For example, a regulation might prohibit carriers from matching call detail

²⁷ See note 1, *supra*.

²⁸ The Harris Survey 2002 contains facts showing that individuals are becoming more privacy “assertive” without the benefit of any government intervention. “Fundamentalists are more privacy assertive than Privacy Pragmatists, who are much more assertive than Privacy Unconcerned. . . . Fundamentalists are the most likely to take steps to protect their privacy.” Westin Commentary at 45. Persons are increasingly asking that their names be removed from marketing list (an increase of 25% up to a total of 83%); asking that information not be shared with third parties (up by 20 points to 73%); and refusing to give personal information (up 9% points to 87%). *Id.* at 44.

(e.g., telephone number information) to name identifications for marketing purposes.²⁹

Thus, it is clear that there is a least one way (and maybe more) to craft a less restrictive government CPNI regulation to achieve governmental objectives of protecting customer privacy other than adoption of an opt-in CPNI approval mandate.

IV. Conclusion

The FCC's position announced in its *CPNI Order* and *CPNI Reconsideration Order* is that a BOC's Section 272 affiliate is part of the corporate enterprise that can use CPNI with appropriate "customer approval."³⁰ The FCC has construed Sections 222 and 272(c)(1) to be satisfied by this approach. BOCs are on record encouraging the FCC to maintain this position.

However, even if the FCC were to shift its previous statutory construction articulations, carriers have presented compelling arguments that Section 272(g)(3) allows CPNI sharing between BOC Section 272 affiliates and the LEC once "joint marketing" begins. (The FCC has not previously ruled on this argument, since its position was supported by other statutory provisions and public interest factors.) Only through such

²⁹ Qwest does not concede that such regulation would be constitutional. However, in efforts to work with the ACC cooperatively, this type of regulation might not be challenged by carriers and might accommodate the ACC's concerns.

³⁰ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115, 13 FCC Rcd. 8061, 8174-8179 ¶¶ 160-169 (1998) ("*CPNI Order*"); *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409, 14480-87 ¶¶ 135-145 (1999) ("*CPNI Reconsideration Order*"). Of course, BOCs, like other LECs, would be required to provide CPNI to any entity the customer directs in writing. 47 U.S.C. § 222(c)(2). Also, BOCs would have to provide CPNI to CLECs authorized to receive it for purposes of pre-ordering, ordering, provisioning, maintenance and repair and billing functions. 47 C.F.R. §§ 51.5, 51.319(g).

interpretation can the FCC advance what it asserts is Congress' intent: that once Section 271 relief is granted, "the ROC[s] [should] be permitted to engage in the same type of marketing activities as other service providers."³¹

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³¹ See *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21895, 22046 ¶ 291 (1996).