evidence of harm to consumers or carriers, we adopt as permanent the interim 30-day time frame. We clarify that this 30-day period is merely the minimum time a carrier must wait to infer a customer's approval of its requested use of CPNI; it is no way a deadline for customer action. Carriers are required to honor customer decisions to opt-out of requested uses whenever those decisions are communicated by customers, which may occur during or after the 30-day waiting period.

113. We also sought comment on how carriers should manage later requests for privacy from the customer.[258] For example, if a customer chooses to opt-out after the date on which approval has already been inferred, or, in the case of an opt-in mechanism, after the customer revokes an express consent previously granted, what would be a reasonable time period within which the carrier and its affiliates should be required to implement that opt-out request or revocation? We received limited comments on this topic, and note that we are unaware of any complaints regarding carriers' failure to implement and honor later requests for privacy. Accordingly, we require carriers to implement customers' privacy requests as expeditiously as possible within the regular course of business. However, we caution carriers that if we receive complaints that later privacy choices are not being effectuated in a timely manner, we will not hesitate to readdress this issue, and adopt prescriptive rules. In addition, we caution carriers that failure to implement customers' privacy elections in a timely manner would likely be actionable violations of sections 222 and 201 of the Act.

114. We also require carriers to notify the Commission if their opt-out mechanisms break down. During the period preceding this Order, a number of carriers implemented opt-out policies. We are aware that many consumers experienced problems in effectuating their choice to opt-out.[259] For example, it was reported that Qwest's call center was understaffed for the level of response and consumers were unable to get through or put on hold for unacceptably long periods; SBC generated similar complaints.[260] In light of recent problems customers have had opting-out, as well as the vital role that proper implementation of the opt-out mechanism plays in protecting consumers' privacy, we require that carriers provide written notice within five business days to the Commission in any instances where opt-out mechanisms do not work properly, to such a degree that consumers' inability to opt-out is more than an anomaly.[261]

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[258] *CPNI Clarification Order*, 16 FCC Rcd at 16518, para. 23.

[259] NASUCA April 12, 2002 *Ex Parte* Letter at 4; Texas Office of Public Utility Counsel April 16, 2002 *Ex Parte* Letter.

[260] *See* Brett Glass Comments; Attorney General of Arizona Jan. 25, 2002 *Ex Parte* Letter at 5; Arizona Corporation Commission Jan. 28, 2002 *Ex Parte* Letter at 2; Texas Office of Public Utility Counsel Apr. 16, 2002 *Ex Parte* Letter at 2. *See also* Paul Wenske, *Consumers Have Difficulty "Opting-Out,"*, KANSAS CITY STAR (Feb. 17, 2002).

[261] Such notices must be filed in WC Docket 96-115 with the Secretary's Office and sent to the Chief, Competition Policy Division, Wireline Competition Bureau and to the Chief, Policy Division, Consumer and Governmental Affairs Bureau.

115. In such instances, the Commission will consider whether to require carriers to extend the date by which opt-outs must be received, or if other corrective action is required. We encourage carriers to take such action voluntarily, and to advise the Commission of such action in the notice. The notice should take the form of a letter, and include the carrier's name, a description of the opt-out mechanism(s) used, the problem(s) experienced, the remedy proposed and when it will be/was implemented, whether the relevant state commission(s) has been notified and whether it has taken any action, a copy of the notice provided to customers, and contact information. Such notice must be submitted even if the carrier offers other methods by which consumers may opt-out.

116. In addition, we no longer allow carriers to use a time frame shorter than 30 days even if supported by an explanation.[262] To the degree that carriers previously provided notices that otherwise comply with our rules, but used a shorter time frame, we allow carriers to continue to use approval generated from those notices consistent with our holding regarding grandfathering of previously obtained approvals.[263]

117. Moreover, we agree with Nextel's request to "allow a carrier to provide the requisite notification at the time of an individual transaction and request that the consumer decide whether to opt-out as a requisite to completing that transaction."[264] In particular, subject to our discussion of shrinkwrap consent, carriers may request that consumers affirmatively make a CPNI election when the consumer signs up for service. However, if the carrier provides an opt-out notice but does not require the customer to specifically demonstrate his decision whether or not to opt-out, then the carrier must abide by the thirty-day waiting period. Specifically, a carrier must obtain a demonstrable customer election to opt-in or opt-out that is separate and distinct from the customer's decision to purchase the carrier's service. For example, a carrier that uses an Internet sign-up page may provide the required notice and then require a customer to click on a button agreeing to opt-out or opt-in.[265] However, carriers may not require customers to assent to CPNI usage as a condition of service.[266]

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[262] Should extraordinary circumstances occur, we will consider individual carriers' waiver requests.

[263] *See* section III.B.3, *infra*.

[264] Nextel Comments at 8.

[265] *See* section III.C.1.a, *supra*.

[266] Accordingly, we disagree with CTIA's assertion that "a carrier could notify a customer of its information practices at the time a customer subscribes. If the customer initiates service after such notice, there should be no dispute that consent has been given and is adequate to satisfy Section 222." Because not all consumers have meaningful choice regarding all of their telecommunications providers, we do not allow carriers to require CPNI access as a term of service. CTIA's proposed solution – "the customer may terminate the service if such practices are no longer acceptable" – is inappropriate where a customer depends on such service as a basic utility and has no other meaningful choice (*e.g.*, local dial tone).

5. Methods by Which Customers Can Exercise CPNI Rights Under Opt-Out or Opt-In

118. We require that carriers make available to every customer (including, but not limited to, those without Internet access, and disabled customers) a method to opt-out that is of no additional cost[267] to the customer and available 24 hours a day, seven days a week. We allow carriers to satisfy this requirement through a combination of methods,[268] so long as all customers have the ability to opt-out at no cost and are able to effectuate that choice whenever they choose.[269] We note that in an opt-in paradigm, carriers have an incentive to make it as easy as possible for customers to opt-in because they need to receive the customer's express approval to use CPNI. However, in the case of opt-out, it makes economic sense for carriers to make it difficult and expensive for customers to opt-out, because opting-out deprives the carrier of approval for its intended use of CPNI.[270] Many commenters suggest that the Commission allow carriers to determine what methods to offer customers to opt-in or out.[271] Based on comments as well as recent experiences with opt-in and opt-out in this and other industries, we allow carriers the freedom to choose the method(s) by which consumers may express their opt-out or opt-in choices, so long as all customers are able to access and use those mechanisms, 24 hours a day, seven days a week. We believe that these requirements will ensure that all consumers are afforded a reasonable opportunity to effectuate their privacy choices, while allowing carriers flexibility in determining how to meet their obligations.[272]

119. We deny the request by a few commenters to require carriers to obtain written evidence of customers' approval.[273] We have previously considered whether to require written evidence and were not convinced that such an approach was necessary, especially in light of the burden it would place on carriers.[274] We decline to do so here because we have not been presented any evidence that carriers are failing to obtain customers' approval and then claiming

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[267] While we recognize that carriers may, and in fact probably will, pass the cost of providing a cost-free method of opting-out on to their customer base, we believe that this approach is more equitable than allowing carriers to impose costs only on consumers who elect not to share their CPNI. We are concerned that carriers could impose enough cost on consumers so as to disproportionately impact low-income consumers.

[268] The avenues for opt-in and opt-out elections are written, oral, and electronic.

[269] However, as discussed in section III.C.1.b, *supra*, we have concerns regarding carriers' use of "break the seal" or "shrinkwrap" methods for customers to opt-in or out.

[270] See para. 62 *supra*, describing carriers' incentives in an opt-in versus opt-out paradigm.

[271] SBC Comments at 15; Sprint Comments at 6; Verizon Wireless Comments at 5.

[272] Such mechanisms could include a wide variety of methods, including a postage-paid return postcard, a toll free number, a secure Internet page, and/or an e-mail address to receive opt-outs. In addition, a form or other mechanism that could be returned with a customer's bill payment would satisfy this requirement, as the customer would not incur any additional cost.

[273] Cal. PUC Comments at 22; Texas PUC Mar. 1, 2002 *Ex Parte* Letter at 3.

[274] *CPNI Order*, 13 FCC Rcd at 8146-8149, paras.110-114.

to have such approval. To the degree that we receive complaints that abuses of this nature are occurring, we will revisit this issue and will not hesitate to initiate enforcement actions against offending carriers. In addition, we note that carriers bear the burden to provide proof that approval was obtained should a complaint arise.[275]

D. Competition Issues

1. Forbearance for Preferred Carrier Freeze Information

120. While we confirm our previous determination that preferred carrier ("PC") freeze information "falls squarely within the definition of CPNI,"[276] in this Order we forbear from imposing section 222's affirmative approval requirements on PC-freeze information so that it can be made more readily available to requesting carriers.

121. MCI WorldCom petitioned the Commission to reconsider its conclusion that PC-freeze status falls within the definition of CPNI.[277] In its petition, WorldCom states that "it is not apparent that customers have any privacy interest in restricting access to knowledge of the fact that their carrier selections have been frozen."[278] WorldCom's argument, however, only partially addresses the legal question. We have classified PC-freeze information as CPNI and have not differentiated among different types of CPNI for the purpose of applying the opt-in/opt-out methodology or other requirements of section 222.[279] We remain convinced that this interpretation is a valid one, and deny MCI WorldCom's request as it has not presented any arguments not already considered and rejected.

122. However, the Commission has nevertheless noted in the past that PC-freeze information is less sensitive than other CPNI.[280] Indeed, before clarifying that PC-freeze information is CPNI, the Commission had encouraged carriers to disclose such information to other carriers without customer consent,[281] although such sharing was not required by the

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[275] 47 C.F.R. § 64.2007(c).

[276] *CPNI Reconsideration Order,* 14 FCC Rcd at 14488, para. 148 & n.462.

[277] MCI WorldCom Petition at 16.

[278] MCI WorldCom Petition at 16.

[279] For this reason, we decline to adopt Mpower's proposal that the Commission adopt different approval requirements for CPNI based on the level of sensitivity. *See* Mpower Comments at 2-6. While we appreciate Mpower's initiative in proposing alternatives to the black and white approach to opt-in or opt-out, we find that Mpower's proposal runs contrary to Congress' unambiguous intent in defining all types of customer proprietary network information under one definition of CPNI in section 222. In addition, we are not convinced that carriers would be able to implement such a distinction in their existing customer service, operations support, and billing systems, where facilities information and call detail all may reside without distinction.

[280] *CPNI Reconsideration Order,* 14 FCC Rcd at 14488, para. 148 & n.462.

[281] *Slamming Order*, 14 FCC Rcd 1508, 1587-88, para. 133. *See also* U S West Opp. at 11-13. As noted above, the statute does not clearly state whether or not PC-freeze information is CPNI.

Commission's rules. Notwithstanding such encouragement, carriers in possession of PC-freeze status information may have feared that sharing this type of information without consent violated the Act.[282] In light of the past uncertainty regarding the sharing of PC-freeze information, and the fact that, absent forbearance, our rules would preclude the sharing of such CPNI without customer approval, we now undertake a forbearance analysis to ensure clear and consistent rules for carriers. We must conduct an analysis under Section 10 of the Act[283] in order to forbear from applying our affirmative approval requirements to PC-freeze information.[284] Section 10 of the Act requires forbearance where:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

123. Section 10(b) of the Act provides that, in determining whether forbearance is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.

a. Section 10(a)(1)

124. The Commission must first ascertain that enforcement of the regulation is not necessary to ensure that services are provided in a just, reasonable and nondiscriminatory manner. Access to PC-freeze information does not implicate whether a given carrier's charges, practices, classifications or regulations by, for, or in connection with PC-freeze information are just or reasonable, or unjustly or unreasonably discriminatory. Further, it is not unjust, unreasonable, or discriminatory for other carriers to have access to PC-freeze information, particularly if doing so prevents manifestly unjust and unreasonable carrier behavior, such as slamming. We thus find that forbearance from enforcing the CPNI notice and approval requirements as they related to PC-freeze information meets the first prong of section 10(a).

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[282] *See* 47 U.S.C. § 222(c)(1).

[283] 47 U.S.C. § 160.

[284] Although MCI WorldCom does not propose regulatory forbearance as an option, we note that U S WEST proposes forbearance as one interpretive option, among others. U S West Comments on Pet. for Further Recon. at 14.

b. Section 10(a)(2)

125. Our review of whether the rule is necessary to ensure consumer protection focuses on two aspects of consumer protection – our slamming rules and consumers' expectations of privacy. First, as we stated above, by this action the Commission does not remove the important consumer protection tools developed to prevent the practice of slamming, but rather, intends to make these rules more effective. As U S WEST notes, consumers will not be harmed because the PC-freeze "cannot be eliminated without the personal intervention of the subscriber, even if the [preferred carrier] freeze information is known to a soliciting carrier."[285] Additionally, PC-freeze information, while CPNI, is not the type of information regarding which consumers would have a strong expectation of privacy.[286] Therefore, the necessity of enforcing the approval requirements in this instance is substantially reduced. Indeed, the only information conveyed by a PC-freeze status is that the customer prefers to verify affirmatively whether any changes are permissible in that customer's choice of carrier.

c. Sections 10(a)(3) and 10(b)

126. Finally, we must consider whether forbearance is in the public interest and whether forbearance will promote competitive market conditions. Commenting parties assert that the unavailability of PC-freeze information can delay the conversion of customers to their services.[287] Such delays often result in unmet customer expectations, and customers may become confused or harmed when the new service or price options they have chosen are not implemented. Indeed, in the *Slamming Order*, the Commission found that PC-freezes could present an additional hurdle to switching carriers that could frustrate consumer choice.[288] The Commission also noted in the *Slamming Order* that broad availability of PC-freeze status information reduces the likelihood a customer will have a negative experience when switching service from one carrier to another.[289] With prior knowledge of a customer's PC-freeze status, carriers can prevent such delays and customer confusion.

127. Forbearing from the CPNI approval requirements may increase carriers' willingness and ability to share PC-freeze status information. Carriers may be able to more

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[285] U S West Comments on Pet. for Further Recon. at 13.

[286] MCI WorldCom Petition at 16; AT&T Comments on Pet. for Further Recon. at 5; U S West Comments on Pet. for Further Recon. at 13. *But see* SBC Comments on Pet. for Further Recon. at 4; CPNI Recon Order at n.462 (noting GTE's argument to the contrary).

[287] *See* Sprint Comments on Pet. for Further Recon. at 2-3.

[288] *Slamming Order*, 14 FCC Rcd at 1577-78, para. 115.

[289] The Commission stated, "we see benefit to the consumer – in terms of decreased confusion and inconvenience – where carriers would be able to determine whether a freeze is in place before or during an initial contact with the consumer." *Slamming Order*, 14 FCC Rcd at 1587-88, para. 133.

smoothly transfer customers who are unaware that a PC-freeze exists on their accounts, as the customers' PC-freeze choices can be discovered earlier in the provisioning process.[290]

128. We also believe all carriers operating in the competitive marketplace will benefit if our rules and regulations are consistent and clear. For example, if PC-freezes are CPNI that cannot be disclosed to a requesting carrier without express written consent, Sprint claims[291] another carrier could refuse to conduct a three-way conference call to lift a PC-freeze, which is allowed by the Commission's rules.[292] Also, as discussed above, it is important to clarify carriers' responsibilities in order to advance the Commission's goal of protecting consumers from slamming. Therefore, we find that regulatory forbearance is in the public interest because it enhances the consumer's choice and clarifies the rules that apply to carriers in the competitive market.

2. Denial of CPNI to Another Carrier With Customer Authorization

129. MCI WorldCom petitioned the Commission to strengthen the presumption that a violation of the Act has occurred when an incumbent LEC fails to provide access to CPNI to a competing carrier that has customer authorization to access that information.[293] We continue to hold that sections 201 and 222 of the Act apply to all carriers, and we find that a distinction between incumbent LECs and competitive LECs in this context would be imprudent.[294] The Commission has not previously required stricter CPNI rules for certain types of carriers, and MCI WorldCom has not provided us with new arguments that section 222 allows such a distinction.

130. The Commission has stated that "a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to that customer who wishes to subscribe to a competing carrier's service, may well constitute an unreasonable practice in violation of section

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[290] While a carrier often can either rely on subscribers' knowledge of whether they have a PC-freeze on their account, or use a three-way calling mechanism to determine such information, we see a benefit to consumers in making their PC-freeze choice available to other carriers. *See Slamming Order*, 14 FCC Rcd at 1587-88, para. 133. However, we affirm our presumption that carriers do not need to rely on LEC-prepared lists identifying subscribers with freezes in place, given the other ways in which this information is available. *See Slamming Third Report and Order*, 15 FCC Rcd at 16031-32, para. 76.

[291] While Sprint makes no allegation that this problem actually exists, we believe that any uncertainty will be addressed by this regulatory forbearance. *See* Sprint Comments on Pet. for Further Recon. at 3.

[292] *Slamming Order*, 14 FCC Rcd at 1585-86, para. 129.

[293] MCI WorldCom Petition at 10-12. AT&T filed comments in support of this petition while Bell Atlantic and SBC filed comments in opposition. AT&T Comment on Pet. for Further Recon. at 1-2; Bell Atlantic Comments on Pet. for Further Recon. at 3; SBC Comments on Pet. for Further Recon. at 3-4; Letter from Michael D. Alarcon, SBC, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed Mar. 22, 2002) (SBC Mar. 22, 2002 *Ex Parte* Letter) at 5.

[294] *CPNI Reconsideration Order*, 14 FCC Rcd at 14418, para. 11.

201(b), depending on the circumstances."[295] For conduct to be unlawful under section 201, the Commission must find that the conduct is "unjust or unreasonable."[296] We believe that this standard requires a review of case-specific facts,[297] and therefore we decline to impose the additional presumption of illegality requested by MCI WorldCom. MCI WorldCom also asks the Commission to reconsider this request under the local competition provisions of section 251.[298] The Commission has addressed the ability of competitors to access customer service records pursuant to section 251 in other proceedings, including *Local Competition* dockets and applications under section 271 of the Act.[299] MCI WorldCom has not provided any reason for us to require further assurance of access in this proceeding, and thus we decline to expand the scope of section 251 access in this proceeding.

3. Winback and Retention Marketing

131. We reaffirm our existing rule that a carrier executing a change for another carrier "is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier."[300] However, because we recognize that a carrier's retail operations may, without using information obtained in violation of section 222(b),[301] legitimately obtain notice that a customer plans to switch to another carrier or contact a defecting customer in the ordinary course of business,[302] we decline to impose a presumption that all retention efforts are illegal, as requested by MCI WorldCom.

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[295] *CPNI Order,* 13 FCC Rcd at 8125-8126, paras. 84-85; *CPNI Reconsideration Order,* 14 FCC Rcd at 14453-14456, paras. 86-92.

[296] 47 U.S.C § 201(b).

[297] BellSouth Opposition and Comments at 5, n.5 ("Because individual circumstances will differ, the Commission cannot make the declaration MCI WorldCom asks of it.").

[298] MCI WorldCom Petition at 10-12.

[299] *Local Competition First Report and Order*, 11 FCC Rcd 15499, 15763-64, 15766-67 at paras. 518, 521-23; *Ameritech Michigan Order*, para. 139 & n.341.

[300] *Slamming Order*, 14 FCC Rcd at 1572-73, para. 106. The Commission's rules are designed to prevent information obtained by a carrier's wholesale operations with other carriers from being used to benefit its retail operations. *See CPNI Reconsideration Order*, 14 FCC Rcd. at 14450, paras. 78-79 (stating, "where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b).")

[301] Section 222(b), entitled "Confidentiality of Carrier Information," states that a "telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." 47 U.S.C. § 222(b).

[302] However, we note that in our experience, such instances are the exception, not the rule. As explained in the *CPNI Reconsideration Order*, "competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger marketing campaigns, and consequently prohibit such actions accordingly . . . Thus, where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-(continued....)

132. Specifically, MCI WorldCom requests the Commission to establish a presumption that any winback[303] efforts be deemed unlawful if undertaken before the new carrier has started providing service.[304] Essentially, MCI WorldCom asks the Commission to change its rules in two ways: first, to re-draw the line between regulation of "retention" and "winback" activities; and second, to alter the legal presumption for "retention" efforts.[305]

133. MCI WorldCom does not present any evidence or justification that we have not previously considered for changing this definitional boundary and legal presumption.[306] Further, we agree with BellSouth's argument that deeming any "winback or retention effort[s], including those based on information learned through the carrier's retail operations, . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits."[307] We note that, to the degree that individual abuses are alleged, the enforcement process provides the proper avenue for resolving such complaints.

134. Finally, we are aware that a number of states are examining the issue of improper winback and retention activities and a number of states have adopted rules governing incumbent LECs' winback activities.[308] We continue to believe that the states are uniquely qualified to assess the local competitive landscape and determine whether additional safeguards are necessary. Accordingly, we affirm that our rules properly balance concerns regarding the proper

(Continued from previous page)
facilities or service provider to market to that customer, it does so in violation of section 222(b)." 14 FCC Rcd at 14449-14450, paras. 77-78.

[303] The Commission defines winback to cover the situation "where the customer has already switched" its service to another carrier. *CPNI Reconsideration Order*, 14 FCC Rcd at 14444, para. 65.

[304] MCI WorldCom Petition at 17.

[305] The Commission's rules regarding "retention" deal with marketing efforts aimed at "soon-to-be-former" customers who have chosen to switch carriers, but have not yet been switched over. *CPNI Reconsideration Order*, 14 FCC Rcd at 14444, 14448-49 at paras. 65, 75. Conversely, "winback" refers to marketing efforts to regain a customer that "has already switched to and is receiving service from another provider." *Id.* at 14444, para. 65. The Commission's rules permit carriers to use CPNI for winback marketing, which serves to provide customers more competitive choices. *Id.* at 14445, para. 67.

[306] MCI WorldCom argues that retention regulations should apply until the later of the date on which the old carrier receives a "loss migration notice" or the date that service with the old carrier actually ends. MCI WorldCom Petition at 17.

[307] BellSouth Opposition and Comments at 6.

[308] *See, e.g., Petition of the Southwest Competitive Telephone Association, IP Communications Corp., XO Texas, Inc., ASCENT, CompTel, Sage Telecom, Inc., Z-Tel Communications, and Birch Telecom of Texas, LLP to Amend PUC Substantive Rule 26.226,* Order Denying Petition for Rulemaking and Initiating Investigation, Project No. 24597, Public Utility Commission of Texas (Nov., 8, 2001); *Investigation of Winback/Retention Offers by Chapter 58 Electing Companies,* Project No. 24948, Public Utility Commission of Texas; *In the Matter of the Commission's Discussion of Qwest Corporation's WinBack Promotional Filing,* Docket No. N2002.4.44 (May 8, 2002 vote to file a complaint in district court). A variety of other states are considering or have adopted rules governing winback/retention activities including Florida, Illinois, Indiana, Missouri, North Carolina, and South Carolina.

use of CPNI with the goals of promoting competition in the marketplace and decline to adopt the presumption that MCI WorldCom suggests.[309]

4. Interplay Between Sections 222 and 272

135. We find that our adoption today of an opt-out customer approval mechanism for the use of CPNI by carriers and their affiliates that provide communications-related services does not affect our prior statutory interpretation regarding the interplay between sections 222 and 272, nor does it alter our ultimate conclusion that the term "information" in section 272(c)(1)[310] does not include CPNI.[311]

136. In the *CPNI Clarification Order,* the Commission sought comment[312] on the interplay between sections 222 and 272 if the customer approval mechanism was revised in light of the Tenth Circuit's opinion.[313] The Commission noted it might need to revisit its conclusion if it adopted an opt-out approach as a final rule in this proceeding.[314] However, we decline to revisit our interpretation of the interplay between sections 222 and 272 simply because we have amended our customer approval mechanisms.[315] While the Commission addressed the interplay of sections 222 and 272 in the context of an opt-in mechanism, the Commission did not rely on its adoption of the opt-in method in reaching its conclusion.[316] Instead, its decision was based

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[309] *See CPNI Reconsideration Order,* 14 FCC Rcd at 14447, para. 72. *See also* SBC Opposition at 4 ("MCI's suggestion should be denied because it does nothing to protect carrier-to-carrier information and does much to harm competition.").

[310] Section 272(c)(1) states that a Bell operating company (BOC), in dealing with its section 272 affiliate, "may not discriminate between the company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and *information,* or in the establishment of standards." 47 U.S.C. § 272(c)(1) (emphasis added).

[311] In the *CPNI Order*, we found that the term "information" in section 272(c)(1) does not include CPNI. *CPNI Order*, 13 FCC Rcd at 8172, para. 154. Our finding in that order overruled our earlier decision in the *Non-Accounting Safeguards Order* that the term "information" in section 272(c)(1) includes CPNI. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22010, para. 222. We affirmed the *CPNI Order* finding in the *CPNI Reconsideration Order*. *CPNI Reconsideration Order*, 14 FCC Rcd at 14481, para. 137.

[312] *CPNI Clarification Order*, 16 FCC Rcd at 16518-19, paras. 24-26.

[313] *CPNI Clarification Order*, 16 FCC Rcd at 16518-19, paras. 24-26. We note that AT&T argues that the Tenth Circuit's opinion vacated all of the Commission's *CPNI Order*. According to AT&T, we need to reconsider the interplay between sections 222 and 272. AT&T Comments at 11. As we tentatively concluded in the *Clarification Order* and affirm in this order, we disagree with AT&T's interpretation. *See* section III.B.1, *supra*; *CPNI Clarification Order*, 16 FCC Rcd at 16510, para. 7.

[314] *CPNI Clarification Order*, 16 FCC Rcd at 16519, para. 26.

[315] Because we do not revise our earlier decisions for the reasons discussed herein, we do not address the other arguments raised by the BOCs, including their definitions of "provision" and "service" under section 272 and their argument that treating BOC affiliates as unaffiliated entities would violate the BOCs' First Amendment rights to communicate with their affiliates and customers. SBC Comments at 17, 22-24; SBC Reply Comments at 9.

[316] *CPNI Order*, 13 FCC Rcd at 8174 -79, paras. 158-169; *CPNI Reconsideration Order*, 14 FCC Rcd at 14481-87, paras. 137-145.

upon statutory analysis and application of the terms used in the Act.[317] However, even if we were to review the portion of analysis that discussed the opt-in mechanism, we would still reach the same conclusion, as discussed below.

137. We find that the legal basis for our decision does not change with our modification of the customer approval mechanism. In prior orders, the Commission found that in the context of the 1996 Act, it is not readily apparent that the meaning of "information" in section 272 necessarily includes CPNI. The Commission found that the most reasonable interpretation of the interplay between sections 222 and 272 is that section 272 "does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates when they share information with their section 272 affiliates according to the requirements of section 222."[318] The Commission found this to be reasonable because, as we have affirmed above,[319] section 222(c)(1) contemplates that, under the total service approach, carriers have implied approval to market services within the package of services to which the customer subscribes, and can also share CPNI with their affiliates to do so. However, section 272(c)(1) prohibits BOCs from discriminating against other parties in the provision and procurement of "information." Thus, if "information" includes CPNI, BOCs would be unable to share CPNI with their affiliates to the extent contemplated by section 222, unless they also met the nondiscrimination requirements of section 272. To meet these requirements, the BOC would be required, under section 222, to seek express approval from its customers to share CPNI with its affiliates and with any third parties.[320] Thus, the Commission found that these requirements, in the context of an opt-in approach, "pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliates would have to solicit approval for countless other carriers as well, known or unknown."[321]

138. This rationale is still applicable under the Commission's new approval mechanism. First, because opt-in is required for third parties, a BOC would still need to obtain express approval for sharing with its 272 affiliates and third parties to meet the nondiscrimination requirements of 272.[322] Applying opt-out to intracompany sharing would not therefore alter the "potentially insurmountable burden" upon BOCs to obtain customer approval

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[317] *CPNI Order*, 13 FCC Rcd at 8174-8176, paras. 160-162; *CPNI Reconsideration Order*, 14 FCC Rcd at 14482-87, paras. 139-144; *In the Matter of AT&T Corp. v. New York Telephone Co., d/b/a Bell Atlantic – New York*, 15 FCC Rcd 19997, 20004-05 (2000). The Commission "also listed other rationales, which were independent of Commission's view that one of Congress' purposes in enacting 222 was to promote competition."

[318] *CPNI Order*, 13 FCC Rcd at 8174-75, 8179, paras. 160, 169; *CPNI Reconsideration Order*, 14 FCC Rcd at 14480-81, para. 136.

[319] *See* section III.B.2, *supra*.

[320] *CPNI Order*, 13 FCC Rcd at 8174, paras. 158-59; *CPNI Clarification Order*, 16 FCC Rcd at 16518-19, para. 25.

[321] *CPNI Reconsideration Order*, 14 FCC Rcd at 14485, para. 142.

[322] A few commenters argue that BOCs' section 272 affiliates effectively should be treated as third parties instead of intra-company affiliates with respect to the disclosure and use of CPNI to neutralize the BOC affiliates' "competitive disparity." AT&T Comments at 15; Nextel Comments at 12-13.

either. Even in a completely opt-out environment, a BOC seeking to share CPNI with its affiliates would have to solicit approval for countless other carriers as well, known or unknown.[323] We find that this result is neither required by the statute nor is it necessary to protect consumers' privacy interests. If we adopted AT&T's proposal to allow competing carriers to obtain CPNI on the same basis as the BOCs' 272 affiliates – that is, using an opt-out approval method under the rules adopted today – we would defeat our purpose in requiring opt-in approval for third parties. As described above, we have found that disclosure to and use of CPNI by third parties requires greater assurance of a customer's knowing consent to prevent unintentional disclosure of CPNI. Therefore, as in our previous orders, we still find that our interpretation best furthers the goals of Congress to protect customer privacy and to promote customer convenience and control.[324]

139. At any rate, the Commission has previously concluded that section 222's customer privacy protections effectively preclude the same anticompetitive behaviors as section 272, and this conclusion is not altered by the Order we adopt today.[325] In the *CPNI Reconsideration Order*, the Commission outlined three factors in section 222 that eliminate the necessity for the application of section 272's nondiscrimination requirements to prevent anticompetitive harms.[326] First, competitors are still afforded access to customer CPNI through section 222(c)(2), which requires disclosure of CPNI to "any person designated by the customer," upon affirmative written request by the customer.[327] Changing the mechanism for obtaining customer approval under section 222(c)(1) does not alter the ability of competitors to obtain CPNI through section 222(c)(2). Second, section 222(c)(3) continues to allow a LEC to use customer aggregate information only if it provides that information to other carriers upon reasonable request.[328] Again, changing section 222(c)(1)'s approval mechanism does not alter the ability of competitors to obtain aggregate information through section 222(c)(3).

140. Third, the Commission stated that under the opt-in mechanism, BOCs could not share CPNI with their section 272 affiliates unless they either obtained express customer approval or the customer is an existing subscriber of a service of that affiliate.[329] Under the opt-in/opt-out mechanisms established in this Order, BOCs are allowed to share customer CPNI with

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[323] *CPNI Reconsideration Order*, 14 FCC Rcd at 14485, para. 142.

[324] *CPNI Order*, 13 FCC Rcd at 8174-75, para. 160; *CPNI Reconsideration Order*, 14 FCC Rcd at 14485, para. 142.

[325] *CPNI Order*, 13 FCC Rcd at 8177, para. 164. We disagree with AT&T's assertion that the Commission's decision to "implement an opt-in policy was inextricably intertwined with the interpretation of section 272." AT&T Comments at 12. The Commission only tangentially discussed the opt-in policy in its prior analysis of the interplay of sections 222 and 272, and AT&T has provided us with no convincing argument to the contrary.

[326] *CPNI Order*, 13 FCC Rcd at 8177-78, paras. 164-65.

[327] 47 U.S.C. § 222(c)(2).

[328] SBC Comments at 21.

[329] *CPNI Order*, 13 FCC Rcd at 8177, para. 164.

their section 272 affiliates without obtaining express customer approval. Under the opt-out approval mechanism we adopt today, BOCs must still provide customer notice and the opportunity for customers to opt out for CPNI uses beyond the existing carrier-customer relationship prior to sharing CPNI with an affiliate.[330] However, as a practical matter, it is likely that the BOCs will be able to share more CPNI with their 272 affiliates under opt-out than they would have been able to share under opt-in. As shown above, consumers typically will accept whatever choice does not require any action on their part.[331] As a result, when the default is opt-out, carriers will be able to use more customer CPNI.[332]

141. The possibility that BOCs will share more CPNI with their affiliates does not tip the scale to require application of section 272 to CPNI. [333] First, section 222 applies to all "telecommunications carriers" and does not single out any carriers for specific treatment, signaling Congress' intent that all carriers should be treated alike in the CPNI context. For example, an interexchange carrier with a significant customer base can share CPNI, after receiving opt-out approval, with its local or wireless affiliates. Thus, under our rules, all carriers can share CPNI with their affiliates. Accordingly, we decline to place additional restrictions upon BOCs. Second, section 272(g) allows BOCs and their section 272 affiliates to market their services jointly.[334] A fair reading of that section indicates that Congress did not intend to preclude BOCs and their long distance affiliates from conducting joint marketing, which is the primary intent behind CPNI use.[335] As we found in earlier orders, we believe our conclusion is therefore consistent with the "regulatory symmetry Congress intended for carrier marketing activities."[336]

142. Finally, numerous commenters used the *Further NPRM* as an opportunity to reargue the statutory and policy issues that we have previously addressed and that are unrelated

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[330] Under the total service approach, carriers can use a customer's CPNI to market services with the parameters of the existing customer-carrier relationship. *See* section III.B.2, *infra*. So a carrier's affiliate could use the CPNI without notice and approval if the affiliate were marketing the same services the customer already uses.

[331] *See* section III.A, *supra*.

[332] *Id.*

[333] Sections 251 and 201(b) ensure that BOCs disclose customer information in connection with their interconnection obligations and by requiring the BOC to act in a reasonable manner. SBC Comments at 21.

[334] 47 U.S.C. § 272(g).

[335] Several commenters agree with us that section 272(g) allows the BOCs to conduct joint marketing with their 272 affiliates, while arguing that if the BOCs' 272 affiliates use BOC customer CPNI, the BOCs must provide that CPNI to competitive carriers. ASCENT Reply Comments at 7; AT&T Reply Comments at 19; Excel Reply Comments at 12; WorldCom Reply Comments at 9. The exact nature of BOC/272 affiliate joint marketing was not explicitly detailed in the statute, and therefore we must decide what is permissible. For all the reasons described above, we have drawn the line more broadly than the commenters would like.

[336] *CPNI Order*, 13 FCC Rcd at 8178, para. 167.

to the issue before us.[337] AT&T and other commenters that request we reverse our holding in the *CPNI Order* do not get yet another "bite at the apple." The Commission has previously considered these arguments in both the *CPNI Order* and the *CPNI Reconsideration Order*.[338] The *Further NPRM* did not request comment on these issues, and commenters have not presented changed circumstances, new evidence or additional arguments that would affect our prior decisions. Therefore, we decline to address them again here.

IV. THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

143. In this Further Notice of Proposed Rulemaking, we seek to refresh the record on two issues raised in the *CPNI Order Further NPRM* and we request comment on an issue of emerging importance, CPNI implications when a carrier goes out of business, sells all or part of its customer base, or seeks bankruptcy protection.

A. Regulation of Foreign Storage of and Access to Domestic CPNI

144. In a July 8, 1997 *Ex Parte* letter, the FBI requested that the Commission regulate the foreign storage of and foreign-based access to CPNI of U.S. customers who use domestic telecommunications services.[339] The Commission requested comment on this proposal in its *CPNI Order Further NPRM*.[340] As an alternative, the FBI suggested that foreign storage or access to domestic CPNI be permitted only upon informed written customer approval. To the degree that CPNI is stored in a foreign country, the FBI asked that the Commission require carriers to keep a copy of customers' CPNI records within the U.S. for public safety, law enforcement, and national security reasons. The FBI also requested that we require carriers to maintain copies of the CPNI of all U.S.-based customers because of the need for prompt and secure law enforcement purposes. The Commission now requests that commenters refresh the record on this topic. Specifically, we request that commenters consider the FBI proposal in light of heightened national security concerns. In addition, we request input as to whether any of the concerns raised by the FBI have been realized since comments were received on this topic. Finally, we ask commenters to provide estimates of the costs that would be incurred if we were to mandate carriers to maintain the domestic storage of, and access to, domestic CPNI.

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[337] Commenters argue that (1) the Commission's statutory interpretation is incorrect and (2) BOCs must "operate independently" and therefore be treated as third parties. AT&T Comments at 12-15; WorldCom Comments at 11; ASCENT Reply Comments at 3; Excel Reply Comments at 7-10. WorldCom also argues that, with an opt-out mechanism, sections 222 and 272 are not in conflict. WorldCom Reply at 6.

[338] *CPNI Order*, 13 FCC Rcd at 8174-79, paras. 158-169; *CPNI Reconsideration Order*, 14 FCC Rcd at 14481-87, paras. 137-145.

[339] Letter from John F. Lewis, Jr., Federal Bureau of Investigation, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 96-115 (filed July 8, 1997) (FBI July 8, 1998 *Ex Parte* Letter).

[340] *CPNI Order*, 13 FCC Rcd at 8203-8204, paras. 208-210.

B. Protections for Carrier Information and Enforcement Mechanisms

145. In the *CPNI Order Further NPRM*,[341] the Commission sought comment on what safeguards in addition to those adopted in the *CPNI Order*, if any, are needed to protect the confidentiality of carrier proprietary information (CPI), including that of resellers and ISPs. The *CPNI Order Further NPRM* also sought comment on what, if any, further enforcement mechanisms the Commission should adopt to ensure carrier compliance with our CPNI policies and rules.[342] We seek to refresh the record on this topic. Specifically, we request that in light of the fact that carriers and other interested parties have actual experience with problems, commenters describe what, if any, problems have occurred since we originally issued the *CPNI Order Further NPRM.*

C. CPNI Implications When a Carrier Goes Out of Business

146. In light of inquiries the Commission has received in the face of recent carrier bankruptcies, mergers, and asset sales, the Commission seeks comment on carrier use and disclosure of CPNI when it sells its assets or goes out of business. We seek comment on whether an exiting carrier should be able to use CPNI for transition of its customers to another carrier. If commenters believe that an exiting carrier should be able to disclose CPNI to the acquiring carrier, should we require the exiting carrier to state that fact in advance notice provided to customers acquired by the sale or transfer from another carrier in compliance with our authorization and verification (slamming) rules?[343] Further, to the degree that the exiting carrier has obtained CPNI approvals from its customer, should the new carrier be deemed to have received such approvals, or should it be required to provide notice and obtain approval for CPNI use and disclosure from the acquired customers? Also, what is the proper application of section 222 to DSL providers? Will this applicability change if the Commission adopts the tentative conclusions in the Wireline Broadband NPRM?[344]

147. Further, should the Commission recognize a difference between service types? For example, the Commission might allow more liberal CPNI sharing to effectuate a LEC's customer base transition than other types of service to ensure that customers continue to receive dial tone. We also seek comment on whether carriers can sell CPNI as an asset. If not, is such a limitation constitutional? Would such regulations go beyond the scope of section 222 or the Commission's authority?[345]

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[341] *CPNI Order*, 13 FCC Rcd at 8201-8202, paras. 206-207.

[342] *Id.*

[343] 47 C.F.R. § 64.1120(e) and orders in CC Docket No. 00-257.

[344] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers,* CC Docket No. 02-33, Notice of Proposed Rulemaking (rel. Feb. 15, 2002).

[345] Qwest Comments at 15, n.52.

V. PROCEDURAL MATTERS

A. Third Report and Order

1. Final Regulatory Flexibility Analysis

148. As required by the Regulatory Flexibility Act, as amended, (RFA),[346] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *CPNI Clarification Order Further NPRM*.[347] The Commission sought written public comment on the proposals in the *CPNI Clarification Order Further NPRM*, including comment on the IRFA. Appendix C sets forth a Final Regulatory Flexibility Analysis for the present Report and Order.

2. Final Paperwork Reduction Act Analysis

149. This Order contains new and modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the OMB, as prescribed by the Act, and will go into effect upon announcement in the Federal Register of OMB approval.

B. Third Further Notice of Proposed Rulemaking

1. Ex Parte Presentations

150. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[348] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[349] Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well.

2. Initial Regulatory Flexibility Act Analysis

151. Appendix D sets forth the Commission's IRFA regarding policies and rules proposed in the *Third Further NPRM*. Written public comments are requested on this IRFA.

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[346] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[347] *See CPNI Clarification Order*, 16 FCC Rcd at 16527-37.

[348] 47 C.F.R. §§ 1.1200 *et seq.*

[349] *See* 47 C.F.R. § 1.1206(b)(2).

Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Third Further NPRM*. The Commission will send a copy of the *Third Further NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[350] In addition, the *Third Further NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[351]

3. Initial Paperwork Reduction Act Analysis

152. This *Third Further NPRM* may modify an information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the possible changes in information collections contained in this *Third Further NPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this *Third Further NPRM* in the Federal Register. Comments should address: (1) whether the possible changes in the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of any information collected; and (4) ways to minimize the burden of any collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

4. Comment Filing Procedures

153. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **30 days after Federal Register Publication of this NPRM**, and reply comments on or before **60 days after Federal Register Publication of this NPRM.** Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

154. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple dockets or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. In more than one

[350] *See* 5 U.S.C. § 603(a).

[351] *Id.*

docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Ave., N.E., Suite 110, Washington, D.C., 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

VI. ORDERING CLAUSES

155. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 222 and 303(r), that the *Third Report and Order* and *Third Further Notice of Proposed Rulemaking* in CC Docket Nos. 96-115, 96-149, and 00-257 ARE ADOPTED, and that Part 64 of the Commission's rules, 47 C.F.R. Part 64, is amended as set forth in Appendix B. The requirements of this Order shall become effective 30 days after publication of a summary thereof in the Federal Register. Sections 64.2007, 64.2008, and 64.2009 contain new or modified information collections that have not been approved by OMB. The Commission will publish a document in the Federal Register announcing the effective date of these rules.

156. IT IS FURTHER ORDERED that the collection of information contained herein is contingent upon approval by the Office of Management and Budget.

157. IT IS FURTHER ORDERED that the California Public Utilities Commission's Motion to Accept Late-Filed Comments is hereby GRANTED.

158. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 10 and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160 and 222, MCI WorldCom's Petition for Further Reconsideration IS GRANTED to the extent indicated herein and otherwise DENIED.

159. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Third Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Comments Filed

ALLTEL Communications, Inc.
AT&T Corp.
AT&T Wireless Services, Inc.
ATX Technologies, Inc.
Association of Communications Enterprises (ASCENT)
BellSouth Corporation
California Public Utility Commission (Cal. PUC)
Cellular Telecommunications & Internet Association (CTIA)
CenturyTel, Inc.
Cingular Wireless LLC
Competition Policy Institute (CPI)
Direct Marketing Association
Electronic Privacy Information Center, American Civil Liberties Union, American Library Association, Center for Digital democracy, Center for Media Education, Computer Professionals for Social Responsibility, Consumer Action, Consumer federation of America, Junkbusters, Media Access, PrivacyActivism, Privacy Journal, Privacy Right Clearinghouse, Privacy Times, Public Citizens Litigation Group, and US PIRG (EPIC et al.)
Intellione Inc.
Mpower Communications Corp.
National Association of Regulatory Utility Commissioners (NARUC)
National Telephone Cooperative Association (NTCA)
Nextel Communications, Inc.
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
Qwest Services Corporation
SBC Communications, Inc.
Sprint Corporation
United States Telecom Association (USTA)
VarTec Telecom, Inc.
Verizon
Verizon Wireless
WorldCom, Inc.

Reply Comments Filed

Association of Communications Enterprises (ASCENT)
AT&T Corp.
ATX Technologies, Inc.
CTSI, LLC
Direct Marketing Association (DMA)
EPIC et al.
Excel Communications, Inc.
Intelligent Transportation Society of America (ITSA)
Mercedes-Benz USA, LLC
National Association of Regulatory Utility Commissioners (NARUC)
Progress & Freedom Foundation (PFF)
Qwest Services Corporation
SBC Communications, Inc.
United States Telecom Association (USTA)
VarTec Telecom, Inc.
Verizon
Verizon Wireless
WorldCom, Inc.

APPENDIX B – Final Rules

Part 64 of Title 47 of the Code of Federal Regulations is revised to read as follows:

* * * * *

Subpart U – Customer Proprietary Network Information

§ 64.2001 Basis and Purpose.

(a) *Basis.* The rules in this subpart are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose.* The purpose of the rules in this subpart is to implement section 222 of the Communications Act of 1934, as amended, 47 U.S.C. § 222.

§ 64.2003 Definitions.

Terms in this subpart have the following meanings:

(a) *Affiliate.* The term "affiliate" has the same meaning given such term in section 3(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(1).

(b) *Communications-related services.* The term "communications-related services" means telecommunications services, information services typically provided by telecommunications carriers, and services related to the provision or maintenance of customer premises equipment.

(c) *Customer.* A customer of a telecommunications carrier is a person or entity to which the telecommunications carrier is currently providing service.

(d) *Customer proprietary network information (CPNI).* The term "customer proprietary network information (CPNI)" has the same meaning given to such term in section 222(h)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 222(h)(1).

(e) *Customer premises equipment (CPE).* The term "customer premises equipment (CPE)" has the same meaning given to such term in section 3(14) of the Communications Act of 1934, as amended, 47 U.S.C. §153(14).

(f) *Information services typically provided by telecommunications carriers.* The phrase "information services typically provided by telecommunications carriers" means only those information services (as defined in section 3(20) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(2)) that are typically provided by telecommunications carriers, such

as Internet access or voice mail services. Such phrase "information services typically provided by telecommunications carriers," as used in this subpart, shall not include retail consumer services provided using Internet websites (such as travel reservation services or mortgage lending services), whether or not such services may otherwise be considered to be information services.

(g) *Local exchange carrier* (LEC). The term "local exchange carrier (LEC)" has the same meaning given to such term in section 3(26) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(26).

(h) *Opt-in approval.* The term "opt-in approval" refers to a method for obtaining customer consent to use, disclose, or permit access to the customer's CPNI. This approval method requires that the carrier obtain from the customer affirmative, express consent allowing the requested CPNI usage, disclosure, or access after the customer is provided appropriate notification of the carrier's request consistent with the requirements set forth in this subpart.

(i) *Opt-out approval.* The term "opt-out approval" refers to a method for obtaining customer consent to use, disclose, or permit access to the customer's CPNI. Under this approval method, a customer is deemed to have consented to the use, disclosure, or access to the customer's CPNI if the customer has failed to object thereto within the waiting period described in section 64.2009(d)(1) of this subpart, after the customer is provided appropriate notification of the carrier's request for consent consistent with the rules in this subpart.

(j) *Subscriber list information* (SLI). The term "subscriber list information (SLI)" has the same meaning given to such term in section 222(h)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 222(h)(3).

(k) *Telecommunications carrier or carrier.* The terms "telecommunications carrier" or "carrier" shall have the same meaning as set forth in section 3(44) of the Communications Act of 1934, as amended, 47 U.S. C. §153(44).

(l) *Telecommunications service.* The term "telecommunications service" has the same meaning given to such term in section 3(46) of the Communications Act of 1934, as amended, 47 U.S.C. §153(46).

§ 64.2005 Use of Customer Proprietary Network Information Without Customer Approval.

(a) Any telecommunications carrier may use, disclose, or permit access to CPNI for the purpose of providing or marketing service offerings among the categories of service (*i.e.*, local, interexchange, and CMRS) to which the customer already subscribes from the same carrier, without customer approval.

(1) If a telecommunications carrier provides different categories of service, and a customer subscribes to more than one category of service offered by the carrier, the carrier is

permitted to share CPNI among the carrier's affiliated entities that provide a service offering to the customer.

(2) If a telecommunications carrier provides different categories of service, but a customer does not subscribe to more than one offering by the carrier, the carrier is not permitted to share CPNI with its affiliates, except as provided in section 64.2007(b).

(b) A telecommunications carrier may not use, disclose, or permit access to CPNI to market to a customer service offerings that are within a category of service to which the subscriber does not already subscribe from that carrier, unless that carrier has customer approval to do so, except as described in paragraph (c) of this section.

(1) A wireless provider may use, disclose, or permit access to CPNI derived from its provision of CMRS, without customer approval, for the provision of CPE and information service(s). A wireline carrier may use, disclose or permit access to CPNI derived from its provision of local exchange service or interexchange service, without customer approval, for the provision of CPE and call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and protocol conversion.

(2) A telecommunications carrier may not use, disclose or permit access to CPNI to identify or track customers that call competing service providers. For example, a local exchange carrier may not use local service CPNI to track all customers that call local service competitors.

(c) A telecommunications carrier may use, disclose, or permit access to CPNI, without customer approval, as described in this subparagraph (c).

(1) A telecommunications carrier may use, disclose, or permit access to CPNI, without customer approval, in its provision of inside wiring installation, maintenance, and repair services.

(2) CMRS providers may use, disclose, or permit access to CPNI for the purpose of conducting research on the health effects of CMRS.

(3) LECs and CMRS providers may use CPNI, without customer approval, to market services formerly known as adjunct-to-basic services, such as, but not limited to, speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call return, repeat dialing, call tracking, call waiting, caller I.D., call forwarding, and certain centrex features.

(d) A telecommunications carrier may use, disclose or permit access to CPNI to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services.

§ 64.2007 Approval Required for Use of Customer Proprietary Network Information.

(a) A telecommunications carrier may obtain approval through written, oral or electronic

methods.

(1) A telecommunications carrier relying on oral approval shall bear the burden of demonstrating that such approval has been given in compliance with the Commission's rules in this part.

(2) Approval or disapproval to use, disclose, or permit access to a customer's CPNI obtained by a telecommunications carrier must remain in effect until the customer revokes or limits such approval or disapproval.

(3) A telecommunications carrier must maintain records of approval, whether oral, written or electronic, for at least one year.

(b) *Use of Opt-Out and Opt-In Approval Processes.*

(1) A telecommunications carrier may, subject to opt-out approval or opt-in approval, use its customer's individually identifiable CPNI for the purpose of marketing communications-related services to that customer. A telecommunications carrier may, subject to opt-out approval or opt-in approval, disclose its customer's individually identifiable CPNI, for the purpose of marketing communications-related services to that customer, to (i) its agents, (ii) its affiliates that provide communications-related services, and (iii) its joint venture partners and independent contractors. A telecommunications carrier may also permit such persons or entities to obtain access to such CPNI for such purposes. Any such disclosure to or access provided to joint venture partners and independent contractors shall be subject to the safeguards set forth below in paragraph (2) of this subsection (b).

(2) *Joint Venture/Contractor Safeguards.* A telecommunications carrier that discloses or provides access to CPNI to its joint venture partners or independent contractors shall enter into confidentiality agreements with independent contractors or joint venture partners that comply with the following requirements. The confidentiality agreement shall: (A) require that the independent contractor or joint venture partner use the CPNI only for the purpose of marketing or providing the communications-related services for which that CPNI has been provided; (B) disallow the independent contractor or joint venture partner from using, allowing access to, or disclosing the CPNI to any other party, unless required to make such disclosure under force of law; (C) require that the independent contractor or joint venture partner have appropriate protections in place to ensure the ongoing confidentiality of consumers' CPNI.

(3) Except for use and disclosure of CPNI that is permitted without customer approval under section 64.2005, or that is described in paragraph (1) of this section, or as otherwise provided in section 222 of the Communications Act of 1934, as amended, a telecommunications carrier may only use, disclose, or permit access to its customer's individually identifiable CPNI subject to opt-in approval.

§ 64.2008 Notice Required for Use of Customer Proprietary Network Information

(a) *Notification, Generally.* (1) Prior to any solicitation for customer approval, a telecommunications carrier must provide notification to the customer of the customer's right to restrict use of, disclosure of, and access to that customer's CPNI.

(2) A telecommunications carrier must maintain records of notification, whether oral, written or electronic, for at least one year.

(b) Individual notice to customers must be provided when soliciting approval to use, disclose, or permit access to customers' CPNI.

(c) *Content of Notice.* Customer notification must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose, or permit access to, the customer's CPNI.

(1) The notification must state that the customer has a right, and the carrier has a duty, under federal law, to protect the confidentiality of CPNI.

(2) The notification must specify the types of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time.

(3) The notification must advise the customer of the precise steps the customer must take in order to grant or deny access to CPNI, and must clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes. However, carriers may provide a brief statement, in clear and neutral language, describing consequences directly resulting from the lack of access to CPNI.

(4) The notification must be comprehensible and must not be misleading.

(5) If written notification is provided, the notice must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to a customer.

(6) If any portion of a notification is translated into another language, then all portions of the notification must be translated into that language.

(7) A carrier may state in the notification that the customer's approval to use CPNI may enhance the carrier's ability to offer products and services tailored to the customer's needs. A carrier also may state in the notification that it may be compelled to disclose CPNI to any person upon affirmative written request by the customer.

(8) A carrier may not include in the notification any statement attempting to encourage a customer to freeze third-party access to CPNI.

(9) The notification must state that any approval, or denial of approval for the use of CPNI outside of the service to which the customer already subscribes from that carrier is valid until the customer affirmatively revokes or limits such approval or denial.

(10) A telecommunications carrier's solicitation for approval must be proximate to the notification of a customer's CPNI rights.

(d) *Notice Requirements Specific to Opt-Out.* A telecommunications carrier must provide notification to obtain opt-out approval through electronic or written methods, but not by oral communication (except as provided in paragraph (f) of this section). The contents of any such notification must comply with the requirements of subsection (c) of this section.

(1) Carriers must wait a 30-day minimum period of time after giving customers notice and an opportunity to opt-out before assuming customer approval to use, disclose, or permit access to CPNI. A carrier may, in its discretion, provide for a longer period. Carriers must notify customers as to the applicable waiting period for a response before approval is assumed.

(A) In the case of an electronic form of notification, the waiting period shall begin to run from the date on which the notification was sent.

(B) In the case of notification by mail, the waiting period shall begin to run on the third day following the date that the notification was mailed.

(2) Carriers using the opt-out mechanism must provide notices to their customers every two years.

(3) Telecommunications carriers that use e-mail to provide opt-out notices must comply with the following requirements in addition to the requirements generally applicable to notification:

(A) carriers must obtain express, verifiable, prior approval from consumers to send notices via e-mail regarding their service in general, or CPNI in particular;

(B) carriers must allow customers to reply directly to e-mails containing CPNI notices in order to opt-out;

(C) opt-out e-mail notices that are returned to the carrier as undeliverable must be sent to the customer in another form before carriers may consider the customer to have received notice; and

(D) carriers that use e-mail to send CPNI notices must ensure that the subject line of the message clearly and accurately identifies the subject matter of the e-mail.

(E) Telecommunications carriers must make available to every customer a method to opt-out that is of no additional cost to the customer and that is available 24 hours a day, seven days a week. Carriers may satisfy this requirement through a combination of methods, so long as

all customers have the ability to opt-out at no cost and are able to effectuate that choice whenever they choose.

(e) *Notice Requirements Specific to Opt-In.* (1) A telecommunications carrier may provide notification to obtain opt-in approval through oral, written, or electronic methods. The contents of any such notification must comply with the requirements of subsection (c) of this section.

(f) *Notice Requirements Specific to One-Time Use of CPNI.* Carriers may use oral notice to obtain limited, one-time use of CPNI for inbound and outbound customer telephone contacts for the duration of the call, regardless of whether carriers use opt-out or opt-in approval based on the nature of the contact.

(1) The contents of any such notification must comply with the requirements of subsection (c) of this section, except that telecommunications carriers may omit any of the following notice provisions if not relevant to the limited use for which the carrier seeks CPNI:

(A) carriers need not advise customers that if they have opted-out previously, no action is needed to maintain the opt-out election.

(B) carriers need not advise customers that they may share CPNI with their affiliates or third parties and need not name those entities, if the limited CPNI usage will not result in use by, or disclosure to, an affiliate or third party.

(C) carriers need not disclose the means by which a customer can deny or withdraw future access to CPNI, so long as carriers explain to customers that the scope of the approval the carrier seeks is limited to one-time use.

(D) carriers may omit disclosure of the precise steps a customer must take in order to grant or deny access to CPNI, as long as the carrier clearly communicates that the customer can deny access to his CPNI for the call.

§ 64.2009 Safeguards Required for Use of Customer Proprietary Network Information

(a) Telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI.

(b) Telecommunications carriers must train their personnel as to when they are, and are not, authorized to use CPNI, and carriers must have an express disciplinary process in place.

(c) All carriers shall maintain a record, electronically or in some other manner, of their own and their affiliates' sales and marketing campaigns that use their customers' CPNI. All carriers shall maintain a record of all instances where CPNI was disclosed or provided to third parties, or where third parties were allowed access to CPNI. The record must include a description of each campaign, the specific CPNI that was used in the campaign, and what

products and services were offered as a part of the campaign. Carriers shall retain the record for a minimum of one year.

(d) Telecommunications carriers must establish a supervisory review process regarding carrier compliance with the rules in this subpart for outbound marketing situations and maintain records of carrier compliance for a minimum period of one year. Specifically, sales personnel must obtain supervisory approval of any proposed outbound marketing request for customer approval.

(e) A telecommunications carrier must have a corporate officer, as an agent of the carrier, sign a compliance certificate on an annual basis stating that the officer has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate explaining how its operating procedures ensure that it is, or is not, in compliance with the rules in this subpart.

(f) Carriers must provide written notice within five business days to the Commission of any instance where the opt-out mechanisms do not work properly, to such a degree that consumers' inability to opt-out is more than an anomaly.

(1) The notice shall be in the form of a letter, and shall include the carrier's name, a description of the opt-out mechanism(s) used, the problem(s) experienced, the remedy proposed and when it will be/was implemented, whether the relevant state commission(s) has been notified and whether it has taken any action, a copy of the notice provided to customers, and contact information.

(2) Such notice must be submitted even if the carrier offers other methods by which consumers may opt-out.

APPENDIX C – FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act, as amended, (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Clarification Order and Second Further Notice of Proposed Rulemaking* issued in CC Docket No. 96-115 and CC Docket No. 96-149.[2] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, the Third Report and Order

2. The initial need for the proceeding of which this Report and Order is a part is that on May 17, 1996, the Commission initiated a rulemaking in response to requests for guidance from the telecommunications industry regarding the obligations of telecommunications carriers under section 222 of the Act and related issues.[4] The Commission released the *CPNI Order* on February 26, 1998, in which it addressed the scope and meaning of section 222 and promulgated implementing regulations.[5] On August 18, 1999, the Tenth Circuit issued an opinion vacating a portion of the *CPNI Order* in *U S WEST v. FCC*.[6] That left the Commission with a need to clarify the CPNI rules and their future operation. We do so herein.

3. On August 28, 2001, the Commission adopted an order (*CPNI Clarification Order*) clarifying the status of its CPNI rules in light of the Tenth Circuit order and issuing a Further Notice of Proposed Rulemaking (*Clarification Order Further NPRM*).[7] Specifically, the

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[1] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd at 16527-16537 (2001) (*CPNI Clarification Order*).

[3] *See* 5 U.S.C. § 604.

[4] *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* Notice of Proposed Rulemaking, 11 FCC Rcd 12513 (1996) (*1996 NPRM*). *See also* section II.A, *supra*

[5] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;* Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*). *See also* section II.B, *supra.*

[6] *U. S. WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (June 5, 2000) (No. 99-1427) (*U S WEST v. FCC*).

[7] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended;* Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 16506 (2001) (*CPNI Clarification Order*).

Commission sought comment on (1) its interpretation of the scope of the Tenth Circuit order; (2) what type of approval (opt-in or opt-out) would best serve the government's goals while respecting constitutional limits;[8] (3) ways in which consumers can consent to a carrier's use of their CPNI;[9] (4) what methods of approval would serve the governmental interests at issue and afford informed consent, while also satisfying the First Amendment's requirement that any restrictions on speech be narrowly tailored;[10] (5) the interests and policies underlying section 222 that are relevant to formulating an approval requirement, including an analysis of the privacy interests that are at issue, and on the extent to which it should take competitive concerns into account;[11] (6) the likely difference in competitive harms under opt-in and opt-out approvals; and (7) whether adoption of an opt-out mechanism is consistent with the rationale for the total service approach set forth in the *CPNI Order*.[12] In addition, the Commission sought comment on whether its consent mechanism would affect its previous findings on the interplay between sections 222 and 272.[13]

4. In this Order, the Commission reaches the objective of resolving several issues in connection with carriers' use of customer proprietary network information pursuant to section 222 of the Telecommunications Act of 1996.[14] In formulating the required approval mechanism described below, we carefully balance carriers' First Amendment rights and consumers' privacy interests so as to permit carriers flexibility in their communications with their customers while providing the level of protection to consumers' privacy interests that Congress envisioned under section 222.

5. More specifically, we adopt an approach that comports with the decision[15] of the United States Court of Appeals for the Tenth Circuit vacating the Commission's requirement that carriers obtain express customer consent for all sharing between a carrier and its affiliates, as well as unaffiliated entities.[16] We adopt today an approach that is derived from a careful

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[8] *CPNI Clarification Order*, 16 FCC Rcd at 16512-16517, paras. 14-22.

[9] *CPNI Clarification Order*, 16 FCC Rcd at 16512, para. 12.

[10] *Id See* section III.A, *supra*, for a discussion of the constitutional standard governing regulation of commercial speech.

[11] *Id.*

[12] *CPNI Clarification Order*, 16 FCC Rcd at 16516, para. 21.

[13] *CPNI Clarification Order*, 16 FCC Rcd at 16518, para. 24.

[14] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. §§ 151 *et seq.*). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[15] *U. S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (June 5, 2000) (No. 99-1427) (*U S WEST v. FCC*).

[16] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting* (continued....)

balancing of harms, benefits, and governmental interests. First, use of CPNI by carriers or disclosure to their affiliated entities providing communications-related services,[17] as well as third-party agents and joint venture partners providing communications-related services, requires a customer's knowing consent in the form of notice and "opt-out" approval.[18] Second, disclosure of CPNI to unrelated third parties or to carrier affiliates that do not provide communications-related services requires express customer consent, described as "opt-in" approval.[19] Finally, we reaffirm our "total services approach," which permits the carrier to use CPNI to market new product offerings within the carrier-customer service relationship, on the basis of the customer's implied consent.[20]

6. In this Order, we also further refine the rules governing the process by which carriers provide notification to customers of their CPNI rights. Specifically, we clarify the form, content and frequency of carrier notices.[21] In addition, although we decline to reconsider our conclusion that customers' preferred carrier (PC) freeze information constitutes CPNI and thereby continue to accord it privacy protection pursuant to section 222, we choose to forbear from imposing the express consent requirements announced in this Order with respect to PC-freezes. Through our limited exercise of forbearance, we balance customers' privacy concerns with carriers' meaningful commercial interests, resulting in PC-freeze information being made more readily available among competing carriers, consistent with the public interest.[22] We also affirm our previous determination that the word "information" in section 272 does not include CPNI, which is governed instead by section 222 of the Act.[23]

7. Finally, we accompany this Order with a Further Notice of Proposed Rulemaking ("Further NPRM") to refresh the record on two issues raised in the *CPNI Order Further NPRM:* foreign storage of and access to domestic CPNI, and CPNI safeguards and enforcement mechanisms. We additionally request comment on what, if any, appropriate regulations should govern the CPNI held by carriers that go out of business, sell all or part of their customer base, or

(Continued from previous page)
Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*).

[17] In this Order and Further NPRM, we use the term "communications-related services" to mean telecommunications services, information services typically provided by telecommunications carriers, and services related to the provision or maintenance of customer premises equipment. We use this term only for convenience in this Order and FNRPM and not for any other purposes.

[18] *See* section III.A.1, *supra.*

[19] *See* section III.A.2, *supra.*

[20] *See* section III.B.2, *supra.*

[21] *See* section III.C, *supra.*

[22] *See* section III.D.1, *supra.*

[23] *See* section III.D.4, *supra.*

seek bankruptcy protection.[24]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

8. One party, the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), commented specifically in response to the IRFA.[25] OPASTCO argues that the IRFA was "deficient" for two reasons. First, OPASTCO notes that the IRFA "reverts to language which incorrectly suggests that small ILECs are not 'small entities' under the Regulatory Flexibility Act."[26] Further, OPASTCO takes issue with the IRFA's determination that whatever consent rules are ultimately adopted will be applicable to all carriers. OPTASCO argues that "the Commission has not considered any alternatives, contrary to the requirements of 5 U.S.C.§ 603(c)."[27]

9. We confirm OPASTCO's assumption that the *Clarification Order's* IRFA did contain a clerical error[28] regarding the classification of small ILECs. Accordingly, we affirm that Commission practice is to discuss small ILECs as "small entities" within our IRFAs, under the RFA. However, we note that no party was prejudiced or harmed by this error because the IRFA put potentially affected entities on notice by affirmatively stating that the Commission was "consider[ing] small ILECs within this analysis and us[ing] the term 'small LECs' to refer to any ILECs that arguably might be defined by SBA as 'small business concerns.'"[29] Hence, the clerical error was cured in the very document in which it was alleged to be present.

10. OPASTCO's concern, therefore, that "if the rulemaking body itself has no preconceived idea of what the final rules might be, there is no way it can make the prejudgment that its final rules will be appropriate for all entities,"[30] takes a statement from the IRFA out of context. Furthermore, OPASTCO's contention inaccurately describes the Commission's decision-making process and outcome in this proceeding.

11. First, although the *Clarification Order* did not propose specific consent requirements, the *Clarification Order* did "seek comment on ways in which carriers can obtain their customers' consent and the extent to which an opt-in or opt-out approach would satisfy both Sections 222 and the Tenth Circuit's concerns that any restrictions on speech be no more than

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[24] *See* section IV.C, *supra*.

[25] OPASTCO Comments at 8-11.

[26] OPASTCO Comments at 8.

[27] OPASTCO Comments at 8 -9.

[28] OPASTCO Comments at 9.

[29] *CPNI Clarification Order*, 16 FCC Rcd at 16529, para. 9 (internal citations omitted).

[30] OPASTCO Comments at 10.

necessary to serve the asserted state interests."[31] Accordingly, although specific consent rules were not proposed, the only two potential types of consent (opt-in and opt-out) were explicitly mentioned and offered to interested parties for consideration and comment. In an instance such as this, where the Commission has previously considered what type of consent to require, and where the Order in question mentions the only two potential options for obtaining consent, it is unreasonable to claim that the Commission or any interested party had and has no idea what the final rules might be. Clearly, the Commission knew and adequately advised interested parties that the final rules would involve opt-in approval, opt-out approval, or some combination of the two. In fact, every commenter, including OPASTCO,[32] focused extensively on whether the Commission should adopt opt-in or opt-out consent requirements. We also note that the IRFA went on to state that "[w]e have, however, taken the limited resources of small entities into account in promulgating certain existing CPNI rules, and intend to do so again in addressing the customer consent requirements."[33] The omission of ILECs, whether or not evidence of Commission oversight, is rendered moot by our inclusion of this statement.

12. Furthermore, the previously adopted opt-in approval rules were subject to, and complied with, the requirements of the RFA. Accordingly, the Commission has previously undertaken an analysis of opt-in and potential alternatives with respect to small carriers. Although such analysis does not supplant the analysis that the Commission must perform in this Order and in this FRFA, it provides meaningful guidance. In previous CPNI Orders, the Commission has received comment from several parties on the impact of proposed rules on small carriers. After extensive analysis, the Commission found that "[a]fter consideration of possible alternatives, we have concluded that our rules should apply equally to all carriers."[34] Thus any argument that the Commission ever neglected the interests of small carriers is thereby rendered invalid. The Commission's reasoning remains valid today. We stated: "we are unpersuaded that customers of small businesses have less meaningful privacy interests in their CPNI."[35] Additionally, the weight added by Congressional intent is critical in this context and deserves comment. In drafting section 222, Congress determined that CPNI protections should apply to consumers of "[e]very telecommunications carrier."[36] Finally, we note that the rules we adopt today are less burdensome on all carriers, including small carriers, than the Commission's original opt-in rules.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

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31 *CPNI Clarification Order*, 16 FCC Rcd at 16536, para. 26.

32 OPASTCO Comments at 3-8.

33 *CPNI Clarification Order*, 16 FCC Rcd at 16536, para. 27.

34 *CPNI Order*, 13 FCC Rcd at 8213, para. 235.

35 *CPNI Order*, 13 FCC Rcd at 8214, para. 236.

36 47 U.S.C. § 222(a).

13. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.[37] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[38] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[39] A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[40]

14. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Provider Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).[41] According to data in the most recent report, there are 5,679 interstate service providers.[42] These providers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

15. We have included small incumbent local exchange carriers (ILECs)[43] in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[44] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[45] We have

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[37] 5 U.S.C. §§ 603(b)(3).

[38] 5 U.S.C. § 601(6).

[39] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[40] 15 U.S.C. § 632.

[41] FCC, Common Carrier Bureau, Industry Analysis Division, *Telecommunications Provider Locator*, Tables 1-2 (November 2001) (*Provider Locator*). *See also* 47 C.F.R. § 64.601 *et seq.*

[42] *Provider Locator* at Table 1.

[43] *See* 47 U.S.C § 251(h) (defining "incumbent local exchange carrier").

[44] 15 U.S.C. § 632.

[45] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

therefore included small incumbent LECs[46] in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

16. *Total Number of Telephone Companies Affected.* The U.S. Bureau of Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[47] This number contains a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[48] It seems reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by these rules.

17. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[49] According to the SBA's definition, a small business telephone company other than a radiotelephone (wireless) company is one employing no more than 1,500 persons.[50] All but 26 of the 2,321 non-radiotelephone (wireless) companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Even if all 26 of the remaining companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone (wireless) companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Therefore, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone (wireless) companies are small entities that may be affected by these rules.

18. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[51] According to the SBA's definition, a small business telephone company other than

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[46] 13 C.F.R § 121.201, NAICS code513310.

[47] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

[48] *See generally* 15 U.S.C. § 632(a)(1).

[49] *1992 Census* at Firm Size 1-123.

[50] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 513310, 513330, and 513340.

[51] 13 C.F.R. § 121.201, NAICS code 513310.

a radiotelephone (wireless) company is one employing no more than 1,500 persons.[52] The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[53] According to our most recent data, there are 1,329 local exchange carriers, including incumbent LECs.[54] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that they are fewer than 1,329 small entity LECs that may be affected by the proposals in the *Second Further Notice*.

19. *Interexchange Carriers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[55] The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS.[56] According to our most recent data, 229 companies reported that they were engaged in the provision of interexchange services.[57] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 229 small entity IXCs that may be affected by this order.

20. *Competitive Access Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[58] According to the SBA's definition, a small business telephone company other than a radiotelephone (wireless) company is one employing no more than 1,500 persons.[59] The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the

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[52] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 513310, 513330, and 513340.

[53] *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

[54] *Provider Locator* at Table 1.

[55] 13 C.F.R. § 121.201, NAICS code 513310.

[56] *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

[57] *Provider Locator* at Table 1.

[58] 13 C.F.R. § 121.201, NAICS code 513310.

[59] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 513310, 513330, and 513340.

data that we collect annually in connection with the TRS.[60] According to our most recent data, 532 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange service.[61] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 532 small entity CAPs that may be affected by this order.

21. *Operator Service Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[62] The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[63] According to our most recent data, 22 companies reported that they were engaged in the provision of operator services.[64] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 22 small entity operator service providers that may be affected by this order.

22. *Pay Telephone Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone providers. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[65] The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[66] According to our most recent data, 936 companies reported that they were engaged in the provision of pay telephone services.[67] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the

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60 *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

61 *Provider Locator* at Table 1.

62 13 C.F.R. § 121.201, NAICS code 513310.

63 *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

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65 13 C.F.R. § 121.201, NAICS code 513310.

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SBA's definition. Consequently, we estimate that there are fewer than 936 small entity pay telephone operators that may be affected by this order.

23. *Wireless Carriers.* Wireless telephony includes cellular, personal communications services (PCS) or specialized mobile radio (SMR) service providers. The SBA has developed a definition of small entities for radiotelephone (wireless) companies;[68] however, neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees, or to providers of paging and messaging services. Through categorized under the same size standard as other wireless services discussed in this paragraph, paging is now considered a separate industry.[69] The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[70] According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[71] We consider paging and messaging services to fall within this category. According to the most recent Provider Locator data, 858 carriers reported that they were engaged in the provision of wireless telephony and 576 companies reported that they were engaged in the provision of paging and messaging services.[72] Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 858 small carriers providing wireless telephony services and fewer than 576 small companies providing paging and messaging services that may be affected by these rules.

24. *Resellers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under the SBA's rules is for all telephone communications companies.[73] The most reliable source of information regarding the number of toll resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[74] According to our most recent data, 710 companies reported that they were engaged in the resale of telephone services.[75] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition.

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[68] 13 C.F.R. § 121.201, NAICS codes 513321 and 513322.

[69] 13 C.F.R. § 121.201, NAICS code 513321.

[70] *Id.*

[71] 13 C.F.R. § 121.201 (SIC 4812/NAICS 513322).

[72] *Provider Locator* at Table 1.

[73] 13 C.F.R. § 121.201, NAICS code 513310.

[74] 13 C.F.R. § 121.201, NAICS code 513310.

[75] *Provider Locator* at Table 1. The total for resellers includes both toll resellers and local resellers.

Consequently, we estimate that there are fewer than 710 small entity resellers that may be affected by this order.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

25. In this Order, we take a number of steps that may affect small entities that use customers' CPNI outside of the total service approval or statutory exceptions in section 222.[76] Some of the approval and notice requirements discussed herein will require additional reporting, recordkeeping or compliance requirements for service providers; however, certain approval and notice requirements discussed herein will also decrease certain reporting, recordkeeping or compliance requirements for service providers. We believe that, overall, these new requirements will lessen the regulatory burden on small carriers by allowing carriers to obtain customers' consent through an opt-out approval mechanism to use customers' CPNI for marketing communications-related services.

26. This Order imposes the following additional reporting, recordkeeping or compliance requirements on all carriers. None of these requirements should affect small carriers disproportionately or require special professional skills. First, carriers must obtain opt-in CPNI approval for certain CPNI uses, and have the choice of obtaining opt-out or opt-in approval for other CPNI uses. As discussed in section III.C.1, *supra,* a carrier may determine whether to use one notice or multiple notices, and may request and provide notice relevant only to the CPNI uses the carriers proposes to make. Accordingly, if, as OPASTCO claims, its members only intend to use CPNI internally for marketing communications-related services,[77] its member small carriers will only have to obtain opt-out approval from their customers.

27. Carriers who use opt-out approval must provide notice to their customers every two years. This requirement, while an added burden on all carriers, is counterbalanced by the fact that carriers who choose to use the opt-out method will be able to use and disclose more CPNI for marketing than under the opt-in method. Accordingly, a carrier that finds the burden of biennial notices to outweigh the benefit of expanded CPNI access can choose to obtain opt-in approval from its customers and avoid the biennial notice requirement. Additionally, notice requirements are common in the telecommunications industry and the requirements adopted here allow carriers flexibility in determining how to provide such notices. Accordingly, all carriers, including small carriers, should already have resources in place to provide notices required by such regulations to their customers.

28. We require carriers who use e-mail notices to advise their customers of their opt-out CPNI choices to abide by certain requirements. See section III.C.1.a, *supra.* These requirements are not burdensome. To the degree that any carrier could seriously argue that these requirements are burdensome, carriers are not required to use e-mail to notify their customers of CPNI policies. Accordingly, a carrier can choose the least burdensome notification method

[76] 47 U.S.C. § 222(d).

[77] OPASTCO Comments at 4.

allowed under our rules, based on the carrier's individual circumstances.

29. In addition, we add minor content requirements to our notice rules to synchronize the rules with the newly adopted consent requirements.[78] These requirements should require minimal effort on the part of carriers, large and small, to implement. Furthermore, we also streamline the notice requirements for carriers to obtain limited, one-time use of consumers' CPNI for the duration of an inbound or outbound call with the customer,[79] which will benefit small carriers.

30. We adopt a 30-day minimum period of time that carriers must wait after giving customers' opt-out notice before assuming customer approval. Every carrier commenter supported the 30-day time period. Such a time period imposes minimal burden on carriers. This is especially true because the 30-day waiting period has been the interim rule since we adopted the *CPNI Clarification Order* and has been the subject of no carrier complaints or concerns.

31. We adopt a requirement that carriers make available to every customer a method to opt-out that is of no additional cost and available 24 hours a day, seven days a week. This requirement can be satisfied through a combination of methods, so long as all customers have the ability to opt-out at no cost and are able to effectuate that choice whenever they choose. To the degree that carriers find that the burden of meeting this requirement outweigh the value of using an opt-out approval method, carriers are free to use opt-in. Carriers are otherwise free to determine what methods to use to allow customer to effectuate their CPNI elections. Although this requirement will impose a burden on small and large carriers alike, the Commission strongly believes that two factors mitigate against allowing small carriers to utilize less burdensome alternatives. First, as the Commission has previously held,[80] there is nothing in this record that convinces us that customers of small carriers are entitled to lesser protection of the privacy of their calling records than those customers of larger carriers. Accordingly, it would be inappropriate to allow small carriers to provide less effective methods for customers to effectuate their CPNI choices. Second, to the degree that these requirements impose burdens on carriers, those burdens are outweighed by the value of using an opt-out approval mechanism to obtain customer approval to use CPNI for marketing communications-related services. Should carriers find that not to be the case in their individual situations, they can avoid the 24/7 requirement by adopting an opt-in approval mechanism.

32. We forbear from applying our CPNI approval regulations to preferred carrier ("PC") freezes, allowing small and large carriers alike easier access to PC-freeze information.[81]

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[78] *See* section III.C, *supra*.

[79] *See* section III.C.2.a, *supra*.

[80] *CPNI Order*, 13 FCC Rcd at 8214, para. 236.

[81] *See* section III.D.1, *supra*. A "preferred carrier freeze (or freeze) prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or he express consent." 47 C.F.R. § 64.1190(a).

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

33. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[82]

34. While the approval and related notice measures adopted in this Order apply similarly to both small and large entities, we expect that small entities are likely to benefit to the extent such firms have fewer or reduced resources available, as compared to large firms. The Commission's previously adopted rules required all carriers to obtain opt-in approval from their customers to use CPNI outside of the total service approach. Although the Commission allowed carriers to use opt-out as an interim measure in light of the Tenth Circuit's opinion, that approach was never codified or adopted as a permanent rule. As discussed above, this Order adopts an approach that is derived from a careful balancing of harms, benefits, and governmental interests.[83] First, use of CPNI by carriers or disclosure to their affiliated entities providing communications-related services,[84] as well as third-party agents and joint venture partners providing communications-related services, requires a customer's knowing consent in the form of notice and "opt-out" approval.[85] Second, disclosure of CPNI to unrelated third parties or to carrier affiliates that do not provide communications-related services requires express customer consent, described as "opt-in" approval.[86] Finally, we reaffirm our "total services approach," which permits the carrier to use CPNI to market new product offerings within the carrier-customer service relationship, on the basis of the customer's implied consent.[87]

35. Accordingly, we conclude that the measures adopted and described in this Order would reduce regulatory burdens for small carriers including resellers, by allowing carriers access to CPNI for marketing communications-related services to their customers via an opt-out mechanism. Further, the Order specifically allows carriers to use opt-in approval for all CPNI uses should a carrier determine that opt-in is more appropriate for its individual circumstances,

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[82] 5 U.S.C. § 603(c)(1)-(c)(4).

[83] *See* sections I and III.A, *supra*.

[84] In this Order and Further NPRM, we use the term "communications-related services" to mean telecommunications services, information services typically provided by telecommunications carriers, and services related to the provision or maintenance of customer premises equipment. We use this term only for convenience in this Order and FNRPM and not for any other purposes.

[85] *See* section III.A.1, *supra*.

[86] *See* section III.A.2, *supra*.

[87] *See* section III.B.2, *supra*.

allowing carriers to make decisions regarding their customers and resources.

36. Furthermore, as noted above, the previously adopted opt-in rules were subject to and complied with the requirements of the RFA. Accordingly, the Commission has previously undertaken an analysis of opt-in and potential alternatives with respect to small carriers. Although such analysis does not replace the analysis that the Commission must perform in this Order, it provides meaningful guidance. In previous CPNI Orders, the Commission received comment from several parties on the impact of proposed rules on small carriers. After extensive analysis, the Commission found that "[a]fter consideration of possible alternatives, we have concluded that our rules should apply equally to all carriers."[88] The Commission's reasoning remains valid today. Of special importance in this context, our consistent determination, made throughout this proceeding, that "we are unpersuaded that customers of small businesses have less meaningful privacy interests in their CPNI."[89] This is especially true because, in drafting section 222, Congress determined that CPNI protections should apply to consumers of "[e]very telecommunications carrier."[90]

37. In this Order, we also describe commenters' positions regarding other appropriate approval methods and related notice issues and state why those alternatives that we do not adopt would not serve the public interest.[91] For example, many carriers, including small carriers, proposed that we allow carriers to use opt-out approval for all CPNI uses. However, as we point out in this Order, the Commission must fulfill its statutorily imposed duty to protect consumers' CPNI, while balancing those interests with carriers' First Amendment interests. Therefore, as discussed in detail in the Order, we conclude that the CPNI rules we adopt today – which balance in an equitable fashion *all* consumers' privacy rights with carriers' First Amendment rights – strike the right balance for small and large carriers alike. Moreover, we gain assurance from

[88] *CPNI Order*, 13 FCC Rcd at 8213, para. 235.

[89] *CPNI Order*, 13 FCC Rcd at 8214, para. 236.

[90] 47 U.S.C. § 222(a).

[91] *See* Sections V.A and V.B.

knowing that the rules we adopt benefit small carriers and serve the public interest by allowing carriers with expanded access to consumers' CPNI from our original opt-in rules.

38. *Report to Congress.* The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[92] In addition, the Commission will send a copy of this Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this Order and FRFA (or summaries thereof) will also be published in the Federal Register.[93]

[92] *See* 5 U.S.C. § 801(a)(1)(A).

[93] *See* 5 U.S.C. § 604(b).

APPENDIX D – INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Third Further Notice of Proposed Rulemaking* ("*Third Further NPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Third Further NPRM* provided above in paragraph 153. The Commission will send a copy of the *Third Further NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the *Third Further NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. The Commission is issuing the *Third Further NPRM* to refresh the record on two issues raised in the *CPNI Order Further NPRM,*[4] and to seek comment on the CPNI implications when a carrier goes out of business, sells all or part of its customer base, or seeks bankruptcy protection. Specifically, the Third Further NPRM seeks comment on: (1) foreign storage of and access to domestic CPNI; (2) CPNI safeguards and enforcements mechanisms; and (3) appropriate regulations governing the CPNI held by carriers that go out of business, sell all or part of their customer base, or seek bankruptcy protection.

3. In a July 8, 1997 *Ex Parte* letter, the FBI requested that the Commission regulate the foreign storage of and foreign-based access to CPNI of U.S. customers who use domestic telecommunications services.[5] The Commission requested comment on this proposal in its *CPNI Order Further NPRM.*[6] As an alternative, the FBI suggested that foreign storage or access to domestic CPNI be permitted only upon informed written customer approval. To the degree that CPNI is stored in a foreign country, the FBI asked that the Commission require carriers to keep a copy of customers' CPNI records within the U.S. for public safety, law enforcement, and national security reasons. The FBI also requested that we require carriers to maintain copies of the CPNI of all U.S.-based customers because of the need for prompt and secure law

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[1] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

[2] 5 U.S.C. § 603(a).

[3] 5 U.S.C. § 603(a).

[4] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8200 (1998) (*CPNI Order Further NPRM*).

[5] Letter from John F. Lewis, Jr., Federal Bureau of Investigation, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 96-115 (filed July 8, 1997) (FBI July 8, 1998 *Ex Parte* Letter).

[6] *CPNI Order Further NPRM,* 13 FCC Rcd at 8203-8204, paras. 208-210.

enforcement purposes. The Commission now requests that commenters refresh the record on this topic. Specifically, we request that commenters consider the FBI proposal in light of heightened national security concerns. In addition, we request input as to whether any of the concerns raised by the FBI have been illustrated by actual incidents during the period since comments were received on this topic. Finally, we ask commenters to provide estimates of the costs that would be incurred if we were to mandate carriers to maintain the domestic storage of, and access to, domestic CPNI.[7]

4. In the *CPNI Order Further NPRM*,[8] the Commission sought comment on what safeguards in addition to those adopted in the *CPNI Order*,[9] if any, are needed to protect the confidentiality of carrier proprietary information (CPI), including that of resellers and ISPs. The *CPNI Order Further NPRM* also sought comment on what, if any, further enforcement mechanisms the Commission should adopt to ensure carrier compliance with our CPNI policies and rules.[10] We seek to refresh the record on this topic. Specifically, we request that carriers and other interested parties describe any actual experience with problems since we originally issued the *CPNI Order Further NPRM*.[11]

5. Finally, in light of inquiries the Commission has received in the face of recent carrier bankruptcies, mergers, and asset sales, the Commission seeks comment on carrier use and disclosure of CPNI when it sells its assets or goes out of business. We seek comment on whether an exiting carrier should be able to use CPNI for transition of its customers to another carrier. If commenters believe that an exiting carrier should be able to disclose CPNI to the acquiring carrier, we seek comment on whether we should require the exiting carrier to state that fact in advance notice provided to customers acquired by the sale or transfer from another carrier in compliance with our authorization and verification (slamming) rules.[12] Further, we ask, to the degree that the exiting carrier has obtained CPNI approvals from its customer, whether the new carrier should be deemed to have received such approvals, or whether it should be required to provide notice and obtain approval for CPNI use and disclosure from the acquired customers.[13] Further, we seek comment on whether the Commission should recognize a difference between service types. We also seek comment on whether carriers can sell CPNI as an asset. We seek comment on whether such regulations would go beyond the scope of section 222 or the Commission's authority.[14]

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7 *See supra* para. 144.

8 *CPNI Order*, 13 FCC Rcd at 8201-8202, paras. 206-207.

9 *CPNI Order*, 13 FCC Rcd at 8193-8200, paras. 190-202.

10 *Id.*

11 *See supra* para. 145.

12 47 C.F.R 64.1120(e).

13 *See supra* para. 146.

14 *See supra* para. 147.

B. Legal Basis

6. The *Third Further NPRM* is adopted pursuant to Sections 1, 4(i), 222, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 222, and 303(r).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.[15] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[16] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[17] A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[18]

8. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Provider Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).[19] According to data in the most recent report, there are 5,679 interstate service providers.[20] These providers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

9. We have included small incumbent local exchange carriers (LECs)[21] in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business

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[15] 5 U.S.C. §§ 603(b)(3).

[16] 5 U.S.C. § 601(6).

[17] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[18] 15 U.S.C. § 632.

[19] FCC, Common Carrier Bureau, Industry Analysis Division, *Telecommunications Provider Locator*, Tables 1-2 (November 2001) (*Provider Locator*). *See also* 47 C.F.R. § 64.601 *et seq.*

[20] *Provider Locator* at Table 1.

[21] *See* 47 U.S.C § 251(h) (defining "incumbent local exchange carrier").

having 1,500 or fewer employees), and "is not dominant in its field of operation."[22] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[23] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

10. *Total Number of Telephone Companies Affected.* The U.S. Bureau of Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[24] This number contains a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[25] It seems reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by these rules.

11. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[26] According to the SBA's definition, a small business telephone company other than a radiotelephone (wireless) company is one employing no more than 1,500 persons.[27] All but 26 of the 2,321 non-radiotelephone (wireless) companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Even if all 26 of the remaining companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone (wireless) companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Therefore, we estimate that fewer than 2,295 small telephone communications

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[22] 15 U.S.C. § 632.

[23] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[24] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

[25] *See generally* 15 U.S.C. § 632(a)(1).

[26] *1992 Census* at Firm Size 1-123.

[27] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 513310, 513330, and 513340.

companies other than radiotelephone (wireless) companies are small entities that may be affected by these rules.

12. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[28] The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[29] According to our most recent data, there are 1,329 local exchange carriers, including incumbent LECs.[30] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that they are fewer than 1, 329 small entity LECs that may be affected by the proposals in the *Second Further Notice*.

13. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[31] The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS.[32] According to our most recent data, 229 companies reported that they were engaged in the provision of interexchange services.[33] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 229 small entity IXCs that may be affected by this order.

14. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[34] The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears

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[28] 13 C.F.R. § 121.201, NAICS code 513310.

[29] *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

[30] *Provider Locator* at Table 1.

[31] 13 C.F.R. § 121.201, NAICS code 513310.

[32] *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

[33] *Provider Locator* at Table 1.

[34] 13 C.F.R. § 121.201, NAICS code 513310.

to be the data that we collect annually in connection with the TRS.[35] According to our most recent data, 532 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange service.[36] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 532 small entity CAPs that may be affected by this order.

15. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[37] The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[38] According to our most recent data, 22 companies reported that they were engaged in the provision of operator services.[39] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 22 small entity operator service providers that may be affected by this order.

16. *Pay Telephone Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone providers. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[40] The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[41] According to our most recent data, 936 companies reported that they were engaged in the provision of pay telephone services.[42] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the

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35 *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

36 *Provider Locator* at Table 1.

37 13 C.F.R. § 121.201, NAICS code 513310.

38 *See* 47 C.F.R. § 64.601 *et seq.*; *Provider Locator* at Table 1.

39 *Provider Locator* at Table 1.

40 13 C.F.R. § 121.201, NAICS code 513310.

41 13 C.F.R. § 121.201, NAICS code 513310.

42 *Provider Locator* at Table 1.

SBA's definition. Consequently, we estimate that there are fewer than 936 small entity pay telephone operators that may be affected by this order.

17. *Wireless Carriers.* Wireless telephony includes cellular, personal communications services (PCS) or specialized mobile radio (SMR) service providers. The SBA has developed a definition of small entities for radiotelephone (wireless) companies;[43] however, neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees, or to providers of paging and messaging services. Though categorized under the same size standard as the other wireless services discussed in this paragraph, paging is now considered a separate industry.[44] The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies.[45] According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[46] According to the most recent Provider Locator data, 858 carriers reported that they were engaged in the provision of wireless telephony and 576 companies reported that they were engaged in the provision of paging and messaging services.[47] Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 858 small carriers providing wireless telephony services and fewer than 576 small companies providing paging and messaging services that may be affected by these rules.

18. *Resellers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under the SBA's rules is for all telephone communications companies.[48] The most reliable source of information regarding the number of toll resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[49] According to our most recent data, 710 companies reported that they were engaged in the resale of telephone services.[50] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition.

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[43] 13 C.F.R. § 121.201, NAICS codes 513321 and 513322.

[44] 13 C.F.R. § 121.201, NAICS code 513321.

[45] *Id.*

[46] 13 C.F.R. § 121.201 (SIC 4812/NAICS 513322).

[47] *Provider Locator* at Table 1.

[48] 13 C.F.R. § 121.201, NAICS code 513310.

[49] 13 C.F.R. § 121.201, NAICS code 513310.

[50] *Provider Locator* at Table 1. The total for resellers includes both toll resellers and local resellers.

Consequently, we estimate that there are fewer than 710 small entity resellers that may be affected by this order.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

19. We have discussed generally in the *Third Further NPRM, supra* paras. 143-147, the possibility that our tentative policies and rules, if adopted, might entail additional obligations for carriers. We ask for comment on any reporting, record keeping, or compliance requirements that might arise that could impact any entities, large and small, affected by such requirements.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

20. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[51]

21. Section 222 applies to all telecommunications carriers, and therefore, any rules that we adopt will be applicable to all carriers.[52] Accordingly, we cannot exempt small entities from complying with any rules that we adopt. We have, however, taken the limited resources of small entities into account in promulgating certain existing CPNI rules,[53] and intend to do so again in addressing the issues that are addressed in the *Third Further NPRM.* In response to the IRFA issued in connection with the *Clarification Order and Second Further Notice of Proposed Rulemaking*, we note that some commenters asserted that, because the statute requires a universal standard, the Commission had not adequately taken notice of the issues of small entities in this area.[54] That is untrue;[55] it is of particular concern to the Commission that the interests of small entities be addressed.

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[51] 5 U.S.C. § 603(c).

[52] *CPNI Order*, 13 FCC Rcd at 8098-8100, paras. 49-50.

[53] *See Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14472-75, paras. 125-27 (1999) (*CPNI Reconsideration Order)* (adjusting certain CPNI safeguards to ease the costs of compliance for small carriers).

[54] *See* App. C, *supra.*

[55] *See* App. C, *supra.*

22. In this *Third Further NPRM*, we seek comment on whether we should regulate the foreign storage or foreign-based access to the CPNI of U.S. customers who use domestic telecommunications services. Specifically, we seek comment on whether foreign storage or foreign access to domestic CPNI should be permitted only upon informed customer approval. We also request comment upon whether we should require that copies of domestic CPNI should be maintained within the United States. If we adopt rules governing foreign storage of and access to CPNI, all telecommunications carriers, including small entities, must comply with such rules. While additional rules could place a burden upon small entities in terms of developing, tracking and maintaining customer consent or in terms of creating copies of customer CPNI, such actions would only be required to the extent carriers choose to store domestic CPNI outside of the United States. Carriers could decide whether the burdens of any such regulations outweighs the benefit to the carrier of foreign storage of or access to domestic CPNI.

23. We also seek to refresh the record on what, if any, additional safeguards may be needed to protect the confidentiality of carrier proprietary information, as well as what further enforcement mechanisms, if any, may be necessary. In addition, we seek comment on the use and disclosure of CPNI in the event a carrier goes out of business or sells its assets. Because we have not proposed any rules at this time, we are unable to forecast the economic impact on small entities. Overall, we ask for comment in response to this IRFA on what competitive or economic impact any proposed rules in these areas would have on small entities and on whether there is any alternative form or proposals that we should consider to minimize the economic impact on them. Further, while we do not anticipate that any adopted rules will have a different impact upon small entities, we seek comment in particular from small entities that have concerns about the affect the proposed policies or rules, if adopted, might have on them if they later go out of business or sell their assets.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

24. None.

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 et al.*

In this *Order*, the Commission implements the Tenth Circuit's directive that we must, as a constitutional matter, carefully weigh the costs and benefits associated with satisfying consumers' statutory entitlement to give knowing consent to the use and disclosure of their customer proprietary network information (CPNI). We do this, as the court insisted, while still respecting companies' valid speech interests pursuant to the First Amendment.

This item is in response to the Tenth Circuit's decision remanding our prior order implementing section 222 by embracing a "mixed approach" to customer approval. Companies must obtain affirmative consent from consumers for third party and non-communications uses (*i.e.*, allow consumers to "opt-in" to such use). But we conclude, albeit somewhat reluctantly, that under the court's constitutional analysis, companies may satisfy the somewhat less stringent requirement of giving consumers the chance to "opt-out" of *intra*company communications-related use of CPNI.[1] Indeed, the court concluded that the First Amendment concerns implicated here are so grave that the Commission is not entitled to the usual *Chevron* deference.[2] This mixed approach we adopt here tracks evidence on the record that consumers have a reduced expectation of privacy regarding CPNI where this information is used by their existing carriers to market services customarily offered by telephone companies, such as voicemail and Internet access. This approach also comports with decisions by other appeals courts, at least one of which has required opt-in consent for some purposes and opt-out consent for others.[3]

Regrettably, the reach of the Tenth Circuit's opinion does not allow us to adopt an across-the-board opt-in regime at this time. Specifically, the Commission is severely constrained by the court's overt skepticism that the record supporting our prior order lacked the empirical support necessary to justify in this instance the intrusion on carriers' commercial speech interests. The court demanded, if requiring opt-in consent were to withstand a second appeal, that the record provide more persuasive empirical evidence that the privacy interest for intracarrier CPNI disclosure is substantial given companies' intended uses of this information. Yet, despite the

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[1] The court instructed the Commission to consider an opt-out strategy, which the court concluded was "an obvious and substantially less restrictive alternative" to opt-in. *U.S. West v. FCC,* 182 F.3d 1224, 1238 (10th Cir. 1999), *cert. denied* 530 U.S. 1213 (2000).

[2] *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[3] *See Trans Union Corp. v. FTC,* 267 F.3d 1138 (D.C. Cir. 2001) (declining to rehear decision approving opt-out consent regime with respect to disclosure of personal information in return for offers of credit, while requiring opt-in consent regime for target marketing generally), *cert. denied, Trans Union LLC v. FTC,* 122 S. Ct. 2386 (June 10, 2002).

laudable efforts of the parties to generate such an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court. Indeed, the most persuasive empirical evidence of this sort regards third party dissemination of CPNI, where this *Order* confidently requires opt-in consent.

In closing, I would underscore that I remain committed to continued vigilance in this area and urge parties to ask us to revisit these requirements in the event they uncover new support that meets the courts' demanding standard. I hasten to add, moreover, that states continue to be uniquely positioned to assess the proper scope of CPNI use and may adopt more stringent notification requirements where those can be squared with the First Amendment based on state-specific facts on which we lack the opportunity to rely here. I take comfort that these avenues will enable the Commission or our state colleagues to protect consumers from unwarranted invasions of privacy where the evidence supports more stringent consent requirements in the manner the Constitution requires.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket Nos. 96-115 and 96-149 (adopted July 16, 2002).

The Report and Order we adopt today appropriately balances the critical governmental interest in protecting consumers' privacy with carriers' First Amendment right to communicate with their customers. Recognizing that customers' privacy interests are strongest and carriers' First Amendment interests are weakest where the disclosure of CPNI *to third parties* is at stake, the Report and Order imposes a stringent "opt in" approval mechanism for such disclosures. In contrast, because *intracompany* disclosures of CPNI generally are consistent with consumers' expectations of privacy and implicate much stronger First Amendment interests, the Report and Order adopts an "opt out" approval mechanism for intracompany information sharing. I am pleased that this bifurcated approach both respects legitimate privacy interests and heeds the concerns expressed by the 10th Circuit Court of Appeals in vacating the Commission's previous approval requirements.

At times in the past, the Commission has responded to court remands by making only cosmetic changes to items, proceeding as if the court decision were an inconvenience to be overcome through creative lawyering. Such an approach not only fails to respect the authority of reviewing courts, but also engenders tremendous regulatory uncertainty. When decisions on remand fail to take seriously a court's instructions, they are often remanded yet again, throwing the industry and consumers into regulatory chaos. We have already had a long period of uncertainty regarding CPNI approval requirements in the wake of the court remand; we certainly do not need another. Thus, while some may have preferred to reinstate an opt-in requirement for *all* uses of CPNI, I do not believe that such a decision could withstand scrutiny under the standard espoused by the 10th Circuit; as the item explains, an opt-in requirement for intracompany disclosures of information would be more restrictive than necessary to protect consumers' expectations of privacy. Because an opt-in requirement for such disclosures almost certainly would subject the Commission to a further court remand — and thus would subject consumers to additional uncertainty and diminished protection as we would once again be left without rules in place — today's decision is the only responsible and consumer-friendly course available to us.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
APPROVING IN PART, DISSENTING IN PART

Re: Implementation of the Telecommunications Act of 1996; Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended

Few rights are so fundamental as the right to privacy in our daily lives, yet few are under such frontal assault. Today information technologies can monitor what we do, who we talk with, what we buy, what organizations we belong to, what political activities we undertake, what gods we worship. We may have avoided Orwell's ***1984***, but the threat of technology intrusion into our private lives is not only real – it is growing.

Today we have an opportunity to do something about it. We take a baby step; I think we could have taken a giant stride. Certainly I support that part of the Order that will prohibit the sale or disclosure of personal data to ***unaffiliated*** third parties unless consumers give specific approval, the so-called "opt-in" approach, and I am pleased that the decision does not preempt states from adopting more stringent privacy protections than we do today. But our business is communications, and when we are given the chance to decide how communications companies handle personal information within themselves and their affiliates, we retreat to an entirely different "opt-out" policy whereby the company gets an always-on green light to sell personal information about its customer unless the customer specifically takes the initiative to tell the company it may not do so.

Today's decision is cast as pro-consumer and "opt-in" except for what is implied to be the limited and less problematic sale of personal information to "communications-related affiliates," "third party agents," and "joint venture partners," where "opt-out" will be required. But everyone should understand that this decision is neither narrow nor pro-privacy. It does not preclude companies in all instances from selling to the highest bidder personal and detailed information about who Americans call, when they call, and how long they talk, as long as these companies use it for some "communications related" purpose and have some undefined and murky affiliation, agency relationship, or partnership with the phone company. Anyone who has looked at some of the incredibly complex organizational charts submitted in our merger proceedings knows just how confusing and murky these affiliations can be. In that confusion and murkiness I find potentially serious trouble for consumer privacy.

Importance of Privacy Safeguards

Telephone carriers obtain a vast amount of information about each of us. Carriers know not only the phone services we purchase, but also personal information such as who we call, how often, and for how long. And in a converging communications industry, these same companies now, or may soon, also be able to track what Internet sites we visit, who we e-mail, what cable or satellite television programs we watch, what wireless phone calls we place, and even our location as we use our cell phone. Companies can combine this data with other information that they buy

from other sources, such as financial data, credit histories, travel habits, and any of the myriad invasive databases that exist in our digital world, to create a profile on each of us.

Companies can use this information, known as CPNI, for a variety of purposes. They rely heavily on this information for marketing. Sometimes these marketing practices are merely annoying, such as telemarketing calls and junk mail. But when this marketing is based on in-depth personal information, it can become dangerous. CPNI could potentially be used to allow a company to market healthcare services to people who call certain doctors or specialists; insurance companies to know who calls AIDS hotlines; fundraisers to identify an individual's political affiliation based on who calls the offices of candidates or political parties; or landlords to monitor the behavior of their tenants. When the stakes for misuse of our personal information are so high the Commission should be extraordinarily vigilant.

Section 222 and the FCC Opt-in Decision

Congress recognized this and instructed the Commission to protect the privacy of telephone consumers in section 222 of the Telecommunications Act. Congress recognized that information about individual communications use requires special privacy safeguards. In particular, section 222 limits the use and disclosure of personal customer information unless a carrier first obtains the "approval of the customer."[1]

In 1998, the Commission adopted rules to implement Congress' privacy directive. The Commission correctly understood Congress's insistence on a company acquiring the "approval of the customer" to require express approval, also known as "opt-in," for use and disclosure of this sensitive personal information. "Approval" is clearly an active rather than a passive requirement. "Opt-out," which would require a customer to take affirmative action to protect his or her personal information, is a failure to object, and not "approval." These concepts are founded on fundamentally different premises. "Opt-out" strikes me as based on the notion that the company owns the information and can use that information as it chooses unless there is objection from the consumer. "Opt-in" is premised on the consumer being in control of this information and grants to each of us the ability to authorize a company to share it with somebody else should we so choose.

On policy grounds, the Commission explained why Congress's insistence on approval had been correct, by determining that "even assuming that an opt-out approach can be appropriate for less sensitive customer information, such an approach would not be appropriate for the disclosure of personal CPNI."[2] The Commission concluded that an express approval requirement was necessary for both privacy and competitive concerns. It reasoned that "an express approval requirement provides superior protection for privacy interests because, unlike

[1] 47 U.S.C. § 222.

[2] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8133 (1998) (*CPNI Order*).

under an opt-out approach, when customers must affirmatively act before their CPNI is used or disclosed, the confidentiality of CPNI is preserved until the customer is actually informed of its statutory protections. This ensures that customers' privacy rights are protected against unknowing and unintended CPNI disclosure."[3] In addition, the Commission recognized that the limitations were designed to eliminate restraints on competition, by "limiting the ability of incumbent carriers to leverage their control over monopoly-derived CPNI into emerging telecommunications markets."[4]

On appeal, the Tenth Circuit struck down the express approval requirement because the Commission had not built an adequate record to demonstrate that the regulations would materially and directly alleviate privacy harms and that the regulations were narrowly tailored so as to avoid a First Amendment violation. In particular, the court determined that the Commission had failed adequately to consider the less restrictive "opt-out" alternative. Importantly, the court did ***not*** hold that the express approval requirement could not be justified or that opt-out was the only way to read section 222. It held only that the Commission had failed to adequately justify its decision. So I think we are being overly cautious here.

The Legal and Policy Inadequacy of Today's Order

In response to the Tenth Circuit's decision, the Commission today requires approval only for disclosure to third parties and non-communications-related affiliates. Contrary to law, and without policy justification, the Commission allows mere notice and "opt-out," an absence of complaint rather than the statutorily required approval, for a company to use, disclose, and permit access to sensitive personal information within a company, to "communications-related affiliates," to "third party agents," and to "joint venture partners." These activities represent the most common of all uses of CPNI.

The majority does not adequately narrow the definition of "communications related," "affiliates," "third party agents," or "joint venture partners." Without careful definitions the restrictions leave dangerous loopholes. I appreciate the majority's willingness to respond to some of my concerns by stating that a carrier cannot sell such information to a pure content provider such as the operator of a Web site, a telemarketer, or a junk e-mailer. The definitions, however, remain unreasonably imprecise. According to my understanding, a carrier could still market personal consumer information to, for example, an ISP who also happens to provide content over its Internet system. Thus a telephone company could, without the permission of its customers, sell CPNI to any company that owns an ISP. I say this is my understanding because, even as late as this morning, the definitions and explanations are in flux. Trying to administer a regime whose exact parameters we, its designers, cannot pin-point creates problems. That's not good for privacy.

The majority seems to believe that they can go no further than "opt-out" for fear of

[3] *Id.*

[4] *Id.* at 8145.

litigation. We can be certain there will be challenges to this order no matter what decision is made. The fear of litigation should not unduly constrain us – we ***will*** be in court on this matter. I prefer to go there with our best foot forward, with a Commission decision that is more securely grounded in statute and one that accomplishes the will of Congress.

Let us be clear: the court did not require "opt-out" nor did it invalidate "opt-in." It demanded better justification for what the previous Commission did. I do not wish to minimize the showing we would have to make to the court, but neither do I want it to become an obstacle for moving proactively ahead. My understanding is that to satisfy court review, the Commission would need to provide more empirical explanation and justification for the government's asserted interest; to demonstrate that "opt-in" materially advances that interest; and that "opt-in" is narrowly tailored and balanced as to its costs and benefits. I believe the Commission can effectively and convincingly meet these tests. There is an abundance of contemporary empirical data, including consumer surveys demonstrating consumer preferences, a state referendum in North Dakota with easy-to-understand results, and at least one company's unhappy experiences with an "opt-out" program. There is new case-law altogether relevant to and supportive of "opt-in." And, as explained below, "opt-in" is both narrowly tailored and balanced.

We must always be at pains to ensure that our decisions do not violate the First Amendment. Part of our responsibility in this instance involves adequately explaining how our rule is necessary to protect privacy, as well as investigating whether less restrictive alternatives exist. Some, including the dissenting judge in *U S WEST*, take issue with whether the Commission's previous order implicated constitutionally protected "speech"; whether it violated the First Amendment; and whether the Commission's statutory construction was reasonable and thereby entitled to deference. But, even under the test applied by the Tenth Circuit, I believe that express approval is justified, necessary, and most clearly comports with the statute.

Section 222 limits the use of sensitive individual information without "approval of the customer." I agree with the Commission's previous order that express approval "is guided by the natural, common sense understanding of the term 'approval,' which we believe generally connotes an informed and deliberate response."[5] As the Commission pointed out, it is "difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents."[6]

Since the Tenth Circuit's decision, other courts have addressed express approval provisions and, using the same analysis, found them not to infringe upon First Amendment rights. In *Trans Union Corp. v. FTC*, the DC Circuit held that "[a]lthough the opt-in scheme may limit more Trans Union speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a 'remedial scheme because some

[5] *Id.* at 8130; *see also U.S. WEST, Inc. v. FCC*, 182 F.3d 1224, 1241 (10th Cir. 1999) (Briscoe, J., dissenting) ("Although Congress did not specifically define the term 'approval' in the statute, its ordinary and natural meaning clearly 'implies knowledge and exercise of discretion after knowledge.'")

[6] *CPNI Order* at 8131.

alternative solution is marginally less intrusive on a speaker's First Amendment interests.'"[7]

We are left with the issue whether "opt-in" is narrowly tailored and balanced. To decide this question, we must examine the prongs of the test applied by the Tenth Circuit. If the speech concerns lawful activity, we must determine whether there is a substantial state interest in regulating the speech, whether the regulation materially and directly advances that interest, and whether the regulation is no more extensive than necessary to alleviate the harm.

The majority agrees that the first two prongs are met for both "opt-out" and "opt-in." Thus, the relevant question at issue is whether "opt-in" is narrowly drawn or whether some lesser alternative such as "opt-out" would serve the government's interest. We have seen in several contexts that "opt-out" does not adequately protect consumers' privacy interests. As today's order details, significant concerns have been raised about the effectiveness of "opt-out" requirements in the banking and financial sectors. Similarly, in the telecommunications sector, we have seen one example after another of instances where notice and "opt-out" have been ineffective in ensuring "that customers maintain control over carrier use of sensitive CPNI, and that those that wish to limit the use and dissemination of their information will know how, and be able to do so."[8] Attorneys General from 39 states strongly advocate an express approval requirement because "opt-out" has proven so ineffective. A number of these Attorneys General have expressed concern about "opt-out" notices from telecommunications companies that are unclear and confusing and may therefore have been ignored or misunderstood by consumers.

Even were I to approve the use of "opt-out," I would dissent from the Commission's rules here because these rules do not adequately address the problem at hand. Indeed, to develop an effective "opt-out" mechanism would require more detailed rules to ensure that consumers have a user-friendly, understandable and effective mechanism. Because companies view personal data as so valuable, they do not have an incentive to offer opt-out mechanisms that make it easy for consumers to choose to protect their privacy. Many companies simply do not want customers to take advantage of "opting-out." So companies may reduce the likelihood of customers "opting-out" by providing notices that are lengthy, vague, obscured by other information or confusing. Consumers may not understand the extent of the use of the information, for example, if the company buries the information about sharing with affiliates and joint venture partners in the middle of a long disclosure form.

"Opt-in," on the other hand, provides an incentive to companies to ensure that customers read, understand, and respond to a notice. I fear that today's decision – adopting "opt-out" and failure to provide adequate rules -- will lead inevitably to consumer abuses in the marketplace.

Today's decision puts the burden on the competitive marketplace to constrain use of personal information, arguing that carriers will not want to lose their customers due to misuse of information. But it is this same competitive marketplace that will put added pressure on carriers

[7] *Trans Union Corp. v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2001)

[8] *CPNI Order* at 8138.

to create customer profiles to enhance their marketing efforts. We've all seen in recent weeks what havoc the pressures of the marketplace can cause. Threats to privacy will become even greater as data processing technology grows increasingly sophisticated and carriers become even more integrated through increasing consolidation. Moreover, "[e]ven if market forces provide carriers with incentives not to abuse their customer's privacy rights . . . these forces would not protect competitors' concerns that CPNI could be used successfully to leverage former monopoly power into other markets."[9]

In light of the grave privacy and competition harms that this order could cause, I respectfully dissent from those parts of this decision that allow carriers to use sensitive personal information without first obtaining the express approval of the customer.

[9] *Id.* at 8134.

STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

Re: *Implementation of the Telecommunications Act of 1996;* ***CC Docket No. 96-115***

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;

Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; ***CC Docket No. 96-149***

2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers; ***CC Docket No. 00-257***

I commend the Chairman and Bureau staff for their hard work and effort to craft rules that attempt to implement the customer proprietary network information ("CPNI") provisions of the Act and continue to protect the privacy of consumers in the face of court decisions that have limited our previous privacy safeguards.

I believe that the Commission must remain vigilant with respect to protecting sensitive personal information of customers of telecommunications carriers. Indeed, our Congressional directive is to empower consumers with the ability to protect the confidentiality of their sensitive personal information. Previously, the Commission sought to protect customer privacy rights by requiring carriers to obtain express customer consent (i.e., an "opt-in" requirement) prior to obtaining access to CPNI. The U.S. Court of Appeals for the Tenth Circuit, however, struck down the Commission's original "opt-in" rules, finding that the rules impermissibly regulated protected commercial speech and thus violated the First Amendment. In particular, the court determined that the "opt-in" rules failed constitutional scrutiny because they were not narrowly tailored as a result of the Commission's failure to adequately consider an "opt-out" regime.

Today's recommendation seeks to find the appropriate balance between the continued privacy interests of consumers and the First Amendment rights of carriers to communicate with their customers. While I generally support the majority's dual opt-in/opt-out approach set forth in the decision, I remain cognizant of the imperfect science we implement today to effectuate the Court's mandate.

While I believe that the notification requirements outlined in today's recommendation to protect customer's privacy interests are adequate, we may need to do more to empower consumers to protect their personal information and I will not hesitate to revisit this decision if evidence in the marketplace indicates that these rules are insufficient to protect the consumers' right to safeguard their personal information.