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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	CC Docket No. 00-257

THIRD REPORT AND ORDER AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 16, 2002 **Released: July 25, 2002**

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By the Commission: Chairman Powell issuing a statement; Commissioners Abernathy and Martin issuing separate statements and Commissioner Copps approving in part, dissenting in part and issuing a separate statement.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1

II. BACKGROUND 5

A. SECTION 222 OF THE ACT 5
B. CPNI ORDER 10
C. CPNI RECONSIDERATION ORDER 15

D. TENTH CIRCUIT OPINION 20
E. AT&T AND WORLDCOM PETITIONS 21
F. CLARIFICATION ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING 23

III. THIRD REPORT AND ORDER 26

A. APPROVAL STANDARD 26
1. Intra-Company and Joint Venture Use of CPNI by Telecommunications Carriers 31
2. Third Parties and Carriers' Affiliates That Do Not Provide Communications-Related Services 50
3. State Choice 69
B. OTHER APPROVAL ISSUES 75
1. The Tenth Circuit's Order Vacated Only Those CPNI Rules Related to Opt-In 79
2. Total Service Approach 83
3. Grandfathering of Previously Obtained CPNI Approvals 85
4. Customer Right to Restrict Carrier Use of CPNI for Marketing Purposes 86
C. CUSTOMER NOTIFICATION REQUIREMENTS 89
1. Form of Notice 90
2. Content of Notice 97
3. Frequency of Notice 107
4. Waiting Period for Opt-Out Notification 112
5. Methods by Which Customers Can Exercise CPNI Rights Under Opt-Out or Opt-In 118
D. COMPETITION ISSUES 120
1. Forbearance for Preferred Carrier Freeze Information 120
2. Denial of CPNI to Another Carrier With Customer Authorization 129
3. Winback and Retention Marketing 131
4. Interplay Between Sections 222 and 272 135

IV. THIRD FURTHER NOTICE OF PROPOSED RULEMAKING 143

A. REGULATION OF FOREIGN STORAGE OF AND ACCESS TO DOMESTIC CPNI 144
B. PROTECTIONS FOR CARRIER INFORMATION AND ENFORCEMENT MECHANISMS 145
C. CPNI IMPLICATIONS WHEN A CARRIER GOES OUT OF BUSINESS 146

V. PROCEDURAL MATTERS 148

A. THIRD REPORT AND ORDER 148
1. Final Regulatory Flexibility Analysis 148
2. Final Paperwork Reduction Act Analysis 149
B. THIRD FURTHER NOTICE OF PROPOSED RULEMAKING 150
1. Ex Parte Presentations 150
2. Initial Regulatory Flexibility Act Analysis 151
3. Initial Paperwork Reduction Act Analysis 152
4. Comment Filing Procedures 153

VI. ORDERING CLAUSES 155

Appendix A -- List of Commenters

Appendix B -- Final Rules

Appendix C -- Final Regulatory Flexibility Analysis (Third Report and Order)

Appendix D -- Initial Regulatory Flexibility Analysis (Third Further NPRM)

I. INTRODUCTION

1. We resolve in this Order several issues in connection with carriers' use of customer proprietary network information ("CPNI") pursuant to section 222 of the Telecommunications Act of 1996.[1] Through section 222, Congress recognized both that telecommunications carriers are in a unique position to collect sensitive personal information – including to whom, where and when their customers call – and that customers maintain an important privacy interest in protecting this information from disclosure and dissemination. The rules we adopt today focus on the nature of the customer approval needed before a carrier can use, disclose or permit access to CPNI. 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.

2. More specifically, we adopt an approach that comports with the decision[2] of the United States Court of Appeals for the Tenth Circuit ("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.[3] We adopt today an approach that is derived from a careful balancing of harms, benefits, and governmental interests. First, use of CPNI by carriers or disclosure to their affiliated entities providing communications-related services[4], 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.[5] 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.[6] Finally, this Order affirms the finding that the Tenth Circuit vacated only those

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[1] 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."

[2] *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*).

[3] *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*).

[4] 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 Further NRPM and not for any other purposes.

[5] *See* section III.A.1, *infra*.

[6] *See* section III.A.2, *infra*.

CPNI rules related to opt-in and left intact the remainder of the Commission's rules,[7] including the "total service 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.[8]

3. 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.[9] 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.[10] 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.[11]

4. 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 seek bankruptcy protection.[12]

II. BACKGROUND

A. Section 222 of the Act

5. This proceeding was initiated in 1996 to implement section 222 of the Act, which governs carriers' use and disclosure of CPNI.[13] Section 222, entitled "Privacy of Customer Information," obligates carriers to protect the confidentiality of certain information. Section

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[7] *See 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,* Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 16506, 16510 (2001) (*CPNI Clarification Order*).

[8] *See* section III.B.2, *infra.*

[9] *See* section III.C, *infra.*

[10] *See* section III.D.1, *infra.*

[11] *See* section III.D.4, *infra.*

[12] *See* section IV.C, *infra.*

[13] 47 U.S.C. § 222.

222(a) imposes a general duty on telecommunications carriers to protect the confidentiality of proprietary information.[14] Carriers owe this duty to other carriers, equipment manufacturers, and customers.[15] Section 222(b) states that a carrier that receives or obtains proprietary information of other carriers in order to provide a telecommunications service can only use that information for that purpose and cannot use that information for its own marketing efforts.[16] Finally, section 222(c) protects the confidentiality of customer information and specifically delineates the exceptions to the general principle of confidentiality.[17]

6. In section 222, Congress laid out a framework for carriers' use of customer information based on the sensitivity of the information. In particular, the statute allows easier dissemination of information beyond the existing customer-carrier relationship where information is not sensitive, or where the customer so directs. Thus, section 222 establishes three categories of customer information to which different privacy protections and carrier obligations apply: (1) individually identifiable CPNI, (2) aggregate customer information, and (3) subscriber list information. The Wireless Communications and Public Safety Act of 1999 (911 Act) amended section 222 with respect to privacy of wireless location information.[18]

7. CPNI is defined as "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier."[19] Practically speaking, CPNI includes personal information such as the phone numbers called by a consumer, the length of phone calls, and services purchased by the consumer, such as call waiting. Congress accorded CPNI – which includes personal, individually identifiable information – the greatest level of protection. A carrier can use customers' CPNI only in limited circumstances, except as required by law or with the customer's approval. As specified in section 222(c)(1), a carrier can only "use, disclose or permit access to CPNI in its provision of (A) the telecommunications service from which such information is

[14] 47 U.S.C. § 222(a).

[15] *Id.*

[16] 47 U.S.C. § 222(b).

[17] 47 U.S.C. § 222(c).

[18] Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286 (911 Act).

[19] 47 U.S.C. § 222(f)(1) and 47 U.S.C. § 222(h)(1)(A) (The 911 Act amended the definition of CPNI at section 222(h) to include "location" among a customer's information that carriers are required to protect under the privacy provisions of section 222).

derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."[20]

8. The narrow exceptions to this general rule allow carriers to use individually identifiable CPNI without customer approval for four additional reasons.[21] CPNI may be used by a telecommunications carrier, either directly or through its agents, to (1) initiate, render, bill and collect for telecommunications services; (2) protect the rights or property of the carrier, or to protect users and other carriers from fraudulent or illegal use of, or subscription to, such services; or (3) provide inbound marketing, referral or administrative services to the customer for the duration of the call, if the call was initiated by the customer and the customer approves of the carrier's use to provide such service; or (4) provide call location information concerning the user of a commercial mobile service in certain specified emergency situations.[22]

9. Aggregate customer information and subscriber list information, in contrast, do not involve personal, individually identifiable information, but nevertheless are valuable to competitors.[23] Aggregate customer information means "collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed."[24] Subscriber list information generally includes subscribers' names, addresses and telephone numbers.[25] Accordingly, under sections 222(c)(3) and 222(e), aggregate customer information and subscriber list information receive less protection from use and disclosure in order to promote competition. In particular, aggregate customer information – which by definition has been stripped of individually identifiable information – may be used beyond the purposes identified in section 222(c)(1) for CPNI, but local exchange carriers (LECs) must make aggregate customer information available to competitors on reasonable and nondiscriminatory terms and conditions.[26] Subscriber list information – which is generally

[20] 47 U.S.C. § 222(c)(1). We note that, subsequent to the adoption of section 222(c)(1), Congress added section 222(f). Section 222(f) states that for purposes of section 222(c)(1), without the "express prior authorization" of the customer, a customer shall not be considered to have approved the use or disclosure of or access to (1) call location information concerning the user of a commercial mobile service or (2) automatic crash notification information of any person other than for use in the operation of an automatic crash notification system. Thus, section 222 adopts a different standard for use of wireless location information than for use of other kinds of CPNI. The standard for use of wireless location information will be addressed in a separately docketed proceeding. *Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices*, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. March 16, 2001).

[21] 47 U.S.C. § 222(d).

[22] 47 U.S.C. § 222(d).

[23] *CPNI Order*, 13 FCC Rcd 8061, 8064, para. 2.

[24] 47 U.S.C. § 222(f)(2).

[25] 47 U.S.C. § 222(f)(3). "The term 'subscriber list information' means any information – (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format." *Id.*

publicly available – must be provided to third parties for the purpose of publishing directories on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions.[27] In addition, subscriber listed and unlisted information must be disclosed to providers of emergency service and emergency support services under the circumstances set forth in section 222(g).[28]

B. CPNI Order

10. 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.[29] 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.[30]

11. In the *CPNI Order*, the Commission found that in order to ensure the "informed consent" of consumers for use of their CPNI in a manner other than specifically allowed under section 222(c)(1), carriers would be required to obtain express written, oral or electronic consent from their customers, *i.e.*, an "opt in" requirement, before a carrier could use CPNI to market services outside the customer's existing service relationship with that carrier.[31] The Commission reasoned that approval by "implied consent" (or opt-out) would not fulfill the statutory purpose of affording consumers with meaningful privacy protection. The Commission also concluded that a carrier must notify the customer of the customer's rights under section 222 before soliciting approval to use the customer's CPNI.

12. At the same time, the Commission adopted what is called the "total service approach" allowing carriers and their affiliates to use customers' CPNI, without notice or approval, to market services within the package of services to which the customer already subscribes.[32] The total service approach recognized existing customer relationships for local, interexchange, and wireless services. Under the total service approach, a carrier that provides local service to a customer may use that customer's local service CPNI to sell that customer other product offerings within the existing local service relationship (*e.g.*, caller ID) without customer approval of the use of the CPNI. As service relationships expanded (*e.g.*, the customer

(Continued from previous page)

[26] 47 U.S.C. § 222(c)(3).

[27] 47 U.S.C. § 222(e).

[28] 47 U.S.C. § 222(g).

[29] *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*).

[30] *CPNI Order*, 13 FCC Rcd 8061.

[31] *CPNI Order*, 13 FCC Rcd at 8128-8150, paras. 87-114.

[32] *CPNI Order*, 13 FCC Rcd at 8080-81, paras. 24-25.

selected both local and wireless service), so too did the parameters of the permissible use of CPNI to market new product offerings. This approach recognizes that the customer may be fairly considered to have given implied consent to the carrier's use of CPNI within the total service package to which the customer subscribes.

13. Such sharing was intended to allow carriers with a pre-existing relationship with the customer to develop "packages" of services best tailored to their customers' needs. The Commission noted that customers would reasonably expect carriers with whom they dealt to review their CPNI to fashion service packages tailored to their needs, and thus would not object to inter-affiliate sharing if each affiliate already has a relationship with the customer. Because the order required express consent for any type of disclosures beyond those permitted by section 222(c)(1), the order did not distinguish between disclosure to an affiliate or other carrier for telecommunications marketing purposes or disclosure to an unrelated third party for non-telecommunications purposes (*e.g.*, divorce actions, insurance reviews, or random product marketing).

14. The *CPNI Order* also included a Further Notice of Proposed Rulemaking (*CPNI Order Further NPRM*) that sought comment regarding: (1) customers' rights to restrict carrier use of CPNI for marketing purposes; (2) protections for carrier information and related enforcement mechanisms; and (3) foreign storage of and access to domestic CPNI.[33]

C. CPNI Reconsideration Order

15. On August 16, 1999, the Commission adopted the *CPNI Reconsideration Order* in response to a number of petitions for reconsideration, forbearance, and clarification of the *CPNI Order*.[34] The *CPNI Reconsideration Order* was adopted "to preserve the consumer protections mandated by Congress while more narrowly tailoring [the CPNI] rules, where necessary, to enable telecommunications carriers to comply with the law in a more flexible and less costly manner."[35]

16. In the *CPNI Reconsideration Order*, the Commission denied petitions for reconsideration that sought to amend the CPNI rules to differentiate among types of telecommunications carriers.[36] The Commission declined to modify or forbear from the total service approach and clarified a number of aspects of the total service approach in response to

[33] *CPNI Order*, 13 FCC Rcd 8200-8204, paras. 203-210. The first issue is dealt with in this Order while the second and third issues are addressed in the Further NPRM contained herein.

[34] *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 (1999) (*CPNI Reconsideration Order*).

[35] *CPNI Reconsideration Order*, 14 FCC Rcd at 14412, para. 2.

[36] *CPNI Reconsideration Order*, 14 FCC Rcd at 14418-14420, paras. 11-15. For example, some petitioners sought stricter requirements for incumbent local exchange carriers as opposed to competitive local exchange carriers or less stringent requirements for small and rural carriers. *Id.*

petitioners' requests.[37] The Commission determined that PC-freeze information[38] "falls squarely within the definition of CPNI set out in both sections 222(f)(1)(A) and (B),"[39] and thus denied MCI's request to classify this information otherwise.[40]

17. The Commission granted, in part, petitions for reconsideration requesting that all carriers be allowed to use CPNI to market customer premises equipment ("CPE") and information services under section 222(c)(1) without customer approval. In particular, the Commission allowed all carriers to use CPNI, without customer approval, to market CPE.[41] The Commission also allowed CMRS carriers to use, without customer approval, CPNI to market all information services, while allowing wireline carriers to do so for most information services.[42] Further, the Commission eliminated "the restrictions on a carrier's ability to use CPNI to regain customers who have switched to another carrier."[43] However, the *CPNI Reconsideration Order* concluded that a carrier's use of information regarding a customer's decision to switch carriers derived from its wholesale operations to retain the customer would violate the prohibitions in section 222(b).[44]

18. The Commission also addressed various aspects of the customer approval required to use CPNI in accordance with section 222. The Commission rejected requests to adopt preemptive national rules and affirmed its previous decision to exercise its preemption authority on a case-by-case basis for conflicting state rules, concluding that in connection with CPNI regulation, the Commission "may preempt state regulation of intrastate telecommunications matters where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed

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[37] *CPNI Reconsideration Order*, 14 FCC Rcd at 14420-14429, paras. 16-38.

[38] Under section 64.1190(a) of our rules, "[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 her express consent." 47 C.F.R. § 64.1190(a).

[39] *CPNI Reconsideration Order,* 14 FCC Rcd at 14488, para. 148. *See also* BellSouth Opposition and Comments at 5.

[40] *CPNI Reconsideration Order*, 14 FCC Rcd at 14488, para 148.

[41] *CPNI Reconsideration Order*, 14 FCC Rcd at 14430-14439, paras. 39-56.

[42] *Id.* The Commission found that CMRS providers historically have bundled CPE and information services with the underlying telecommunications service, and therefore, due primarily to customer expectations, those services fell within the meaning of "necessary to, or used in" the provision of service. *Id.* While wireline carriers traditionally have bundled CPE with wireline services, wireline carriers had not bundled Internet access services with wireline services. As a result, the Commission found that Internet access services are not "necessary to, or used in" the provision of service. *Id.* at 14434, para. 46.

[43] *CPNI Reconsideration Order*, 14 FCC Rcd at 14442-14448, paras. 64-74. This activity is commonly referred to as "winback" marketing.

[44] *CPNI Reconsideration Order*, 14 FCC Rcd at 14448-14450, paras. 75-79. This activity is commonly referred to as "retention" marketing.

from the intrastate aspects."[45] Further, in order to lessen the burden on carriers, the Commission modified various CPNI safeguards, while allowing carriers more flexibility in determining how best to safeguard customers' privacy.[46]

19. The Commission also affirmed the conclusion reached in the *CPNI Order* regarding the interpretation of the interplay between sections 222 and 272 that "information," as defined in section 272, does not include CPNI.[47] As a result, Bell operating companies ("BOCs") are not obligated by section 272 to make CPNI available to other carriers on a non-discriminatory basis when they share it with their long distance affiliates. Finally, the Commission determined that section 254 does "not confer any special status on carriers seeking to use CPNI to market enhanced services and CPE in rural exchanges to select customers."[48]

D. Tenth Circuit Opinion

20. On August 18, 1999, the Tenth Circuit issued an opinion vacating a portion of the *CPNI Order* in *U S WEST*.[49] U S WEST (now Qwest) contended that the opt-in approach adopted by the Commission violated the First and Fifth Amendments of the Constitution.[50] The Tenth Circuit struck down the Commission's original customer approval rules, finding that the CPNI rules impermissibly regulated protected commercial speech and thus violated the First Amendment.[51] Specifically, the court found that the opt-in regime was not narrowly tailored because the Commission had failed to adequately consider an opt-out option.[52]

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[45] *CPNI Reconsideration Order*, 14 FCC Rcd at 14465-66, para 112-13, quoting *CPNI Order*, 13 FCC Rcd at 8075-78, paras. 16-18.

[46] *CPNI Reconsideration Order*, 14 FCC Rcd at 14468-14479, paras. 117-134. In the *CPNI Order*, the Commission had required carriers to develop and implement software systems that "flag" customer service records in connection with CPNI ("flagging") and to maintain an electronic audit mechanism ("audit trail") that tracks access to customer accounts. *CPNI Order*, 13 FCC Rcd at 8198-8200, paras. 198-199. In the *CPNI Reconsideration Order*, the Commission allowed carriers more flexibility by requiring carriers only to implement a system by which the status of a customer's CPNI approval can be clearly established prior to access to CPNI. Carriers no longer had to implement an electronic system. *CPNI Reconsideration Order*, 14 FCC Rcd at 14474, para.126. The Commission also eliminated the audit trail requirement and instead required carriers to maintain a record of their sales and marketing campaigns that use CPNI. *CPNI Reconsideration Order*, 14 FCC Rcd at 14474-75, para. 127.

[47] *CPNI Reconsideration Order*, 14 FCC Rcd at 14481-88, paras. 137-145.

[48] *CPNI Reconsideration Order*, 14 FCC Rcd at 14490, para. 151.

[49] *U S WEST v. FCC*, 182 F.3d 1224.

[50] *U S WEST v. FCC*, 182 F.3d at 1231.

[51] *Id.* at 1239.

[52] *Id.*

E. AT&T and WorldCom Petitions

21. On October 8, 1999, AT&T filed a petition for review of the *CPNI Order* with the U.S. Circuit Court of Appeals for the District of Columbia, challenging the Commission's CPNI decisions as they relate to the interplay between sections 222 and 272 of the Communications Act.[53] On July 25, 2000, the D.C. Circuit granted the Commission's motion for voluntary remand of the AT&T appeal.[54]

22. On November 1, 1999, MCI WorldCom filed a petition for further reconsideration arguing that the Commission should reexamine some of its notice requirements as applicable to competitive carriers' access to CPNI during the sales and provisioning processes.[55] MCI WorldCom also argued that the Commission should reexamine its determination that preferred carrier freeze[56] information is CPNI, as well as its refusal to issue a definitive rule governing winbacks.[57]

F. Clarification Order and Further Notice of Proposed Rulemaking

23. 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*).[58] The Commission affirmed its previous determination that the Tenth Circuit invalidated only the opt-in rule, not the entire CPNI Order.[59] The Commission sought comment on its interpretation of the scope of the Tenth Circuit order, and on what type of approval (opt-in or opt-out) would best serve the government's goals while respecting constitutional limits.[60] In addition, the

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[53] AT&T Petition for Review, *AT&T v. FCC*, No. 99-1413 (D.C. Cir., July 25, 2000) (petition for review filed Oct. 8, 1999).

[54] *AT&T v. FCC*, No. 94-1413 (D.C. Cir., July 25, 2000) (*AT&T v. FCC*).

[55] MCI WorldCom Petition for Further Reconsideration (filed Nov. 1, 1999) (MCI WorldCom Petition).

[56] Preferred carrier freezes and primary interexchange carrier freezes are sometimes referred to as PC-freezes and PIC-freezes, respectively. A PC-freeze is a more general term, applying to any freeze placed on a customer's account to protect her preferred carrier selection from being changed without her explicit permission. PIC-freeze refers specifically to a freeze on a customer's interexchange carrier selection. A PC-freeze/PIC-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 her express written or oral consent." *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1575, para. 112, n.348 (1998) (*Slamming Order*).

[57] MCI Petition at 17. Winback activities involve carriers' attempts to regain the business of customers who have switched to another carrier.

[58] *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*).

[59] *CPNI Clarification Order*, 16 FCC Rcd at 16510, para. 7.

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

Commission noted that "the consent mechanism that we eventually adopt in response to the Tenth Circuit's Order could impact our previous findings regarding the interplay between [sections 222 and 272], and we therefore find it necessary to raise the relevant issues here."[61]

24. In the *CPNI Clarification Order*, the Commission sought to obtain a more complete record on ways in which consumers can consent to a carrier's use of their CPNI.[62] Taking into account the Tenth Circuit's opinion, the Commission sought comment on 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.[63] Specifically, the Commission sought comment on 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 we should take competitive concerns into account.[64] To the extent that promoting competition is also a legitimate government interest under section 222, the Commission sought comment on the likely difference in competitive harms under opt-in and opt-out approvals.

25. In the *CPNI Clarification Order*, the Commission also sought comment on whether adoption of an opt-out mechanism is consistent with the rationale for the total service approach set forth in the *CPNI Order*.[65] Additionally, in the *CPNI Reconsideration Order*, the Commission determined that carriers may use CPNI derived from the provision of a telecommunications service to market CPE necessary to, or used in, the provision of that telecommunications service in accordance with section 222(c)(1).[66] In a separate proceeding, the Commission modified and clarified its bundling rules promulgated under *Computer II*[67] to allow carriers to bundle CPE and enhanced services with telecommunications services.[68] The Commission sought comment on whether the issues raised in that proceeding should affect our interpretation of section 222(c)(1) and the total service approach.[69] The Commission received

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

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

[63] *Id.*

[64] *Id.*

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

[66] *CPNI Reconsideration Order*, 14 FCC Rcd at 14430, para. 39.

[67] *Amendment of Section 64.702 of the Commission's Rules and Regulations,* CC Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980).

[68] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended,* CC Docket No. 96-16, *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Market,* CC Docket No. 98-183, Report and Order, 16 FCC Rcd 7418 (2001).

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

extensive comments and replies from commenters representing a broad cross section of the industry and consumer interest groups in this proceeding.[70]

III. THIRD REPORT AND ORDER

A. Approval Standard

26. The primary issue to be decided here is how to implement section 222(c)(1), which governs the use and disclosure of CPNI upon the "approval of the customer."[71] In the *CPNI Order*, the Commission concluded that "approval" for all such uses and disclosure, whether sharing among affiliated entities or unaffiliated third parties, required express consent from the customer.[72] The Tenth Circuit invalidated the Commission's original opt-in regime based on its concerns that the Commission's CPNI rules impermissibly burdened carriers' and consumers'[73] commercial speech.[74] The court noted that nonmisleading commercial speech regarding a lawful activity is a form of protected speech under the First Amendment, although it is generally afforded less protection than noncommercial speech.[75] The court found that the CPNI rules implicated commercial speech concerns under the First Amendment "[b]ecause [U S WEST's] targeted speech to its customers is for the purpose of soliciting those customers to purchase more or different telecommunications services. . . ."[76] Notably, the court's opinion presupposes that the speech at issue involves sharing with affiliates for telecommunications marketing, rather than unrestricted disclosure to unrelated third parties.[77]

27. In deciding *U S WEST v. FCC*, the court analyzed the *CPNI Order* using the constitutional standards applicable to governmental regulations of commercial speech articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission.*[78] In order to determine

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[70] A list of parties filing comments and reply comments on the *Clarification Order Further NPRM* is included at Appendix A.

[71] 47 U.S.C. § 222(c)(1).

[72] *CPNI Order*, 13 FCC Rcd at 8128-50, paras. 87-114.

[73] The Tenth Circuit stated that the First Amendment protects both the right to engage in commercial speech and "necessarily protects the right to receive it." *U S WEST,* 182 F.3d at 1232 (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), which involved distribution of literature).

[74] *U S WEST,* 182 F.3d at 1239.

[75] *U S WEST,* 182 F.3d at 1233.

[76] *Id.* at 1232-33 (finding that [U S WEST's] targeted speech "'does no more than propose a commercial transaction' . . . [c]onsequently, the targeted speech in this case fits soundly within the definition of commercial speech.") (quoting *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976)).

[77] *U S WEST,* 182 F.3d at 1230, 1232-33.

[78] *U S WEST v. FCC*, 182 F.3d at 1233. *See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557(1980) (*Central Hudson*).

whether restrictions on commercial speech survive "intermediate scrutiny," *Central Hudson* sets out a four-part test.[79] *Central Hudson* asks first whether the speech in question concerns illegal activity or is misleading, in which case the government may freely regulate the speech. If the speech is not misleading and does not involve illegal activity, the court applies the rest of the four-part test to the government's regulation.[80] The second prong of *Central Hudson* examines whether the government has a substantial interest in regulating the speech. Third, the government must show that the restriction on commercial speech directly and materially advances that interest. Finally, the regulation must be narrowly drawn.[81]

28. The court assumed that the Commission had demonstrated a substantial state interest in protecting privacy and acknowledged that Congress might have considered promoting competition in tandem with the privacy interest. Notwithstanding this assumption, the court later found that "[t]he government presents no [empirical] evidence showing the harm to either privacy or competition is real."[82] Accordingly, the court concluded that the government did not demonstrate that the opt-in regulations directly and materially advanced its interests. The court noted that the Commission also must show the dissemination of CPNI would "inflict specific and significant harm on individuals," such as misappropriation of sensitive personal information for the purpose of assuming another's identity.[83] The court concluded that the opt-in requirement was not "narrowly tailored" because the agency had not demonstrated a sufficiently good fit between the means chosen (opt-in or express approval) and the desired statutory objectives (protecting privacy and competition). In addition, the court recognized that while the government is obligated to consider less restrictive means, that requirement "does not amount to a least restrictive means test."[84] However, the court found that the Commission had failed to adequately consider an "obvious and less restrictive alternative," an opt-out strategy.[85]

29. Importantly, the court did not find section 222 of the Act unconstitutional.[86] As noted, U S WEST did not even challenge the constitutionality of section 222.[87] Therefore, the

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[79] *Central Hudson*, 447 U.S. at 564-65.

[80] As the court noted and no commenter has disputed, the commercial speech impacted by the Commission's CPNI rules is neither misleading nor does it involve illegal activity. *U S WEST*, 182 F.3d at 1234.

[81] *Central Hudson*, 447 U.S. at 564-65. *See also U S WEST*, 182 F.3d at 1233.

[82] *U S WEST*, 182 F.3d at 1237.

[83] *U S WEST*, 182 F.3d at 1235.

[84] *Id.* at 1238, n.11.

[85] *U S WEST*, 182 F.3d at 1238.

[86] *U S WEST*, 182 F.3d at 1243 (Briscoe, J., dissenting).

[87] The dissent argued that U S WEST's arguments were flawed because they were "more appropriately aimed at the restrictions and requirements outlined in section 222 rather than the approval method adopted in the CPNI Order." She observed that the order, not the statute, was the subject of U S WEST's petition for review. *U S WEST*, 182 F.3d at 1243 (Briscoe, J., dissenting).

task before the Commission remains the same: to implement regulations that satisfy Congress' goal of protecting consumer privacy by requiring carriers to obtain customer consent for certain uses of CPNI. As required by the Tenth Circuit, any new regulations adopted by the Commission in the instant proceeding must meet the standard articulated by the Supreme Court in *Central Hudson.*

30. In view of the court's guidance, we take into account the burden on carriers' commercial speech rights, provide an empirical justification for the government's interest in protecting the privacy of consumers' CPNI, and consider whether opt-out provides sufficient protection of consumer privacy. We discuss separately the appropriate means of obtaining customer approval for intra-company use of CPNI and for disclosure of CPNI to third parties because our application of *Central Hudson* in light of the record in this proceeding shows that the balance of the costs and benefits associated with the burden on speech are different between these categories, thus requiring different outcomes. Specifically, we find that opt-out is a narrowly tailored means that directly and materially advances Congress' interest in protecting consumers from unapproved use of CPNI by carriers and their affiliates that provide communications-related services.[88] However, opt-in is a narrowly tailored means that directly and materially advances Congress' interest in protecting consumers from unapproved disclosure of CPNI to third parties that have no business relationship with the customer and are not subject to enforcement under the Communications Act or the Commission's rules such as those governing use and disclosure of CPNI.

1. Intra-Company and Joint Venture Use of CPNI by Telecommunications Carriers

31. Although in 1999 the Commission concluded that the more stringent opt-in rule was necessary, in light of *U S WEST* we now conclude that an opt-in rule for intra-company use cannot be justified based on the record we have before us. Thus, we adopt a less restrictive alternative – an opt-out rule – which is less burdensome on commercial speech. Applying the *Central Hudson* test to possible schemes for carriers to obtain customer approval for use and disclosure of CPNI under section 222(c)(1), we conclude that: (1) the government has a substantial interest in ensuring that a customer be given an opportunity to approve (or disapprove) uses of her CPNI by a carrier and a carrier's affiliates that provide communications-related services;[89] (2) opt-out directly and materially advances this interest by mandating that carriers provide prior notice to customers along with an opportunity to decline the carrier's requested use or disclosure; and (3) opt-out is no more extensive than necessary to serve the government interest in protecting privacy because it is less burdensome on carriers than other alternatives such as opt-in, while still serving the government's interest in ensuring that

[88] However, we allow and encourage carriers to use an opt-in approval method if they prefer in order to provide consumers with heightened privacy protections. We note, for example, that some financial institutions market the fact that they provide privacy protections beyond those mandated by federal law.

[89] We have defined "communications-related services" *supra* at n.4.

consumers have an opportunity to exercise their approval rights regarding intra-company use and disclosure of CPNI.[90]

32. We also conclude that opt-out is an appropriate approval mechanism for the sharing of CPNI with, and use by, a carrier's joint venture partners and independent contractors in connection with communications-related services that are provided by the carrier (or its affiliates) individually, or together with the joint venture partner.[91] That is, in these two contexts, this form of consent directly and materially advances the government's interest in ensuring that customers have an opportunity to approve such uses of CPNI, while also burdening no more carrier speech than necessary.

a. Intra-Company Use

33. *Government's Substantial Interest.* The customer approval requirement in section 222(c)(1) is designed to protect the interest of telecommunications consumers in limiting unexpected and unwanted use and disclosure of their personal information by carriers who must collect such information in order to render bills and perform other services. Section 222(c)(1) thus assumes a minimum level of customer concern regarding certain uses of CPNI by a carrier and its affiliates. This assumption has been borne out by evidence in the record, including surveys indicating consumers' desires regarding dissemination of CPNI and other personal information. Notably, in one study, 55.5 percent of Cincinnati Bell Telephone (CBT) customers expressed some level of concern with use of CPNI by CBT for targeted marketing, including 17.2 percent that were "extremely concerned."[92] Likewise, the Westin Study submitted by Pacific Telesis in the original CPNI proceeding indicated that 36 percent of customers found it "not acceptable" for their local telephone company to use CPNI for targeted marketing.[93] These concerns show a sensitivity to use of CPNI, consistent with the very private nature of the information collected by a telecommunications carrier, which includes, at a minimum, the telephone numbers a subscriber calls, and the times, dates, destinations and duration of those calls.[94] CPNI also includes services that a subscriber purchases, the equipment and facilities used, and it may also include personal/household usage patterns, among other things.[95] Based on

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[90] However, we allow carriers to use an opt-in approval method if they prefer to do so. See section III.C.1, *infra*.

[91] *See* section III.A.1.b *infra*.

[92] Cincinnati Bell Telephone Comments (filed June 11, 1996), App. A at 2 (Cincinnati Bell Study). This carrier-specific evidence is consistent with the results of more recent survey data put on the record by Qwest which show that about 25 percent of all consumers are "privacy fundamentalists" who tend to oppose any sharing or dissemination of their private information. Qwest May 14, 2002 *Ex Parte* Letter, App. C at 11 n.6.

[93] Letter from Gina Harrison, Pacific Telesis Group, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 96-115 (filed Dec. 12, 1996) (Pacific Telesis Dec. 12, 1996 *Ex Parte* Letter), Attach. A at 8 (Westin Survey). Sixty-four percent said that such uses would be acceptable to them. *Id.*

[94] CPNI Order, 13 FCC Rcd at 8064, para. 2.

[95] "[T]his data can be processed and translated into subscriber profiles which may contain information about the identities and whereabouts of subscribers' friends and relatives, which businesses subscribers patronize, when subscribers are likely to be home and awake, product and service preferences, and subscribers' medical, business, (continued....)

the record before us, we conclude that the government's interest in limiting unexpected disclosure and use of consumers' CPNI is a substantial one.

34. *Direct and Material Advancement.* The next prong of *Central Hudson* examines whether a regulation impacting commercial speech directly and materially advances the government's interest, *i.e.*, the restriction is effective at promoting the government's interest.[96] We conclude that, with respect to intra-company uses, opt-out directly and materially advances the government's interest that a customer be given an opportunity to approve (or disapprove) uses of her CPNI by mandating that carriers provide prior notice to customers along with an opportunity to decline the carrier's requested use or disclosure.

35. Although the record evidence demonstrates that a substantial portion of consumers have a high level of concern about protecting the privacy of their CPNI (a concern most acute for disclosure to parties other than their own carrier),[97] the record also makes evident that a majority of customers nevertheless want to be advised of the services that their telecommunications providers offer.[98] Furthermore, the record establishes that customers are in a position to reap significant benefits in the form of more personalized service offerings (and possible cost savings) from their carriers and carriers' affiliates providing communications-related services based on the CPNI that the carriers collect. Enabling carriers to communicate with customers in this way is conducive to the free flow of information,[99] which can result in more efficient and better-tailored marketing[100] and has the potential to reduce junk mail and other forms of unwanted advertising.[101] Thus, consumers may profit from having more and better information provided to them, or by being introduced to products or services that interest them.[102]

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client, sales, organizational, and political telephone contacts." *U.S. West, Inc. v. FCC*, Julie Tuan, 15 Berkeley Tech. L.J. 353, 369 (2000).

[96] *U S WEST*, 182 F.3d at 1237 (stating that the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree") (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

[97] *See infra* section III.A.2.

[98] Cincinnati Bell Study at 2 (indicating that 81.5 percent of respondents wanted to be advised of the services that Cincinnati Bell Telephone offers).

[99] CTSI Reply Comments at 7 ("Customers, as well as the market, benefit from the free flow of information."). *See also* BellSouth Comments at 7.

[100] Letter from Michael D. Alarcon, SBC, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed Apr. 12, 2002) (SBC April 12, 2002 *Ex Parte* Letter) (stating that interim opt-out approval has resulted in "[c]ustomized offerings of SBC's products and services based on customers' CPNI."). *See also* Progress & Freedom Foundation Comments at 4.

[101] AT&T Comments at 5, n.3 ("Indeed, limiting the use of CPNI may have the effect of increasing the number of solicitations by telecommunications carriers."). *See also* Verizon Comments at 6; Progress & Freedom Foundation Reply Comments at 4.

[102] Progress & Freedom Foundation Reply Comments at 4 ("In other words, information allows communications to be targeted to make it more likely that consumers are made aware of goods and services they want to reach them, while reducing consumer exposure to unwanted or irrelevant advertising."); Qwest Comments, Attach. A at 3 (continued....)

The empirical evidence indicating that a majority of customers want to be advised of service offerings from their carriers is consistent with the expectation that targeted carrier marketing will benefit them.[103]

36. Based on this record evidence, we think it is reasonable to conclude that targeted marketing of communications-related services using CPNI by the carrier that collects it is within the range of reasonable customer expectations. We find that telecommunications consumers expect to receive targeted notices from their carriers about innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits.[104] Similar to a case recently before the D.C. Circuit, the record here indicates that "the identity of the audience and the use to which the information may be put"[105] bear strongly on consumers' privacy interests.[106] In this respect, we conclude that consumers are concerned about use of CPNI, but that a large percentage of telecommunications customers also expect that carriers will use CPNI to market their own telecommunications services and products, as well as those of their affiliates. Thus, we conclude that an opt-out scheme giving customers an opportunity to disapprove intra-company uses of CPNI directly and materially advances customers' interest in avoiding unexpected and unwanted use and disclosure of CPNI and is sufficient to meet the "approval" requirement under section 222.

37. Although many commenters have argued that opt-out necessarily is a less effective protection against unapproved dissemination of private information than opt-in, we are convinced, based on the record, that these concerns can be adequately addressed in the intra-company context. We find that an opt-out regime would adequately protect consumers' privacy interests with respect to disclosure to carrier affiliates based on two important considerations that are dependent upon the underlying carrier-customer relationship. First, likelihood of any potential privacy harm from an inadvertent approval under opt-out is significantly reduced in the intra-company context by the carrier's need for a continuing relationship with the customer.[107]

(Continued from previous page)
("CPNI allows telecommunications carriers to identify customers, on the basis of their past purchasing habits, who are most likely to be interested in particular new services, or to offer them information about packages of services through communications tailored to their individual needs."). *See also* AT&T Comments at 9-10.

[103] Westin Survey at 8.

[104] AT&T Comments at 9-10; BellSouth Comments at 4; CenturyTel Comments at 5; Cincinnati Bell Telephone June 11, 1996 Comments at App. A; Nextel Comments at 5; USTA Comments at 13; AT&T Reply Comments at 2; Verizon Reply Comments at 8.

[105] *Trans Union Corp v. Federal Trade Commission*, 245 F.3d 809, *rehearing denied*, 267 F.3d 1138, 1143 (D. C. Cir. 2001), petition for cert. pending.

[106] CenturyTel Comments at 5 ([C]arriers do not use or disseminate sensitive or personal information that would inflict specific or significant harm on their customers."); Qwest Comments at 16 ("Arguments may be made to the Commission that might support a finding that, in some circumstances, some carrier disclosures of CPNI to unaffiliated third parties might be privacy invasive.").

[107] USTA Reply Comments at 1 ("In competitive telecommunications markets, the failure of carriers to meet customer privacy expectations will only serve to alienate those customers and cause them to obtain service from carriers that meet their expectations.").

As AT&T argues, "[i]f a carrier were to abuse CPNI, customers would likely switch carriers."[108] Because of commercial constraints required to ensure customer accountability, therefore, the carrier with whom the customer has the existing business relationship has a strong incentive not to misuse its customers' CPNI or it will risk losing its customers' business.[109]

38. Second, we find the potential harm to privacy to be much less significant in instances where the entity that uses and shares the CPNI is subject to section 222 and our implementing rules. If a consumer should decide to restrict disclosure after the original period to respond to an opt-out notice has elapsed, she may do so at any time and the carrier must comply with that request. Significantly, the holder of CPNI, the customer's existing telecommunications provider (including its telecommunications affiliates), is subject to enforcement action by the Commission[110] for any failure to abide by the notice rules regarding planned use, disclosure, or permission to access a customer's CPNI.[111]

39. We are given further comfort that we can protect privacy interests under intra-company opt-out by fine-tuning our notification rules. These rules, as described below, are crafted to ensure that any opt-out mechanism provides effective notification to consumers. We are mindful of the deficiencies widely reported for the Gramm-Leach-Bliley[112] notifications in the financial services sector,[113] and have fashioned our CPNI notification requirements in this Order with an eye toward learning from that experience. As discussed further in section III.C *infra,* we bolster the CPNI opt-out regime by requiring a 30-day waiting period before consent is inferred and by refreshing consumers on a company's opt-out policy every two years. Moreover, we note that under the opt-out rules we adopt today, the customer's carrier would remain subject to enforcement action from the Commission for any deficiencies in its opt-out notice.

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[108] AT&T Comments at 7.

[109] We recognize that this constraint is less effective where competitive choices are less readily available. *See* Arizona Attorney General Jan. 25, 2002 *Ex Parte* Letter, Ex. B. at 86). However, as competition continues to develop, this safeguard will only increase in its usefulness.

[110] In addition, carriers may be subject to enforcement actions by state utility commissions.

[111] By contrast, the threat of enforcement action in the third-party sharing context does not serve as a deterrent against the misuse of customer CPNI because non-carriers are not subject to section 222. Thus, such third parties have little or no reason to use customers' CPNI in any way but that which generates the most profits, which may include selling or providing access to the personal information.

[112] 15 U.S.C. § 6802. The Financial Services Modernization Act is more commonly known as the "Gramm-Leach-Bliley Act" (*Gramm-Leach-Bliley).*

[113] Russell Gold, *Privacy Notice Offers Little Help*, WALL STREET JOURNAL, May 30, 2002, at D1. Implementation of Gramm-Leach-Bliley has been particularly problematic, prompting complaints from privacy groups, consumers, and state and federal regulators. Commenters say that the opt-out notices to consumers have not been "clear and conspicuous" and that many notices have been unintelligible and couched in language far above the average American's reading level. NAAG Dec. 21, 2001 *Ex Parte* Letter at 8; *see* Harris Interactive for the Privacy Leadership Initiative survey, available at http://www.ftc.gov/bcp/workshops/glb; NAAG Dec. 21, 2001 *Ex Parte* Letter at 9. Many consumers did not recall receiving the notices or reading them. *See* American Bankers Association survey, available at http://www.aba.com/Press+Room/bankfee060701.htm.

40. *Narrow Tailoring.* We now consider whether opt out is narrowly tailored, *i.e.*, whether it burdens substantially more of a carrier's speech than necessary. The Tenth Circuit points out that the narrow tailoring requirement under *Central Hudson* means that the government's speech restriction must signify a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition."[114] We have described the primary benefit associated with opt-out above. It directly and materially addresses customers' interest in avoiding unexpected and unwanted use and disclosure of individually identifiable CPNI. Turning to the carriers' burdens, *i.e.*, the "costs" of the regulation, we find that, in this case, there is no flat prohibition on speech, but rather a requirement that a telecommunications carrier use a specified means of obtaining a customer's consent before using that customer's personal information in CPNI to market communications-related services or share the information with an affiliate that provides communications-related services. We also find that carriers have provided evidence that their commercial speech interest in using a customer's CPNI for tailored telecommunications marketing is real and significant, and that an opt-out regime is a less burdensome means of obtaining a customer's "approval" under section 222(c)(1) than is an opt-in regime.

41. Carriers uniformly assert a significant competitive need to use CPNI for marketing purposes and/or to share such information with their affiliates that provide communications-related services.[115] The carriers seek to offer competitive packages that are tailored to their customers' usage patterns and demonstrated service needs. Carriers have demonstrated on the record that use of CPNI to develop such targeted offerings can lower the costs and improve the effectiveness of customer solicitations.[116] Moreover, carriers assert that opt-out imposes fewer burdens on their commercial speech interests than the other alternative for ascertaining approval – opt-in – and is thus the only approval mechanism that will satisfy First Amendment scrutiny under *Central Hudson.*[117] This assertion rests on a comparison of the relative costs of the mechanisms: under opt-out, carriers would be required to provide customers with advance notice that they intend to use a customer's CPNI, and give the customer an opportunity to disapprove of the use; under opt-in, carriers are prohibited from using a customer's CPNI unless the customer expressly approves the use that the carrier requests the customer to approve in its notice.[118] Given that approval is required under section 222(c)(1), and opt-out or opt-in are the only means of obtaining an expression of the customer's preference,

[114] *U S WEST v. FCC,* 182 F.3d at 1238 (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417 (1993)).

[115] AT&T Comments at 9-10; BellSouth Comments at 7; CenturyTel Comments at 7; Nextel Comments at 6; NTCA at 3.

[116] AT&T Comments at 10; BellSouth Comments at 14; CenturyTel Comments at 11.

[117] AT&T Comments at 7; BellSouth Comments at 5; CenturyTel Comments at 11; Nextel Comments at 6; Qwest Comments at 7; SBC Comments at 8; WorldCom Reply Comments at 3.

[118] AT&T Comments at 9; Nextel Comments at 6.

carriers assert that opt-out is obviously less burdensome than opt-in and sufficient to ascertain approval for a carrier's marketing of communications-related services.[119]

42. We note that the particular form of opt-out that we adopt here is narrowly tailored to ensuring that a customer be given an opportunity to approve (or disapprove) uses of CPNI by a carrier and its affiliates that provide communications-related services. Specifically, as noted above, opt-out has been criticized in other contexts, *e.g.*, the financial services sector, because of the possibility that customers may not actually see, read, or understand opt-out notices, and therefore the customers may not be able to respond to a carrier's request for approval in a timely and appropriate manner. Furthermore, circumstances may change over time that would cause a customer to want to reexamine any privacy election he or she has made with respect to CPNI. We respond to these specific problems with requirements that are designed to increase the effectiveness of opt-out without burdening more carrier speech than necessary.

43. We require a 30-day waiting period following notice before customer consent can be inferred to ensure that customers have adequate time to respond to a notice. We also require carriers to provide refresher notices to customers of their opt-out rights every two years in case circumstances have changed so as to warrant a change in customers' privacy elections. These requirements are narrowly tailored because they address the known shortcomings of opt-out in a targeted manner in lieu of adopting a more restrictive approach such as opt-in. Furthermore, there is no indication in the record that these requirements impose any undue burden on carriers. Carriers have been following the 30-day waiting period on an interim basis and are generally supportive of it in their comments.[120] Refresher notices, which are only required once every two years, give carriers an opportunity to reconfigure their CPNI policies.

44. We thus conclude, after weighing the relevant considerations, that a more stringent opt-in mechanism is not necessary to protect the substantial governmental interest evinced by section 222. Rather, an opt-out regime for intra-company use of CPNI to market communications-related services directly and materially advances Congress' interest in ensuring that customers' personal information is not used in unexpected ways without their permission, while at the same time avoiding unnecessary and improper burdens on commercial speech, thus meeting *Central Hudson's* narrow tailoring requirement.

b. Joint Venture/Agent Use

45. We find that the same factors we consider above weigh in favor of allowing carriers to share CPNI based on opt-out approval with their agents, and with independent contractors (such as telemarketers) and joint venture partners to market and provide communications-related services. We allow carriers to disclose CPNI to agents, and for the purpose of marketing communications-related services, to independent contractors and joint

[119] *See U S WEST v. FCC*, 182 F.3d at 1230 (noting that under opt-out, a customer's approval is inferred from the customer-carrier relationship unless the customer specifically requests that his or her CPNI be restricted).

[120] *See* AT&T Wireless Comments at 3; Nextel Comments at 8; SBC Comments at 14; Verizon Comments at 13; Verizon Wireless Comments at 6, n.9; Verizon Feb. 20, 2002 *Ex Parte* Letter at 4.

venture partners, because under those circumstances, consumers are protected by the same or equivalent safeguards as those that exist when carriers use CPNI themselves. We also realize that carrier burdens could be significant for these types of uses under an opt-in scenario because opt-in could immediately impact the way carriers conduct business.[121] Thus, the rule we adopt today permits a carrier to share CPNI with a joint venture partner to provide information services typically provided by telecommunications carriers, such as Internet access or voice mail services.[122] Further, those joint venture services that may be provided using CPNI exclude 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.[123]

46. In defining the entities that may use or receive CPNI based on opt-out approval, we extend this treatment to all agency relationships, and, where certain additional safeguards are met, to joint ventures and independent contractors as well. As we discuss in detail below, the regulations we adopt distinguish between CPNI uses that are governed by section 222 and our rules, and those that are not. We allow carriers to share CPNI with their agents because the principles of agency law hold carriers responsible for the acts of their agents. Carriers thus remain responsible for improper use or disclosure of consumers' CPNI while in the hands of their agents. Accordingly, carriers have an incentive to maintain appropriate control of CPNI disclosed to agents. As described below, we also allow carriers to share CPNI with independent contractors and in joint venture arrangements (collectively, "non-agency relationships") for communications-related services based on opt-out approval as long as the following protections are employed.

47. *Joint Venture/Contractor Safeguards.* We require that carriers that allow access to or disclose CPNI to independent contractors or joint venture partners under an opt-out regime assure that certain safeguards are in place to protect consumers' CPNI from further dissemination or uses beyond those consented to by the consumer. In particular, we require carriers, at a minimum, to enter into confidentiality agreements with independent contractors or joint venture partners that: (1) allow the independent contractor or joint venture partner to use the CPNI only for the purpose of marketing the communications-related services for which that CPNI has been provided; (2) 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; (3) require that the independent contractor or joint venture

[121] Many carriers employ independent contractors such as telemarketers rather than their own employees. We are taking this factor into account in order to avoid undue burdens to the carriers based on having to change current commercial practices. We note that we are also putting sufficient safeguards in place to avoid any abuses.

[122] We reach this conclusion based on our analysis of customer surveys that indicate that customers have a reasonable expectation that their telecommunications providers will market to them other services that those carriers provide. Moreover, there is no indication in the record that carriers have an interest in entering into joint ventures to market types of services other than those they traditionally provide. To the extent, in the future, record evidence demonstrates that there are other types of services that carriers may desire to market and provide to customers through joint venture partnerships, we will address those situations as the record presents itself.

[123] *See* Appendix B, 47 C.F.R. § 64.2003(f) (defining "information services typically provided by telecommunications carriers").

partner have appropriate protections in place to ensure the ongoing confidentiality of consumers' CPNI.[124] We urge carriers to limit independent contractors' and joint venture partners' ability to maintain CPNI after it has been used for its specific purpose, but do not so mandate at this time. In addition, we note that carriers are required to maintain a record of all such disclosures as part of their responsibilities under section 64.2009(c) of our rules. Of course, to the degree that carriers intend to make such use of CPNI, they must provide notice of that fact in accordance with our rules.[125]

48. *Central Hudson Analysis.* Applying *Central Hudson,* we conclude that opt-out with the additional safeguards described in this section would directly and materially advance consumers' substantial privacy interests where a carrier enters into a joint venture with an unrelated third party for the offering and/or provision of a communications-related service.[126] *Central Hudson's* narrow tailoring requires that we balance the costs and benefits of the burden on speech imposed by our privacy rules. Considering the "benefits" of the regulation we adopt, consumers generally anticipate that they will receive marketing of telecommunications services and products from their own carriers, and the safeguards we require will ensure that the limited dissemination under the joint venture (or independent contractor) arrangement – under the auspices of the carrier – will avert the privacy harms from unrestricted third party dissemination that we discuss below. Specifically, without confidentiality agreements with carriers collecting CPNI, independent contractors or joint venture partners would not have any incentive to restrict their use of CPNI, to refrain from further disclosure to third parties, or to guard against their own employees' use or disclosure of a customer's CPNI. These requirements place independent contractors and joint venture partners on a similar footing as the carriers themselves in terms of incentives, thus obviating the need for more stringent approval requirements such as opt-in.

49. Considering the "costs" to carriers of adopting opt-out with these safeguards, we note that the burdens to carriers' speech would be much more substantial if they were required to treat disclosures to their independent contractors as a "third-party disclosure." Many carriers use telemarketers to conduct portions of their marketing business, and so long as adequate safeguards are in place, we believe that a narrowly tailored requirement should *not* dictate that these carriers change their existing business practices. Moreover, carriers urge us to adopt opt-out for these uses because of the lessened carrier burdens associated with an opt-out method of obtaining customer approval under section 222.[127] We do not expect that carriers will have to enter into

[124] Regarding enforcement associated with these confidentiality agreements, we note that under section 403 of the Communications Act, the Commission has "full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of [the] Act, or concerning which any question may arise under any of the provisions of [the] Act, or relating to the enforcement of any of the provisions of [the] Act." 47 U.S.C. § 403.

[125] "The notification must specify . . . the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used. . . ." 47 C.F.R. § 64.2007(2)(ii).

[126] Qwest Comments at 14-16; Qwest May 14, 2002 *Ex Parte* Letter at 4 , App. C at 10 & n.5 (noting that Qwest uses agents to conduct marketing "when it makes sound business sense to contract the function out").

[127] *Id.*

any contracts that they otherwise would not have to enter because joint venture agreements and contractor relationships routinely provide for confidentiality of sensitive business information. Carriers would simply be required to include treatment of CPNI when negotiating such confidentiality provisions. In conclusion, balancing of the interests and the harms in this context weighs in favor of an opt-out regime with suitable consumer safeguards.

2. Third Parties and Carriers' Affiliates That Do Not Provide Communications-Related Services

50. Applying the *Central Hudson* test to methods for carriers to obtain customer approval under section 222(c)(1) to disclose or allow access to CPNI to third parties, we conclude that: (1) the government has a substantial interest in ensuring that a customer give her knowing approval to disclosures of CPNI to third parties because such disclosures can have significant privacy consequences and be irreversible; (2) opt-in directly and materially advances this interest by mandating that carriers provide prior notice to customers and refrain from disclosing or allowing access to CPNI unless a customer gives her express consent by written, oral, or electronic means; and (3) opt-in is narrowly tailored because carriers have not asserted any intention of sharing CPNI with unaffiliated third parties, and thus the burden of requiring opt-in in this context is negligible and certainly warranted in light of consumers' substantial privacy interest in protecting their CPNI from unapproved disclosure to third parties.

51. As discussed in the following paragraphs, the record unequivocally demonstrates that, in contrast to intra-company use and disclosure of CPNI, there is a more substantial privacy interest with respect to third-party disclosures. The record indicates not only that consumers' wishes are different regarding third-party disclosure, but that the privacy consequences are more significant in the case of unintended disclosure to third parties. Once the personal information in CPNI is disclosed to such companies or individuals, the use of that information is no longer subject to the constraints of section 222, and further, these third parties have no incentive to honor the privacy expectations of customers with whom they have no relationship. On the other hand, any carrier speech burden from having to seek express consent for third-party disclosures appears to be negligible. Carriers say that they need to share with third parties for telemarketing and joint ventures, for which we adopt opt-out with certain protections. Beyond that, carriers say they do not share with third parties, making any burden on speech nil, or speculative at best. Therefore, with respect to customer approval of third-party disclosures, carriers have not established on our record that there is, or would be, any significant burden on their First Amendment commercial speech interest from opt-in to weigh against consumers' substantial privacy interest in avoiding unapproved disclosures to third parties. There is also no demonstrated consumer benefit to be derived from third-party sharing that would impact our balancing analysis. Thus, we find that opt-in is narrowly tailored under *Central Hudson* because it burdens no more carrier speech than necessary to directly and materially advance the government's interest in ensuring informed consent before a customer's personal information is disclosed to third parties by its telecommunications carrier.

52. We also conclude that opt-in is necessary with respect to disclosures of CPNI to a carrier's affiliates that provide no communications-related services.[128] In this context, opt-in consent directly and materially advances the government's interest in ensuring that customers give their knowing approval to such uses of CPNI, while burdening no more carrier speech than necessary.

a. Disclosure to Third Parties

53. *Government's Substantial Interest.* The record in this proceeding shows that the government's interest in protecting consumers from unexpected and unwanted disclosure of their personal information in CPNI is a significant one, and the potential privacy harm to consumers from disclosure to third parties significantly exceeds that presented by the intra-company uses described above. First, carrier surveys and comments vividly demonstrate that consumers view use of CPNI by a consumer's carrier differently than disclosure to or use by a third party. In the Cincinnati Bell study described above, nearly half of consumers questioned said they would be "extremely concerned" by the release of CPNI for marketing purposes to companies other than their own telephone company.[129] The most recent Harris 2002 Survey shows that this figure is now even higher, and today 73 percent would bar disclosure to other companies.[130]

54. Second, the record shows that unexpected and unwanted disclosure of private information to third parties also exposes telecommunications consumers to potentially more harm from subsequent disclosures. Specifically, if a consumer's CPNI is disclosed to entities unaffected by section 222 and our rules, that entity can resell or use the CPNI in any lawful way without limitation.[131] Once CPNI enters the stream of commerce, consumers are without meaningful recourse to limit further access to, or disclosure of, that personal information.[132] Thus, the threat to telecommunications consumers' privacy interest from having their personal information in CPNI disclosed to parties who are not subject to section 222 and the Commission's rules – *without their knowing approval* – is a substantial one. As one example of the disposition of sensitive personal information without adequate constraints, the state Attorneys

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[128] *See infra* section III.A.2.b.

[129] Cincinnati Bell Study at 2; Qwest Reply Comments at 18, n.58.

[130] Letter from Kathryn Marie Krause, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed July 2, 2002) (Qwest July 2, 2002 *Ex Parte* Letter) (confidential submission), attaching "Privacy On & Off the Internet: What Consumers Want," conducted by Harris Interactive, at 44 (Feb. 7, 2002) ("Harris 2002 Survey"); Letter from Kathryn Marie Krause, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed May 14, 2002) App. D at 14 n.28 (Qwest May 14, 2002 *Ex Parte* Letter).

[131] Letter from Ken Reif, NASUCA, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed April 12, 2002) at 8 ("NASUCA April 12, 2002 *Ex Parte* Letter") ("The use to which CPNI can be put and the resulting harm to the consumer is limited only by the imagination of those with an interest in selling it to the highest bidder.").

[132] NASUCA Apr. 12, 2002 *Ex Parte* Letter at 7 ("Once disclosed, private information cannot be gathered up and returned to the customer.").

General recount the questionable behavior of U.S. Bank under another privacy statute, which caused 40 states and the District of Columbia to enter into a settlement resolving allegations that the bank misrepresented its practice of selling highly personal and confidential financial information regarding its customers to telemarketers.[133]

55. Harm to the consumer is exacerbated by the fact that third party entities receiving CPNI have no existing business relationship with the consumer and, hence, no accountability to the consumer.[134] Thus, companies that are not constrained by section 222, and with which the customer has no ongoing business relationship, are motivated to use customers' CPNI in the way that generates the most profits – which may include selling or providing access to personal information to the highest bidder.[135] Indeed, as data mining and personalization capabilities mature, the value of personal information increases, as do the carrier's incentive and opportunity to sell CPNI and third parties' incentive and opportunity to purchase it. By contrast, a carrier with whom a customer has an existing business relationship has an incentive not to misuse its customer's CPNI or it will risk losing that customer's business.[136] For these reasons, we conclude that the government's interest in ensuring knowing customer approval before carriers can disclose customers' CPNI to third parties is a substantial one.

56. *Direct and Material Advancement.* We have noted the substantial government interest in protecting consumers' privacy choices in the preceding paragraphs. Specifically, consumers say that their privacy interest is substantially greater when asked about releasing information to third parties or for uses beyond their expectations based on the existing relationship with their chosen carrier.[137] Furthermore, once such information leaves the hands of the customer's carrier, the customer loses her ability to limit further dissemination, and section 222 and the Commission's rules concerning use of CPNI are not applicable to those unknown third parties that receive the customer's personal information.[138] For these reasons, there is a greater need to ensure express consent from an approval mechanism for third party disclosure. Opt-in directly and materially advances this interest by mandating that carriers provide prior

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[133] NAAG Dec. 21, 2001 *Ex Parte* Letter at 5.

[134] *Cf.* CenturyTel Comments at 5 ("CenturyTel notes that, in using, accessing and disseminating CPNI, carriers do not use or disseminate sensitive or personal information that would inflict specific or significant harm on their customers.").

[135] NAAG Dec. 21, 2001 *Ex Parte* Letter at 5 ("The type of information that telemarketers and joint marketing partners would find useful, and therefore, be willing to pay for, is limitless.").

[136] AT&T Comments at 7.

[137] Harris 2002 Survey at 44; Cincinnati Bell Study at 2.

[138] Compare the CPNI statute to Gramm-Leach-Bliley, which specifically limits third parties' ability to further use and disseminate consumers' personal information: "Except as otherwise provided in this subtitle, a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution." 15 U.S.C. § 6802(c).

notice to customers and refrain from disclosing CPNI unless a customer gives her express consent by written, oral, or electronic means. Thus, we require opt-in approval because it directly and materially advances the government's interest in ensuring that customers give their knowing consent to use or sharing of CPNI that can have irreversible consequences for consumers' privacy.

57. *Narrow Tailoring.* Under the narrow tailoring prong of *Central Hudson,* as noted above, we consider the "careful calculation" of costs and benefits associated with the burden on speech.[139] Considering the burden on carriers' speech, *i.e.*, the "costs" of an opt-in customer approval regime for disclosures of CPNI to third parties, we recognize that opt-in is more restrictive on carriers' speech than opt-out because carriers wishing to engage in third-party disclosures other than to telemarketers and joint venture partners for communications-related services must secure express customer approval by written, electronic, or oral means. However, as described below, carriers themselves recognize the qualitative difference between third-party disclosure and disclosure to their own affiliates, and they do not assert any meaningful burden from having to seek opt-in approval for intended disclosures to third parties. In fact, carriers say they do not share CPNI with third parties.

58. In contrast to intra-company and joint venture uses, carriers generally have not asserted any commercial speech interest in (or consumer benefit from) sharing CPNI with third parties. We also know of no carrier that currently secures opt-out approval for third-party disclosure. Indeed, most carriers suggest that it would not be appropriate to disclose CPNI to unrelated third parties for independent use without express customer approval.[140] Therefore, most carriers that have spoken to this question affirmatively support an opt-in regime for third-party disclosures.

59. Even Qwest, which previously indicated it would challenge an opt-in requirement for third-party disclosure,[141] expressly acknowledges that there is a much greater customer

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[139] *U S WEST v. FCC,* 182 F.3d at 1238 (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417 (1993)).

[140] USTA Comments at 11 ("Carriers have not disputed that a customer's CPNI may not be shared with a third party without the customer's consent."); Letter from Richard T. Ellis, Verizon, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed Feb. 20, 2002 (Verizon Feb. 20, 2002 Ex *Parte* Letter) (asserting that fears of carrier joint marketing with providers of medical products and telemarketing retailers "have no basis in fact and would be beyond scope of opt-out rule" and that "most recent publicity has centered around disclosure to non-affiliates, which requires prior written consent"); Letter from Michael B. Fingerhut, Sprint, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 96-115 (filed Apr. 11, 2002) (Sprint Apr. 11, 2002 *Ex Parte* Letter) (third party disclosure requires express consent and opt-in). Some carriers speak about opt-out only in the context of disclosures within "the carrier's corporate family" or to provide only telecommunications services. BellSouth Comments at 4; AT&T Wireless Comments at 2 ("AWS supports the use of an 'opt-out' mechanism for obtaining customer approval before using CPNI to provide telecommunications services other than those from which the CPNI is derived."). *But see* WorldCom Comments at 7-8 ("There is no statutory basis for the claim that the sharing of CPNI with a third party requires a higher form of consent . . . . [T]here is no evidence that such disclosure constitutes an invasion of privacy. . . .").

[141] Qwest Comments at 14-16.

privacy interest in avoiding third-party disclosures than in limiting carrier uses of CPNI. Qwest now only asserts a right to use telemarketers or to engage in joint marketing with "appropriate [but undefined] protections for the confidentiality of the information."[142] Qwest indicates that it has imposed voluntary internal constraints on CPNI disclosure "for years, operating in a fashion that protects the confidentiality of information about its customers and refusing to provide CPNI to unaffiliated parties for their own marketing uses."[143] Thus, outside the carriers' interest in disclosing CPNI to telemarketing agents and joint venture partners (for which we allow opt-out), carriers have not demonstrated that opt-in imposes any burden on speech that carriers need or even wish to undertake.

60. The significant benefits of opt-in approval for third party dissemination are discussed above, and we have already concluded that such approval directly and materially advances the government interest in protecting consumer privacy. We also note that opt-in, as we define the requirement,[144] is not the most restrictive approach the Commission could adopt. Requiring express prior written approval, such as a letter of authorization, would be the most restrictive means of obtaining customer approval.

61. We reject some commenters' arguments that section 222(c)(2)[145] requires express written authorization by a customer before a carrier may disclose CPNI to a third party.[146] We reiterate our prior conclusion that section 222(c)(2) applies only to customer-initiated requests and does not circumscribe the form of "approval" that a carrier may secure from its customer under section 222(c)(1) for use and disclosure of CPNI.[147] But we do find these commenters' positions probative of (i) the absence of any burden on actual commercial speech from constraints on third party disclosure, and (ii) the greater consumer privacy interest in preventing unwanted third party disclosures.

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[142] *See* Qwest May 14, 2002 *Ex Parte* Letter, App. C (filing with Arizona Corporation Commission dated March 29, 2002). Notably, Qwest appears to have changed its position after consumer complaints about its CPNI disclosure policies (particularly its vague notices), resulting in investigations by various state Attorneys General and state commissions. Although initially indicating that it opposed opt-in even for third party disclosures, its recent *ex parte* submissions indicate its acceptance of some constraints on third-party disclosure.

[143] *Id.* (page 10, answer (i)).

[144] *See* Appendix B, § 64.2003(h).

[145] Section 222(c)(2) states that "[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2).

[146] Verizon Reply Comments at 4; Nextel Comments at 12 (. . . "section 222(c)(2) [requires] that the customer submit an affirmative written request to the BOC or its affiliate before such information may be disclosed to their competitors."); *see also* Verizon Feb. 20, 2002 *Ex Parte* Letter, attached presentation at 1 (stating that carrier joint marketing with providers of medical products and telemarketing retailers "have no basis in fact and would be beyond scope of opt-out rule" and "most recent publicity has centered around disclosure to non-affiliates, which requires prior written consent").

[147] *CPNI Order*, 13 FCC Rcd at 8125-26, para. 84.

62. We have also examined opt-out as an alternative, and find that it would not be an effective means of protecting consumers from the far more substantial harms that are attendant upon unknowing and unwanted third-party disclosures. Some commenters recognize the possibility that customers may not see, read or understand notices informing them of third-party sharing. But, in contrast to intra-company sharing, there is no ongoing customer relationship or Commission enforcement authority over third-party recipients that would mitigate the harms from unwanted or inadvertent third-party disclosures that are possible with opt-out. This is a particular concern given empirical evidence that the method of approval significantly impacts the level of disclosure of personal information. Testimony submitted to the Federal Trade Commission (FTC) shows that opt-out results in disclosure rates of 95 percent,[148] but when the default is opt-in, 85 percent of consumers would choose not to provide their data.[149] In contrast, an opt-in approval offers greater protection for consumers' privacy. In an opt-in regime, carriers have incentives to ensure that consumers are aware of CPNI notices, that such notices are comprehensible, that the methods for consumers to opt-in are not burdensome, and that consumers are given incentives to opt-in.[150] Opt-out regimes tend to reverse these incentives.

63. Accordingly, we conclude that opt-in for third party disclosures satisfies the narrow tailoring prong of *Central Hudson* because it does not impose any substantially greater burden on speech than is necessary to achieve the government's interest. We note that our decision to establish an opt-in requirement is consistent with and draws support from the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Trans Union v. FTC.*[151] In this case, the court upheld the FTC's application of an opt-in mechanism to obtain consumers' approval for the use of private information in credit reports for target marketing. In so doing, the court held that an individual's privacy interests in personal information "are defined not only by the content of the information, but also *by the identity of the audience and the use to which the information may be put.*"[152] Our analysis recognizes that the harms to customer privacy and the speech interests of the carriers are different in the context of third-party disclosure. *Central Hudson* requires that we recognize these differences, and we do so. While the means employed to protect the greater consumer privacy interest with respect to third-party disclosure of CPNI is more stringent, as discussed above, it reflects a narrowly

[148] *See* Progress & Freedom Foundation Reply Comments at 5; Qwest May 14, 2002 *Ex Parte* Letter, App. C (filing with Arizona Corporation Commission dated March 29, 2002).

[149] Progress & Freedom Foundation Reply Comments at 5.

[150] EPIC et al. Reply Comments at 5 ("Opt-out regimes create an economic incentive for businesses to make it difficult for consumers to exercise their preference not to disclose personal information to others.").

[151] *Trans Union Corp. v. Federal Trade Comm'n.*, 267 F.3d 1138, 1143 (D.C. Cir. 2000), *petition for cert. pending* (finding that requirement of customer opt-in approval before a credit reporting agency could use collected credit information for target marketing satisfied intermediate First Amendment scrutiny because selection of only "marginally" less restrictive alternative – opt-out – was not required under *Central Hudson* test).

[152] *Id.*

tailored fit and "proper balancing of the benefits and harms of privacy,"[153] which *Central Hudson* requires of any privacy regulations that impact a carrier's commercial speech interests.

b. Disclosure to Affiliates that Provide no Communications-Related Services

64. We find that the same factors we consider above weigh in favor of requiring opt-in before a carrier may share CPNI with its affiliates that do not provide communications-related services. We find that CPNI dissemination to such affiliates is far more similar to third party dissemination than to the sharing of CPNI with affiliates that provide communications-related services, and thus warrants a similar level of protection as that required for third party disclosure.

65. *Central Hudson Analysis.* Applying *Central Hudson*, we find that opt-in in this context directly and materially advances the government's interest, which is to ensure that customers give their knowing approval to disclosure of CPNI for purposes unrelated to obtaining communications-related services from their carrier (or its affiliates and partners). As noted, disclosure to affiliates that offer no communications-related services is strikingly similar to disclosures to unrelated parties, and the record has shown that the privacy interests in such types of disclosures – which are far more substantial than for disclosures to carriers for communications-related purposes[154] – will be protected to a greater extent by the express consent under opt-in approval, which best prevents against inadvertent disclosures.[155]

66. Balancing the costs and benefits of opt-in for this type of disclosure under *Central Hudson,* we conclude that requiring opt-in approval before sharing CPNI with affiliates that do not provide communications-related services is narrowly tailored to protect consumers' privacy interests. Considering consumers' privacy interests, the empirical evidence cited above for customer expectations holds equally true for entities that, while technically affiliated with a telephone company, do not provide communications-related services. In various studies, consumers have stated that they do not want their CPNI released to anyone outside their telephone company.[156] There is no evidence in the record to suggest that customers expect or want marketing from an affiliate that does not offer communications-related services and may not even have a similar name as their telephone company. As we noted above, carriers have an incentive not to misuse CPNI, as otherwise they risk losing the customer. This incentive diminishes or disappears entirely, however, if the solicitation is not identifiable as coming from the carrier or within its corporate family.

67. Application of opt-in in this context significantly advances the consumer interest at the heart of section 222. If, despite the advocacy in this proceeding, a carrier were to share CPNI with an affiliate that did not provide communications-related services, such use would fall

[153] *U S WEST v. FCC,* 182 F.3d at 1235.

[154] *See* paras. 53-55.

[155] *See* paras. 57-63.

[156] Harris 2002 Survey at 44; Cincinnati Bell Study at 2; Qwest Reply Comments at 18, n.58.

outside the consumer's reasonable expectation that CPNI would only be used by the telephone company for solicitation of communications-related services.[157] Moreover, misuse by such affiliates is less likely to result in the loss of the customer, so the affiliate would not have the same mitigating incentive to guard against misuse of CPNI as the carrier would when conducting its own solicitation. Thus, the analysis for affiliates that do not provide communications-related services parallels our reasoning regarding disclosure to third parties, who have no immediate carrier-customer relationship to maintain and consequently no incentive to use CPNI in accordance with a customer's expectations.

68. Considering the burdens on carriers' speech from having to obtain a customer's express consent, we observe that while some commenters discuss intra-company sharing in general terms, others acknowledge that they are advocating opt-out approval only for affiliates that provide communications services.[158] Therefore, the record demonstrates that the actual burden on carriers' speech is low, as the only burden demonstrated on the record would be a carrier's inability to market communications-related services in conjunction with an affiliate. Thus, on this record, our balance of privacy interests and carrier speech burdens persuades us that opt-in is a proportionate and narrowly tailored means to protect the governmental interest.

3. State Choice

69. In this Order, we reconfirm our decision to exercise preemption authority on a case-by-case basis.[159] As the Commission found in the *CPNI Order*, the Commission may preempt state regulation of intrastate telecommunications matters "where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects."[160] Because no specific state regulations are before us, we do not at this time exercise our preemption authority. We will examine any potentially conflicting state rules brought before us on a case-by-case basis.[161]

70. We differ from our earlier approach in one respect. Should states adopt CPNI requirements that are more restrictive than those adopted by the Commission, we decline to apply any presumption that such requirements would be vulnerable to preemption. We recognize

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[157] *Id.*

[158] *See, e.g.*, AT&T Wireless Comments at 2 ("AWS supports the use of an 'opt-out' mechanism for obtaining customer approval before using CPNI to provide telecommunications services other than those from which the CPNI is derived."); Sprint Comments at 5 ("[T]he fact that carriers have . . . flexibility [to devise methods to meet section 222 obligations] does not mean that they are violating Section 222 and using their customers' CPNI to market the products and services offered by their affiliates or sharing their customers' CPNI with such affiliates without first informing their customers of their CPNI rights and gaining their customers' approval for such use.")

[159] *CPNI Order* at 8077-78, para. 18; *CPNI Reconsideration Order* at 14466-67, para. 113.

[160] *CPNI Order* at 8075-76, para. 16.

[161] We disagree with those commenters who urge us to preempt state regulations. Qwest May 30, 2002 *Ex Parte* Letter; Verizon Feb. 20, 2002 *Ex Parte* Letter, Attach. at 4.

this approach differs from our approach in earlier CPNI orders,[162] but the change is necessary as a result of the change in approach we adopt in this Order. Prior to the Tenth Circuit's opinion, our analysis did not incorporate First Amendment concerns, and, by requiring opt-in for all customer approval under section 222(c)(1), established a relatively more burdensome means of ascertaining customer approval for the use of CPNI. As a practical matter, the only more restrictive approach that could be adopted, as noted above, would be express written approval. In this Order, as required by the Tenth Circuit, we have conducted a *Central Hudson* analysis of the burden of different approval mechanisms on protected speech, balancing carrier and customer rights to commercial speech with consumers' rights to privacy in their CPNI.

71. We conclude that carriers can use opt-out for their own marketing of communications-related services, as described above, which is less burdensome than opt-in. We reach this conclusion based on the record before us, but must acknowledge that states may develop different records should they choose to examine the use of CPNI for intrastate services.[163] They may find further evidence of harm, or less evidence of burden on protected speech interests. Accordingly, applying the same standard, they may nevertheless find that more stringent approval requirements survive constitutional scrutiny, and thus adopt requirements that "go beyond those adopted by the Commission."[164] While the Commission might still decide that such requirements could be preempted, it would not be appropriate for us to apply an automatic presumption that they will be preempted. We do not take lightly the potential impact that varying state regulations could have on carriers' ability to operate on a multi-state or nationwide basis. Nevertheless, our state counterparts do bring particular expertise to the table regarding competitive conditions and consumer protection issues in their jurisdictions, and privacy regulation, as part of general consumer protection, is not a uniquely federal matter.[165] We

[162] Previously, the Commission has noted that state rules "vulnerable to preemption are those that (1) permit greater carrier use of CPNI than section 222 and the Commission's rules allow, or (2) seek to impose additional limitations on carriers' use of CPNI." *CPNI Reconsideration Order* at 14465-66, para. 112. *See also CPNI Order* at 8077-78, para. 18.

[163] For example, we note that Arizona is currently examining whether to require carriers to provide verification to customers regarding customers' CPNI elections. *See* Arizona Corporation Commission Docket No. RT-00000J-02-0066, Order, Decision No. 64375 (Jan. 28, 2002); Arizona Corporation Commission Staff Memorandum, Docket No. RT-00000J-02-0066 (Feb. 15, 2002). We note that states may conduct their own examination of such alternatives and determine, based on the record developed in those proceedings, whether such additional safeguards are warranted.

[164] NASUCA Apr. 12, 2002 *Ex Parte* Letter at 8. *See also* Arizona Corporation Commission Jan. 28, 2002 *Ex Parte* Letter at 2.; Letter from Jay Stovall, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed Feb. 21, 2002) (Montana PSC Feb.12, 2002 *Ex Parte* Letter) at 2; Texas Office of Public Utility Counsel April 16, 2002 *Ex Parte* Letter at 4. We also note in this respect that state commissions are charged with implementing differing state laws, regulations and constitutions. *See, e.g.*, Arizona Corporation Commission Jan. 28,2002 *Ex Parte* Letter discussing Arizona's state constitutional right to privacy. *See also* California Public Utilities Commission Comments at 6 (noting that California amended its Constitution to make privacy an inalienable right).

[165] In dealing with issues that have serious implications for consumers' day-to-day use of their telecommunications services, such as the protection of their personal information, we look upon the states as partners whose experience and unique perspective informs our own. *See, e.g., In the Matter of Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking 14 FCC Rcd 7492, 7507-08, para. 26 (1999) ("We (continued....)

decline, therefore, to apply any presumption that we will necessarily preempt more restrictive requirements.

72. Indeed, this approach is consistent with that taken in other Commission proceedings issued subsequent to the previous CPNI orders. In the *UNE Remand Order*, the Commission found that state commissions had the authority to impose additional unbundling obligations upon incumbent LECs, beyond those established by the Commission, as long as the state's additional obligations meet the requirements of section 251 and the Commission's analytical framework.[166] Section 251(d)(3) specifically allows state commission to establish access and interconnection obligations that are "consistent with the requirements" of section 251.[167] The Commission found that additional obligations imposed by the states are not necessarily inconsistent with the statute and the Commission's rules. Like our determination today that our CPNI rules establish the minimum requirements for carriers, the Commission in the *UNE Remand* Order also found that states could not remove unbundled network elements from the Commission's list.[168]

73. In addition, in the slamming context, the Commission acknowledged that while "it may be simpler for carriers to comply with one set of verification rules, [the Commission would not] interfere with the states' ability to adopt more stringent regulations."[169] As the Commission stated in the *Slamming Order*, "the Commission must work hand-in-hand with the states towards the common goal of eliminating slamming. States have valuable insight into the slamming problems experienced by consumers in their respective locales and can share their expertise with this Commission."[170] Furthermore, our rules implementing truth-in-billing requirements for all common carriers state that "the requirements [. . .] are not intended to preempt the adoption or enforcement of consistent truth-in-billing requirements by the states."[171]

(Continued from previous page)
look upon this [. . .] as another phase of our partnership with the states to promote competition and to combat telecommunications-related fraud. Through information sharing and dialogue, we intend to work together with the states towards the common objective of truth-in-billing.").

[166] *UNE Remand Order*, 15 FCC Rcd 3696, 3767, para. 154 (1999), *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[167] 47 U.S.C. § 251(d)(3).

[168] *UNE Remand Order*, 15 FCC Rcd at 3767, para. 154.

[169] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, 16036, para. 87 (rel. Aug. 15, 2000) (*Slamming Third Report and Order*); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Erratum, DA 00-2192 (rel. Oct. 4, 2000); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Errata, DA 00-2163 (rel. Sept. 25, 2000).

[170] *Slamming Third Report and Order,* 15 FCC Rcd at 16036, para. 87.

[171] 47 C.F.R. § 64.2400(c). *See also Truth-in Billing Order.*

74. We note that we would be willing to preempt state requirements in the event that numerous different approval schemes make it impracticable for carriers to obtain customer approval for the use of CPNI. Carriers can always establish that burdens from state and federal CPNI regulation are unworkable. By reviewing requests for preemption on a case-by-case basis, we will be able to make preemption decisions based on the factual circumstances as they exist at the time and on a full and a complete record.

B. Other Approval Issues

75. In the foregoing section of the Order we adopt today, we address the core of the Tenth Circuit's order by establishing narrowly tailored means of advancing the privacy interests Congress sought to protect under section 222 and, in doing so, recognize that harms to both privacy and commercial speech interests may differ depending on how a carrier might choose to use CPNI. Commenters have also raised a variety of other issues by petition and in response to the *CPNI Clarification Order*, some related to and some independent from consideration of whatever mechanism we might adopt to determine whether customers have granted "approval" under section 222(c)(1). Thus, while the above approval mechanism is directly responsive to the Tenth Circuit, we resolve these other issues as set forth below to provide the greatest degree of certainty in the industry regarding handling of CPNI.

76. As an initial matter, we confirm our previous determinations that the Tenth Circuit only vacated the portion of our original *CPNI Order* relating to the opt-in mechanism for determining customer approval under section 222(c)(1). Unless otherwise specifically changed by this Order, the rules and mechanisms we have otherwise adopted to implement section 222 remain in place. Accordingly, we reaffirm our total service approach,[172] which was originally designed to define the limits of what a carrier could do with CPNI without first obtaining the customer's "approval." We also clarify the extent to which we elect to grandfather approvals already obtained under our interim rules. Additionally, we decline to establish rules that would allow customers to restrict carriers from using CPNI regardless of whether such use might otherwise be allowed under the statute, although we certainly encourage carriers to continue to honor customers' requests in this respect.

77. While we also reaffirm many of our existing rules with regard to the form and content of opt-in or opt-out notices, we provide further clarification in Section III.C with regard to the form, content, and frequency of such notices. As part of this clarification, we explain that carriers using opt-out notices will be subject to specific requirements designed to ensure that such notice allows a customer to comprehend and effectively exercise his or her approval rights, while carriers using opt-in notices will be subject to relatively fewer specific requirements. In particular, we adopt as permanent the interim requirement that carriers using opt-out must allow a minimum period of thirty days from receipt of notice to assume a customer's implicit approval to use CPNI.

[172] *See* Section III.B.2, *infra*.

78. After addressing issues related to how customers receive notice of their ability to elect approval, we address several final issues relating to the application of section 222 in Section III.D of this Order. First, we forbear from applying CPNI affirmative approval requirements to the use of preferred carrier freeze information, even though such information is appropriately considered CPNI, as we find such forbearance to be required under section 10 of the Act. Second, we decline to modify our CPNI rules to address several issues raised by MCI WorldCom that are related to the use of CPNI by competitive local exchange carriers. Third, we reaffirm our conclusion that the term "information" in section 272(c)(1) does not include CPNI as defined under section 222, and we explicitly hold that this conclusion is not impacted by the opt-in/opt-out mechanism we adopt today.

1. The Tenth Circuit's Order Vacated Only Those CPNI Rules Related to Opt-In

79. We affirm our previous determinations that the "Tenth Circuit vacated only the specific portion of our CPNI rules relating to the opt-in mechanism."[173] As the Commission noted in seeking comment in the *Clarification Order Further NRPM*, the Tenth Circuit's order was subject to interpretation as to whether it vacated the entirety of the CPNI rules or just those related to the opt-in requirement.[174] However, as we have twice previously held, substantial portions of the Commission's CPNI rules were not relevant to the issue before the court and were beyond the scope of the court's constitutional analysis.[175]

80. In *AT&T v. New York Telephone, d/b/a Bell Atlantic – New York*[176] and in the *CPNI Clarification Order*, the Commission determined that the court's opinion in *U S WEST v.*

[173] *CPNI Clarification Order*, 16 FCC Rcd at 16512, para. 13.

[174] *CPNI Clarification Order*, 16 FCC Rcd at 16512, para. 13. *See also* USTA Comments at 16 ("[t]he fact that the Tenth Circuit 'vacated' the *CPNI Order* raises a question as to which of the Commission's rules, if any, survived the Tenth Circuit's ruling"); ALLTEL Comments at 3 ("ALLTEL believes that there remain serious questions as to the extent of the Court's order and its effect ultimately on the vitality of the Commission's CPNI rules in their entirety."); NTCA Comments at 2 ("[i]n reaching a conclusion, the Commission must consider the Tenth Circuit's opinion that vacated at least a portion of the Commission's CPNI rules").

[175] To the degree that such action is necessary, we grant USTA's request that we "remove any uncertainty as to all matters previously addressed in [the] CPNI Order and Order on Reconsideration" (USTA Comments at 16) and formally readopt all previously adopted CPNI rules not related to opt-in or otherwise amended in this Order. *See also* Verizon Wireless Reply Comments at 7 ("If the Commission determines that it must take further action to maintain these other aspects of its CPNI policy, it should re-adopt the rules and policies contained in the [*CPNI Reconsideration Order*] in the instant rulemaking proceeding."). To allay any concerns regarding the status of our rules unrelated to opt-in after *U S WEST v. FCC*, we herein formally readopt the relevant reasoning and rules adopted in the *CPNI Order* and *CPNI Reconsideration Order*. To the degree that rules or reasoning related directly to the opt-in provisions of our previous orders, this Order will supplement any such reasoning.

[176] *AT&T Corp., v. New York Telephone Company, d/b/a Bell Atlantic – New York*, 15 FCC Rcd 19997, 20004, para. 17 (2000) (*AT&T v. Bell Atlantic Order*) (concluding in the context of a formal complaint regarding certain CPNI issues, that "when read in context, the [Tenth Circuit's] vacatur order related only to the discrete portions of the order and rules that were before the court in light of the parties' petitions for review and were addressed by the court.").

FCC analyzed only the constitutionality of the Commission's establishment of the opt-in regime as its interpretation of the customer approval requirement of section 222(c)(1). The Commission determined that the court's vacatur order applied only to the discrete portions of the *CPNI Order* and rules requiring opt-in customer approval, which were the specific issues before the court.[177] The Commission concluded that the remainder of the CPNI rules remain in effect.

81. As we found in our previous orders, we find no compelling evidence to convince us that the court intended to "take the unusual step of vacating portions of the order and rules not before it"[178] without so stating explicitly, despite the fact that the court's mandate is worded quite broadly.[179] A number of commenters in the instant proceeding support the Commission's determination, agreeing that "the [Tenth] Circuit vacated the portion of the CPNI order and regulations relating to customer opt-in as a violation of the First Amendment."[180] A few commenters argue that our previous determinations were erroneous and that *U S WEST v. FCC* did, in fact, vacate all of the Commission's CPNI rules.[181] However, beyond pointing to the broad language of the court's mandate, which exceeds the scope of the question presented to the court, these commenters present no new compelling argument that we have not already considered, and thus fail to convince us that the court intended to take the unusual step of vacating rules not before it.

82. We also reject arguments that simply by seeking comment on our notice rules, we have somehow undermined our holding.[182] We sought further comment in the *CPNI Clarification Order* without assuming any specific outcome, and effective administration requires us to periodically review regulatory requirements to ensure that they remain valid in

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[177] *CPNI Clarification Order,* 16 FCC Rcd at 16510, para. 7.

[178] *Id.*

[179] "Accordingly, we VACATE the FCC's CPNI Order and the regulations adopted therein." *U S WEST,* 182 F.3d at 1240.

[180] EPIC et al. Comments at 2. See also, NAAG Dec. 21, 2001 *Ex Parte* Letter at 3 (The Tenth Circuit "vacated the portion of the Commission's CPNI order and regulations that required customer opt-in before carriers could use the information outside of one of the statutory exceptions."); OPASTCO Comments at 3 ("Specifically, the Court vacated the Commission's 'notice and opt-in' requirement before a carrier may use CPNI to market services outside the customer's existing service relationship with that carrier.") (citation omitted); Direct Marketing Association Comments at 2, n.1 ("The court's decision, however, makes plain that any of the subparts of the rule that entail opt-in are invalid."). *See also* AT&T Wireless Comments at 3, n.5; California Public Utilities Commission Comments at 3; National Association of Regulatory Utility Commissioners Comments at 1; Letter from Pam Whittington, Public Utility Commission of Texas, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed March 1, 2002) (Texas PUC March 1, 2002 *Ex Parte* Letter) at 1.

[181] See CTIA Comments at 2-6 ("However, the court did not simply vacate the specific opt-in method of customer approval, it vacated the entire section 64.2007 rulemaking as constitutionally inadequate, failing all three prongs of *Central Hudson.*"); AT&T Reply Comments at 11 ("The Tenth Circuit expressly vacated the entire order, including the discussion of section 272."). *See also* ASCENT Comments at 8.

[182] CTIA Comments at 4.

light of experience and changed circumstances over time.[183] In any event, the *CPNI Clarification Order* posed questions that were broader than the court's vacatur, and thus interested parties were provided notice of our intention to consider aspects of our rules beyond those impacted by *U S WEST*. The rules we adopt in this Order are consistent with the scope of the issues presented in the *CPNI Clarification Order*.

2. Total Service Approach

83. We affirm the continued use of the total service approach to define what carriers may do under section 222(c)(1) without notice to customers.[184] Based on the language of section 222(c)(1), Congress intended that a carrier could use CPNI without customer approval, but could only do so depending on the service(s) to which the customer subscribes.[185] The total service approach defines the parameters of those services and thus defines what carriers may do without the approval of the customer.

84. In reaching our conclusion, we note that every commenter that addressed this issue save one[186] supports retaining the total service approach,[187] largely because the original justification for its adoption remains valid even if an opt-out system is applied to some uses of CPNI. Accordingly, today, as when we originally adopted it, the total service approach is a reasonable implementation of section 222(c)(1) and remains reasonable regardless of the mechanism we adopt in this Order to provide for customer approval of other uses of CPNI. We also note that no better alternative has been proposed. The sole commenter to question the

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[183] *See, e.g., Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Notice of Proposed Rulemaking, 16 FCC Rcd 22781, 22782 (2001) (*Triennial Review*) at para. 1 ("We seek to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act in light of our experience over the last two years, advances in technology, and other developments in the markets for telecommunications services.").

[184] Section 222(c)(1) provides that, except with the approval of the customer, a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in the provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publication of directories."

[185] *CPNI Order*, 13 FCC Rcd at 8080, 8083-84, 8087-88, paras. 23-24, 30, 35. *See also CPNI Reconsideration Order*, 14 FCC Rcd at 14421, para. 17.

[186] *See* CenturyTel Comments at 11-12.

[187] Nextel Comments at 7, n.18 ("Adoption of a notice and opt-out approach does not require any modification to the Commission's total service approach, because the notice and opt-out framework in no way should affect the efficiency benefits to customers from the total service approach."); Verizon Wireless Comments at 15 ("[t]he Commission's [total service approach] policy should be unaffected by adoption of a notice and opt-out mechanism ... the [total service approach] was premised on the finding that customers fully expect a carrier to use CPNI to market services to them that are within the bounds of the existing carrier-customer relationship."). *See also* AT&T Comments at 11; AT&T Wireless Comments at 9-11; Cingular Wireless Comments at 7-8; Verizon Comments at 12.

approach, CenturyTel, basically requests that we abandon the total service approach and instead adopt the "single category approach."[188] The single category approach was considered and rejected in the *CPNI Order* and again rejected in the *CPNI Reconsideration Order*.[189] We again decline to adopt such an approach because that would vitiate the total service approach and attendant protection of customers' personal information. As the Commission has stated, "[t]he hallmark of the total service approach is that the customer, whose privacy is at issue, establishes the bounds of his or her relationship with the carrier."[190] CenturyTel has provided no new evidence to convince us to reconsider the total service approach and the benefits and protections it affords to consumers and carriers alike. Finally, in the absence of comments indicating that the total service approach is undermined by our CPE bundling rules, we find no reason to modify our interpretation of section 222(c)(1) or the total service approach at this time.[191]

3. Grandfathering of Previously Obtained CPNI Approvals

85. We allow carriers to continue to use CPNI approvals previously received from customers based on our interim rules with the following limitations. Carriers cannot use or disclose CPNI in ways that require opt-in under the rules we adopt herein (*e.g.*, third party disclosure) without first obtaining opt-in approval.[192] Accordingly, carriers that obtained opt-in approval prior to *U S WEST*, or carriers that voluntarily obtained opt-in approval during the period since *U S WEST*, where the other requirements of our rules were met, can continue to use those approvals. However, carriers that provided opt-out notices can only use customers' opt-out approval for marketing of communications-related services by carriers, their affiliates that provide communications-related services, and carriers' agents, joint venture partners and independent contractors.

4. Customer Right to Restrict Carrier Use of CPNI for Marketing Purposes

86. In the *CPNI Order Further NPRM*, the Commission sought comment on whether customers should be able to restrict a telecommunications carrier from using, disclosing or permitting access to CPNI, regardless of whether the use might otherwise be allowed under

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[188] The "single category approach would have permitted carriers to use CPNI obtained from the provision of any telecommunications service, including local or long distance or CMRS, to market any other service offered by the carrier, regardless of whether the customer subscribes to such service from that carrier." *CPNI Reconsideration Order*, 14 FCC Rcd at 14421, para. 18.

[189] *CPNI Order*, 13 FCC Rcd at 8083, 8085-8091, paras. 29, 33, 39. *CPNI Reconsideration Order*, 14 FCC Rcd at 14421-14422, paras. 19-20.

[190] *CPNI Reconsideration Order*, 14 FCC Rcd at 14422, para. 19.

[191] In the *CPNI Clarification Order* the Commission sought comment as to whether the issues raised in the *Computer II* proceeding should affect the interpretation of section 222(c)(1). 16 FCC Rcd at 16516, para. 21.

[192] Carriers were on notice that such a determination was a real possibility. *See CPNI Clarification Order*, 16 FCC Rcd at 16510, para. 8 ("Specifically, *pending resolution of this docket*, carriers may proceed to obtain consent consistent with the notification requirements in Section 64.2007(f), using an opt-out mechanism or, should they choose to do so, an opt-in mechanism") (emphasis added).

sections 222(c)(1)(A) and (B).[193] We find that such a restriction is not warranted under section 222, consistent with the Tenth Circuit's decision, or currently necessary to protect customer privacy.

87. Section 222 does not specifically address whether customers can restrict a telecommunications carrier from using, disclosing or permitting access to CPNI within the circumstances defined in sections 222(c)(1)(A) and (B).[194] If section 222 allowed customers to do so, customers could prevent carriers from using CPNI for all marketing purposes, even if the marketing was within the carrier's total service offering. However, as we have noted previously, section 222 "balances principles of privacy and competition in connection with the use and disclosure of CPNI and other customer information."[195] Therefore, where the statute is silent, we weigh both of these interests. Most commenters urged the Commission not to adopt additional restrictions, arguing that such restrictions would be broader than that required by section 222 and would disallow carriers from engaging in the behavior necessary and appropriate in the provision of telecommunications services.[196] While we do not explicitly endorse this view, we must take notice of the fact that the Tenth Circuit's recognition of a carrier's right to use CPNI to engage in protected commercial speech strongly counsels against imposing additional restrictions. While section 222 imposes requirements to obtain approval for the use of CPNI under certain circumstances, and thus explicitly recognizes the interest of consumers in keeping this information private, the Tenth Circuit has also made clear that restrictions on the use of CPNI must be narrowly tailored.[197] A broad customer right to prevent any use of CPNI regardless of the uses allowed under section 222 would appear, on its face, to fail the Tenth Circuit's requirement.

88. At any rate, as several commenters noted, adding a new rule allowing customers to restrict a carrier's use of CPNI for all marketing purposes would do little to further the goal of protecting consumers' privacy.[198] Commenters argue that mechanisms allowing customers to limit unwanted marketing solicitations already exist in the form of do-not-call or do-not-contact

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[193] *CPNI Order*, 13 FCC Rcd at 8200-8201, paras. 204-205.

[194] *Id.*

[195] *CPNI Order*, 13 FCC Rcd at 8073, para. 14.

[196] Omnipoint March 30, 1998 Comments at 2 ("[t]o add to this regime an opt-out requirement for CPNI within the total service offering would be contrary to the structure of the statute"). *See also* AT&T March 30, 1998 Comments at 1-8; Bell Atlantic March 30, 1998 Comments at 1-3; BellSouth March 30, 1998 Comments at 1-4; GTE March 30, 1998 Comments at 2-4; Intermedia March 30, 1998 Comments at 3-7; MCI March 30, 1998 Comments at 2-6; SBC March 30, 1998 Comments at 1-8; Sprint March 30, 1998 Comments at 1-5; USTA March 30, 1998 Comments at 2-4; U S WEST March 30, 1998 Comments at 2-5; Vanguard March 30, 1998 Comments at 3-6. Although the comments we received applied to our previously adopted approval regime (opt-in), the arguments made by commenters continue to have force under the rules we adopt in this Order.

[197] *U S WEST*, 183 F.3d at 1238.

[198] Bell Atlantic March 30, 1998, Comments at 2.

lists kept by the carrier.[199] The Telephone Consumer Protection Act and subsequent regulations require carriers to maintain and honor lists of consumers who have requested that they not receive telephone solicitations.[200] Coupled with section 222 and our CPNI rules, these mechanisms appear to provide safeguards that consumers who do not want to receive telemarketing or other unwanted marketing contacts can affirmatively remove themselves from carriers' marketing lists.[201] We also recognize that additional regulations often require a financial and time commitment from carriers to implement new rules. Here, any such costs would not be justified by the incidental additional privacy protection further CPNI restrictions would afford consumers.[202] We decline to read section 222's ambiguity in this respect to allow such a broad restriction. Nevertheless, we approve of voluntary mechanisms that keep consumers' information confidential, and encourage carriers to continue to respect the privacy interests of their customers by using them.[203]

C. Customer Notification Requirements

89. In this Order we largely affirm our previous notice rules,[204] which specify, *inter alia*, that a carrier's notification "must be comprehensible and must not be misleading," and that written notices "must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to a customer."[205] A telecommunications carrier's solicitation for approval must also be proximate to the notification of a customer's CPNI rights.[206] Failure to comply with these rules will subject carriers to appropriate enforcement action by the Commission. This Order also makes changes to the notice rules based on industry experience since their adoption, as well as some changes that are necessary to synchronize the notice requirements with the approval methods we adopt herein. Specifically, with respect to opt-in notices, we allow carriers

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[199] Among those carriers noting that they had such lists were GTE and Bell Atlantic. Bell Atlantic March 30, 1998 Comments at 3; GTE March 30, 1998 Comments at 3.

[200] 47 U.S.C. § 227(c)(1)(A); 47 U.S.C. § 64.1200(e)(2).

[201] The record does not indicate that these mechanisms are ineffective.

[202] Intermedia March 30, 1998 Comments at 5-6.

[203] We note that some financial institutions have marketed the fact that they have voluntarily adopted privacy protections that exceed that which is required under Gramm-Leach-Bliley. We welcome such efforts to further educate consumers of their privacy choices regarding CPNI and encourage carriers to undertake such actions.

[204] Many commenters support our continued use of the existing notice rules. Verizon Wireless Reply Comments at 4 ("With the addition of a thirty-day opt-out period following notice, the Commission's existing notice rules will sufficient [sic] to ensure knowing, informed approval."); Worldcom Reply Comments at 3 ("The Commission's current rules already outline specific requirements on customer notification, including the provision of sufficient information that is comprehensible and not misleading."). *See also* Verizon Comments at 13; Verizon Reply Comments at 8. A few, however, urge the Commission to adopt general principles or guidelines and allow carriers to determine how to implement those guidelines. *See* SBC Comments at 15.

[205] *See* Appendix B, 47 C.F.R. §§ 64.2008(c)(4)-(c)(5).

[206] *See* Appendix B, 47 C.F.R. § 64.2008(c)(10).

more flexibility to determine what type of notices best suit their customers' needs, and with respect to opt-out, we adopt more stringent notice requirements to ensure that customers are in a position to comprehend their choices and express their preferences regarding the use of their CPNI. In addition, we allow carriers to choose whether to use an opt-in or opt-out method for obtaining customer approval for carriers and their affiliates to use CPNI to market communications-related services.[207] We recognize, as SBC points out, that different types of customer relationships may be better suited to different types of notice and approval methods.[208]

1. Form of Notice

90. We continue to allow carriers to use written, electronic, and oral notice to customers when soliciting opt-in approval. However, except as described below, we require carriers to provide some type of individual[209] tangible notice (written or electronic) to customers when soliciting opt-out approval. We continue to allow carriers to use oral notice to obtain limited, one-time use of CPNI, whether opt-in or opt-out.[210]

91. In addition, we allow carriers the flexibility to provide combined opt-out and opt-in notices or to provide such notices separately, at individual carriers' discretion. Accordingly, a carrier seeking approval to use CPNI internally and to share with third parties could combine notice for opt-out and opt-in CPNI uses on one notification, so long as it complies with our notice rules. Alternatively, we allow carriers that prefer to do so to provide separate notices to customers seeking different types (opt-in or opt-out) of CPNI approval. Of course, carriers may choose to use opt-in for all CPNI uses, in which case a carrier making such an election can provide a single notice to its customers. Finally, we allow carriers to provide notice based on the CPNI usage approvals they seek to obtain. Accordingly, a carrier that does not intend to disclose CPNI to third parties or affiliates that do not provide communications-related services does not need to provide to its customers notice regarding opt-in. Carriers that do not intend to use CPNI outside of the total service approach do not need to provide notice to their customers at all.

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[207] For this purpose, we also allow carriers to choose whether to use opt-in or opt-out on an individual customer basis. However, we caution carriers that the Act's prohibition against "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services" applies to CPNI practices. 47 U.S.C. § 202(a). We note that, as a general matter, a carrier can certainly elect to use opt-in to obtain customer approval of the use of CPNI by a carrier and its affiliates for marketing communications-related services, even though we have explicitly permitted carriers to use the relatively less burdensome alternative of opt-out. Thus, we leave to carriers the decision as to which approval method to use, and do not prohibit them from using opt-in even if they are not required to do so.

[208] SBC Comments at 15. *See also* AT&T Comments at 3, n.1; NTCA Comments at 2.

[209] By individual, we mean that carriers must provide notice to each customer from which it seeks consent to use CPNI. Broadcast notice methods such as newspaper publication will not satisfy our requirements.

[210] The method of one-time approval will depend on whether the use qualifies for the opt-out method under our rules – as in the case of an inbound customer inquiry to a carrier. Uses that would not qualify for the opt-out – for example, a cold call by a competitor seeking access to the customer's CPNI – will require that the carrier obtain opt-in approval for the duration of the call. However, as we discuss in section III.C.2.a, we allow carriers to provide abbreviated notice to obtain CPNI approval for limited duration, one-time CPNI approval.

a. Electronic Notice

92. We allow carriers to provide CPNI notices to customers through the use of e-mail or other electronic formats,[211] such as a website, as urged by some commenters.[212] However, we recognize that consumers are deluged with unrequested or unwanted commercial e-mail ("spam") and could easily overlook a notice provided via e-mail. Accordingly, we require carriers to follow certain precautions to ensure that such notices will not be mistaken as spam. Such requirements directly and materially advance our goal of ensuring that consumers have the information necessary to make informed decisions regarding the use of their personal information.

93. We require carriers that use e-mail to provide opt-out notices to obtain express, verifiable, prior approval from consumers to send notices via e-mail regarding their service in general, or CPNI in particular.[213] In addition, we require carriers to allow consumers to reply directly to e-mails containing CPNI notices in order to opt-out. We also encourage carriers who elect to use e-mail for opt-in notices to accept replies, but, because we do not think it is necessary to ensure consumers' privacy choices are honored, we do not so mandate. Further, we require that opt-out e-mail notices which are returned to the carrier as undeliverable be sent to the customer in another form before carriers may consider the consumer to have opted-out. Finally, we require carriers that use e-mail to send CPNI notices to ensure that the subject line of the message clearly and accurately identifies the subject matter of the e-mail.

94. Carriers that elect to use other forms of electronic notice, such as notice provided on a website during the carrier selection process, are cautioned that, similar to our warning on the shrinkwrap/break-the-seal approach in the next section, such notice must comply with our form requirements (*e.g.*, placement so as to be readily apparent to the customer). In particular, we likely would not consider a CPNI notice that was combined with other legal terms and conditions, or other privacy information, to comply with our rules if the customer were deemed to have opted-in or opted-out simply by signing up for service.

b. Shrinkwrap or Break-the-Seal "Notice"

95. Commenters raise the issue of shrinkwrap or break-the-seal agreements,[214] and

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[211] We note that carriers who use electronic notice methods must abide by our generally applicable notice rules and safeguards (*i.e.*, record retention for at least one year, 47 C.F.R. § 64.2008(a)(2)), as well as the rules specifically applicable to electronic notice.

[212] CTIA Comments at 11; Verizon Reply Comments at 8.

[213] In addition, carriers must have procedures in place to allow consumers to: (1) discontinue receiving information via e-mail, and (2) update their e-mail addresses.

[214] "The shrinkwrap license gets its name from the fact that . . . packages are covered in plastic or cellophane 'shrinkwrap' and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package." *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

whether such agreements constitute effective solicitation of approval under section 222(c)(1).[215] While we decline to adopt more stringent notice requirements at this time, we confirm that all of the existing notice requirements generally applicable under section 222 apply equally when a carrier solicits customer approval through shrinkwrap or break-the-seal methods. As a threshold matter, we note that the distinctions between notice of a customer's rights, solicitation for approval to use CPNI, and the approval process sometimes become blurred.[216] In fact, shrinkwrap or break-the-seal approval "notice" implicates all three areas of our rules. Using a shrinkwrap or break-the-seal approach, a carrier[217] purports to provide "notice" of customers' CPNI rights to the customer – usually in connection with other terms and conditions of service – and claims to "solicit" consumers' approval for CPNI use and disclosure by asserting that by using the service or "breaking-the-seal" (as in the case of a cellular phone), the consumer has approved use and disclosure of his CPNI. Some shrinkwrap/break-the-seal approaches offer the consumer an opportunity to take some action regarding his CPNI,[218] while some do not.

96. We are concerned that the shrinkwrap/break-the-seal notices as they have been described to us are ineffective and may not comply with either the letter or spirit of our notice rules. However, in the absence of specific concerns on this record of abuse of these types of agreements, we do not find that additional restrictions beyond generally applicable notice requirements are warranted at this time. Nevertheless, we caution carriers that abuse of shrinkwrap or break-the-seal approaches will cause us to reexamine this question or initiate enforcement action.

2. Content of Notice

97. We largely affirm our previously adopted content rules with a few changes.[219] First, we allow carriers to obtain one-time limited use CPNI approval using a streamlined notice. Second, as discussed in more detail below, we require carriers to provide opt-out notices to their customers every two years. Accordingly, we require carriers to advise customers that if they have opted out previously, no action is needed to maintain the opt-out election. However, consumers who wish to reverse their previous decision to opt-out, or consumers who have not

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[215] The commenters who raise the issue generally assume or argue that shrinkwrap or break-the-seal approval is an acceptable "notice" method. *See* CTIA Comments at 14; Verizon Wireless Reply Comments at 4, n.7.

[216] "Prior to seeking customer approval . . . carriers must provide a one-time *notification* to the customer of her or his rights to restrict the use or disclosure of, and access to, her or his CPNI . . . . Once a customer is notified of her or his rights, the carrier may undertake a *solicitation* of the customer's approval." *CPNI Reconsideration Order*, 14 FCC Rcd at 14462, para. 103.

[217] We note that this type of "notice" has generally been discussed in connection with wireless carriers. However, this section applies to all telecommunications carriers and to any type of "notice" that operates like shrinkwrap or break-the-seal "notice."

[218] We note that an agreement that amounted to a customer providing "opt-in" approval by his or her action of accepting or using service may be titled "opt-in" by the carrier, but would likely operate as negative approval or opt-out approval – and might not satisfy our other notice requirements.

[219] *See* Appendix B.

previously opted out but wish to do so, must take action as described in the notice. Carriers that elect to provide opt-in notices more than once are required to advise customers that no action is needed to maintain their opt-in election. These requirements are necessary to minimize customer confusion and complaints regarding previously expressed privacy preferences.

a. Streamlined Consent for One-Time Use of CPNI

98. We grant in part MCI WorldCom's request to modify our notice requirements for customers placing inbound calls to telecommunications providers.[220] While we do not grant MCI's request in its entirety, we do allow carriers to omit the information described below in providing notice for limited, one-time use, where such information is not applicable to the circumstances for which the carrier seeks CPNI approval. This streamlining applies both to inbound and outbound customer contacts that seek CPNI approval only for the duration of the call, and is a reasonable way to further narrow application of the CPNI rules in light of the burden they might otherwise work on protected uses of CPNI for solicitation. However, we caution carriers to take a conservative approach in deciding which information is necessary for consumers to make informed decisions regarding their CPNI usage. Should we learn of abuses, we will not hesitate to readdress this issue, and to pursue enforcement actions against individual carriers. Finally, we note that this does not change the opt-in or opt-out requirement in any way, although we are aware that CPNI approval received for limited one-time use during an inbound call necessarily takes the form of an opt-in approval, because the carrier must obtain some sort of approval after giving the customer the required notice and soliciting the customer's approval to use the CPNI.[221]

99. Carriers may omit any of the following notice provisions if not relevant to the limited use for which the carrier seeks CPNI:

- Carriers need not advise customers that if they have opted-out previously, no action is needed to maintain the opt-out election. Obviously, if this is the first contact with the consumer, such a disclosure would be confusing and meaningless.[222]

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

[220] MCI WorldCom Petition at 14; *see also* Letter from Karen T. Reidy, WorldCom, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed Feb. 20, 2002) (WorldCom Feb. 20, 2002 *Ex Parte* Letter).

[221] A carrier that provides notice and then assumes opt-out approval from a customer's failure to object would violate our rule requiring carriers to wait thirty days after providing notice before assuming the opt-out approval has been granted. *See* section III.C.4.

[222] However, if a customer has opted-out previously, and assents to limited CPNI use for the duration of the call, the carrier cannot deem the customer to have rescinded the opt-out for other uses.

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

- In addition, carriers may omit disclosure of the precise steps consumers must take in order to grant or deny access to CPNI, as long as the carrier clearly communicates to the customer that the customer can deny access to his CPNI for the call.[223]

b. Availability of Customer Service Feature Information During Outbound Calls

100. We deny MCI WorldCom's request that we modify our interpretation of section 222(c)(1)(A) of the Act to enable carriers making sales calls to potential customers to access the CPNI records of those potential customers' without meeting the customer approval requirements previously adopted by the Commission.[224] In particular, MCI WorldCom states that it wants access to certain CPNI – the list of features that a potential customer receives from its current carrier – so that MCI WorldCom may make direct price comparisons against its own services in order to persuade the customer to choose MCI WorldCom as its local service provider.[225] Additionally, MCI WorldCom makes a second argument that this same customer feature information should be made available to smooth the process of provisioning a customer that has chosen to migrate from his former carrier to MCI WorldCom.[226] Sprint, AT&T, U S WEST, and RCN filed comments in support of MCI's request for further reconsideration on this subject[227]

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[223] Accordingly, presumptive notice and solicitation for approval to access CPNI, which purports to inform the customer that the carrier's representative is going to access the customer's CPNI without providing the customer full disclosure of his rights or a realistic opportunity to decline access to his CPNI, would likely not satisfy our rules.

[224] MCI WorldCom Petition at 3-10. To the extent that MCI WorldCom's petition raises issues about the specific requirements for obtaining customer approval to access CPNI, we discuss that topic in section III.C.1. Although we recognize that some of the commenters have acquired different corporate names since filing their comments, to avoid confusion we refer to commenters and their filings using the names under which they filed. AT&T, Sprint, U S West and TRA filed comments in support of this petition while BellSouth, Bell Atlantic, SBC, and USTA filed comments in opposition to this petition. AT&T Comments on Pet. for Further Recon. at 4-5; Sprint Comments on Pet. for Further Recon. at 2-3; U S West Comments on Pet. for Further Recon. at 11-14; Telecommunications Resellers Association Comments on MCI WorldCom Petition for Further Reconsideration, CC Docket Nos. 96-115, 96-149, filed Dec. 2, 1999 (TRA Comments on Pet. for Further Recon.) at n.9; BellSouth Comments on Pet. for Further Recon. at 5-6; BellSouth Comments at 7-8; Bell Atlantic Comments on Pet. for Further Recon. at 6; SBC Comments on Pet. for Further Recon. at 4; USTA Comments at 6-7.

[225] MCI WorldCom Petition at 9-10. MCI WorldCom suggests that it be able to obtain customer consent for CPNI through a short notice statement, "May I view your customer service record?" MCI WorldCom Petition at 5. *See also* WorldCom Comments at 8, n.16.

[226] MCI WorldCom Petition at 5-9.

[227] Sprint Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (Sprint Comments on Pet. for Further Recon.) at 2; AT&T Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (AT&T Comments on Pet. for Further Recon.) at 2-4; RCN Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (RCN Comments on Pet. for Further Recon.) at 3-4; U S West Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed (continued....)

while Verizon, BellSouth, GTE, and SBC filed comments in opposition to MCI WorldCom's request.[228]

101. The Commission previously has considered and rejected this same argument twice.[229] The Commission's rules permit disclosure of a customer's records only upon adequate notice to and approval from the customer.[230] These rules are designed to allow customers to make reasoned, informed decisions about their CPNI in which they have a privacy interest.[231] As several commenting parties note, the short notice statement proposed by MCI WorldCom is too vague to enable the customer to make an informed decision.[232] Although MCI WorldCom presents information about its experience competing for local exchange customers, MCI WorldCom and the other commenters supporting this request do not present compelling new facts or arguments that justify altering the existing rules, especially in light of the fact that, in the instant proceeding, we streamline the notice requirements. Specifically, MCI WorldCom does not establish how its need for this information[233] during an initial cold call to a potential customer overcomes that customer's privacy interests – especially since there is no existing business relationship, making MCI WorldCom or another similarly situated carrier a third party to the consumer.[234] Accordingly, for the same reasons that we have differentiated the approval required

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Dec. 2, 1999) (U S West Comments on Pet. for Further Recon.) at 3-9 (supporting MCI WorldCom's petition in part). *See also* WorldCom Reply on MCI WorldCom's Petition for Further Recon., CC Docket Nos. 96-115 and 96-149 (filed Dec. 15, 1999) (MCI WorldCom Reply on Pet. for Further Recon.) at 2-5; WorldCom Comments at 7-8.

[228] Bell Atlantic Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (Bell Atlantic Comments on Pet. for Further Recon.) at 1-2, 4-5; BellSouth Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (BellSouth Comments on Pet. for Further Recon.) at 1-5; GTE Reply Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (GTE Reply to Pet. for Further Recon.) at 2-3; SBC Communications Comments on MCI WorldCom's Petition for Further Reconsideration, CC Docket Nos. 96-115 and 96-149 (filed Dec. 2, 1999) (SBC Comments on Pet. for Further Recon.) at 1-3; BellSouth Reply at 5-7; Letter from Richard T. Ellis, Verizon, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket Nos. 96-115 and 96-149 (filed Mar. 6, 2002) (Verizon Mar. 6, 2002 *Ex Parte* Letter).

[229] *See CPNI Reconsideration Order*, 14 FCC Rcd at 14453-14454, paras. 86-90 (determining that "the language of 222(c)(1)(A) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of *an existing customer relationship*.") (emphasis in original); *CPNI Order*, 13 FCC Rcd at 8080, para. 23.

[230] *See* Section III.C.1. In addition, we note that this Order allows for streamlined notice for one-time, limited use of CPNI in Section III.C.2.a.

[231] The Commission's rules requiring proper notice before a customer gives a carrier consent to access CPNI ensure that customers are given an opportunity to make a reasoned decision. *See CPNI Order*, 13 FCC Rcd at 8128, para. 87.

[232] *See* BellSouth Comments on Pet. for Further Recon. at 1-4; SBC Comments on Pet. for Further Recon. at 2.

[233] As noted, this is information that Congress has determined to be private and worthy of special protection against disclosure without customer approval.

[234] Moreover, MCI WorldCom and supporting commenters argue that making a customer's feature information available will improve the process of converting customers from one carrier to another. MCI WorldCom Petition at (continued....)

depending on intended use as described above, we reject MCI WorldCom's arguments here and again find no reason to disturb our earlier decisions.

c. Notice Requirements Regarding Disclosure of Carriers' Affiliates

102. We deny MCI WorldCom's request that we allow carriers to use "broad, general terms" when providing notice, rather than informing "customers of the types of CPNI that may be viewed and the entities that may view it."[235] MCI WorldCom provides no new facts and makes no arguments that we have not previously considered in our analysis and determination in the *CPNI Reconsideration Order.*[236]

d. Ability to Warn Customer that Provisioning Delays are Possible Without Access to CPNI

103. We grant, with certain safeguards, MCI WorldCom's request that we remove the prohibition against warning customers that failure to approve the disclosure of CPNI to a new carrier may disrupt the installation of service.[237] In the *CPNI Second Report and Order*, the Commission explained that customer notification "must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to disclose, or permit access to CPNI."[238] In that same discussion, the Commission prohibited the inclusion of any implication "that approval is necessary to ensure the continuation of services to which the customer subscribes, or the proper servicing of the customer's account."[239] In the *CPNI Reconsideration Order*, based on a lack of evidence, the Commission denied an MCI petition to allow carriers to warn customers of problems that could result from failure to give permission to access the customer's CPNI.[240] Because we want customers to be able to make informed decisions,[241] and because we do not want to place an undue burden on truthful speech,[242] we consider this topic below.

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5-9. This argument, as well as AT&T's argument that failure to allow access to such information could compromise a customer's privacy and personal safety (AT&T Comments at 3), is misplaced in this discussion of access during the initial sales contact because it fails to consider that, before WorldCom or AT&T places an order for that customer, the customer can choose whether or not to permit access to his CPNI to facilitate the provisioning process.

[235] MCI WorldCom Petition at 13-14.

[236] *CPNI Reconsideration Order*, 14 FCC Rcd at 14467-68, paras. 115-116.

[237] MCI WorldCom Petition at 12-13.

[238] *CPNI Order*, 13 FCC Rcd at 8162, para. 138.

[239] *Id.*

[240] *CPNI Reconsideration Order* at para. 91 & n.511.

[241] *See, e.g.*, RCN Comments on Pet. for Further Recon. at 6.

[242] *See, e.g.*, U S West Comments on Pet. for Further Recon. at 10.

104. Several parties commented on this issue.[243] For example, RCN and Qwest support MCI's contention that without access to CPNI, delays or problems with proper provisioning are likely when a customer chooses to change carriers.[244] Verizon, however, disagrees with the argument that a competing carrier's lack of access to a customer's CPNI necessarily causes delays or provisioning problems, arguing instead that if such problems occur, they are the fault of MCI WorldCom.[245] Parties raise sufficient cause for us to believe that our current rules may restrict truthful speech that could beneficially inform consumers' decisions on CPNI disclosure.[246]

105. We recognize an important balance of interests in warning customers that failure to grant access to CPNI may impede the provisioning process. On one hand, we believe that customers should be given useful and truthful information that will better inform their decisions regarding CPNI. On the other hand, we are wary that carriers might use such a warning in such a way as to coerce customers into granting consent to access CPNI. Therefore, in order to maximize the ability of customers to make fully informed decisions about their CPNI, we permit carriers to provide an informative statement to customers about problems that often occur in provisioning service without access to CPNI.

106. Specifically, we decide that carriers soliciting consent to access a customer's CPNI may, in addition to the statements required to obtain consent, provide a brief statement, in clear and neutral language, describing consequences directly resulting from the lack of access to CPNI. However, any consequences must affect customers and must be provable and material.[247] By requiring carriers to limit their representations in this way, we can best ensure that customers are protected from coercive or trivial assertions, while nevertheless ensuring that customers have information that is relevant to their decisions to allow use of their CPNI. We decline, at this time, to mandate specific language for such warnings because we believe that our rules will provide carriers with sufficient guidance to formulate scripts that inform customers in a neutral manner of significant consequences, without unduly restricting carrier flexibility in delivering the message.

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[243] Bell Atlantic Comments on Pet. For Further Recon. at 5-6; RCN Comments on Pet. for Further Recon at 6; U S WEST Comments on Pet. for Further Recon. at 9-10.

[244] RCN Comments on Pet. for Further Recon. at 6; U S WEST Comments on Pet. for Further Recon. at 10.

[245] Bell Atlantic Comments on Pet. for Further Recon. at 5-6.

[246] We expressly do not find that the specific claims of the various commenters are truthful, provable, significantly probable customer-impacting consequences of a lack of access to CPNI.

[247] Consequences must be provable in the sense that they cannot be mere speculation as to possible harm. Rather, they must constitute an actual consequence of a failure to use CPNI in providing service to a customer, based on the carrier's experience. Consequences must be material in the sense that they must constitute a problem that would prevent or significantly delay the initiation of service. Consequences must be customer-impacting, as otherwise there would be no reasonable purpose in communicating them, aside from attempting to coerce or confuse the customer.

3. Frequency of Notice

107. We hold that carriers using the opt-in customer approval mechanism must provide customers with a one-time notice before soliciting approval to use CPNI. Carriers electing the opt-out mechanism must provide notices to their customers every two years. We note that few commenters addressed the issue of frequency of notice and none suggested a specific time period.[248]

108. We adopt a more stringent notice requirement for the opt-out regime for several reasons. First, under the opt-out mechanism, the possibility exists that customers have not made a conscious decision to allow the additional use of their CPNI. For example, the lack of response could be due to a customer's failure to receive the notice, a failure to read the notice, or a failure to understand the notice.[249] As Qwest itself recognized in its comments, "[t]he failure to act, then, provides little evidence of an individual's true intentions, and no dispositive or compelling demonstration of a 'decision.'"[250] As already discussed, the opt-out mechanism requires more stringent safeguards because of the possibility that consumers are unaware of their rights and because opt-out provides incentives for carriers to not be as forthright as possible.[251] By contrast, in an opt-in environment, customers have taken affirmative action regarding the use of their CPNI that demonstrates they are informed of the scope and duration of a carrier's use of CPNI.[252]

109. Second, a number of relevant customer and carrier circumstances can change over time. A customer's marital or parental status, job status, or health status can change. Carriers may change their affiliates, the methods available to opt-out, and the uses the carrier makes of the information. For example, a customer might be willing to share his CPNI with a local telephone company, but decide that he wants to restrict the use of his CPNI after that company merges with a larger entity. Periodic renotification is thus a reasonable way of ensuring that customers have an adequate opportunity to indicate approval.

110. Therefore, in accordance with the general policy we have adopted regarding the need for consumer safeguards in an opt-out regime, and because failing to provide for periodic confirmation would fail to account for material changes in circumstances over time, we hold that

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[248] Verizon Wireless urged the Commission not to adopt "costly or burdensome notice and consent requirements in conjunction with opt-out (in terms of frequency of notice, volume of notice materials, etc.)." Verizon Wireless Comments at 6.

[249] NAAG Dec. 21, 2001 *Ex Parte* Letter at 7-9.

[250] Qwest Comments at 13. *See also* AT&T Wireless Comments at 4 regarding supposed limitations of opt-in, but equally applicable to opt-out ("A carrier would not know whether the absence of such affirmative action reflects a conscious decision by the customer not to permit the carrier to use his or her CPNI, or simply a lack of interest").

[251] See *supra* description of problems reported with the Gramm-Leach-Bliley notifications, as well as survey information indicating that even those consumers with particularly strong privacy concerns are not responding as anticipated to opt-out notifications.

[252] *CPNI Order*, 13 FCC Rcd at 8165, para. 142 (finding that a periodic notice requirement was no longer necessary under an opt-in customer approval mechanism).

carriers must provide opt-out notices at least once every two years. A two-year period is a reasonable period over which one might reasonably expect changed circumstances to warrant confirmation of an opt-out election. Biennial notice is also unlikely to impose an onerous burden on carriers, particularly when compared to their likely benefit in making use of the opt-out mechanism.[253]

111. In addition, we require carriers to honor their customers' CPNI elections unless and until a customer affirmatively changes his election. Following a customer's election to withhold approval of CPNI usage, the carrier may subsequently attempt to secure the customer's approval to use, disclose, or permit access to his CPNI as frequently as the carrier deems appropriate, but carriers may not force customers to opt-out repeatedly in an attempt to wear the customer down or obtain an inadvertent "approval." Accordingly, although carriers must provide biennial opt-out notice to their customers, carriers must respect previously expressed opt-outs. Nor can carriers provide opt-in notices to their customers and immediately provide additional notices to those customers who choose not to opt-in, because such use of repeated notices is burdensome to customers and fails to respect their privacy choices regarding CPNI.

4. Waiting Period for Opt-Out Notification

112. We adopt a 30-day minimum period of time that carriers must wait after giving customers' notice before assuming customer approval. In the *CPNI Clarification Order*, the Commission noted that the then-current rules did not provide for any time period after which a customer's implicit approval of the use or sharing of CPNI could be reasonably assumed to have been given to the carrier.[254] As an interim measure, the Commission adopted a 30-day period from customer receipt of notice as a "safe harbor," but permitted some shorter period if supported by an adequate explanation from the carrier.[255] Commenters addressing this topic uniformly supported a 30-day waiting period,[256] although one commenter found troubling that "[a carrier's] notice gave customers <u>only</u> thirty days to object."[257] In light of the comments we received supporting the 30-day time frame and the lack of any other suggested time frames or

[253] We note that the Commission's earlier CPNI rules required carriers to send annual notices to some customers regarding their use of CPNI to market customer premises equipment and enhanced services. *Computer III Phase II Order*, 2 FCC Rcd 3072, 3093-97, paras. 141-174 (1987); *GTE Safeguards Order*, 9 FCC Rcd 4922, 4944-45, para. 45 (1994). In addition, the Commission considered annual or semi-annual approval requirements in the *CPNI Order*, but found such a condition unwarranted in an opt-in environment. *CPNI Order*, 13 FCC Rcd 8061, 8151, para. 116. The requirement we adopt here is less burdensome than an annual or semi-annual requirement but still serves the purpose of ensuring consumers' wishes with respect to the privacy of their CPNI are honored.

[254] *CPNI Clarification Order*, 16 FCC Rcd 16506, 16511, para. 11.

[255] *Id.*

[256] AT&T Wireless Comments at 3 ("AWS agrees that there should be a reasonable waiting period between the time notice is provided and consent is assumed, and supports the 30-day waiting period proposed by the Commission."); Verizon Comments at 13 ("a thirty-day period is sufficient for a response."); *see also* Nextel Comments at 8; SBC Comments at 14; Verizon Wireless Comments at 6, n.9; Verizon Feb. 20, 2002 *Ex Parte* Letter at 4.

[257] Attorney General of Arizona Jan. 25, 2002 *Ex Parte* Letter at 5 (emphasis added).

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).