

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

In the Matter of)	
)	
Implementation of the Telecommunications)	CC Docket No. 96-115
Act of 1996:)	
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network Information)	
And Other Customer Information)	
)	

**VERIZON'S PETITION FOR RECONSIDERATION
OF THIRD REPORT AND ORDER IN CC DOCKET NO. 96-115**

Of Counsel
Michael E. Glover
Edward Shakin

Ann H. Rakestraw

1515 North Court House Road
Suite 500
Arlington, VA 22201
Tel (703) 351-3174

Andrew G. McBride
Kathryn L. Comerford
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, D.C. 20006
Tel (202) 719-7000

October 21, 2002

Contents

I.	Background – The Commission’s Failure to Preempt in the Third CPNI Order.....	2
II.	The Commission Must Preempt More Restrictive State Regulation of CPNI.....	4
	A. Because Intrastate and Interstate Portions of CPNI Are Intertwined, Inconsistent State Regulations Will Negate the Commission’s Exercise of its Lawful Authority	7
	B. The Commission Is Infringing Upon Carriers’ First Amendment Rights by Failing to Preempt State CPNI Regulations.....	12
	1. <i>Opt-out is the only mechanism that will not violate the First Amendment.</i>	13
	2. <i>There is no substantial state interest.</i>	14
	3. <i>Neither the Commission nor the states can demonstrate that opt-in is no more extensive than necessary to protect any government interest.</i>	16
	4. <i>The Commission has a duty to preempt because it must interpret Section 222 in a manner that will not result in unconstitutional action.</i>	19
	5. <i>By allowing states to enact CPNI regulations that infringe on carriers’ First Amendment rights, the Commission is itself violating the First Amendment.</i>	20
	Conclusion	23

**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)	

**VERIZON'S¹ PETITION FOR RECONSIDERATION
OF THIRD REPORT AND ORDER IN CC DOCKET NO. 96-115²**

Introduction

Verizon respectfully requests that the Commission reconsider its order to make clear that all state regulations of customer proprietary network information (“CPNI”) that are inconsistent with the federal CPNI rules, including any state rules that adopt an opt-in requirement, are preempted. Pursuant to Section 222, the Commission set forth a comprehensive national CPNI policy that balances competing concerns about customer privacy, competition in the telecommunications marketplace, and carriers’ First Amendment rights. The Commission has recognized that CPNI inherently is jurisdictionally mixed – that is, it cannot be separated into different interstate and intrastate components. Thus, when states institute CPNI standards that are inconsistent with federal regulations, carriers cannot apply those standards to just the CPNI associated with intrastate products and services. The net effect is that carriers must either operate under the stricter standard (thus allowing states’ CPNI policy to trump federal policy in

¹ The Verizon telephone companies (“Verizon”) are the local exchange carriers affiliated with Verizon Communications Inc., and are listed at Appendix A.

² See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*; Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 02-214 (rel. July 25, 2002) (“Third CPNI Order”).

those states that have adopted inconsistent CPNI regulations), or abandon use of CPNI altogether. This is contrary to the Congressional goal of uniform national CPNI regulation embodied in Section 222.

In addition, the Commission’s policy of reviewing and preempting state regulations on a case-by-case basis also infringes carriers’ First Amendment rights. The Commission has often recognized that it has an obligation to construe the Act in such a way as to avoid constitutional infirmities. In this case, however, the Commission’s order would allow states in the first instance to adopt CPNI regulations that the Commission has expressly found would not pass constitutional muster. Thus the Commission is allowing states to construe the Act in a way that violates the First Amendment. This fact, combined with the Commission’s own standardless discretion to review and preempt regulations on a “case-by-case” basis, constitutes an infringement of First Amendment rights by the Commission itself.

For all these reasons, Verizon respectfully requests that the Commission reconsider its order, and preempt state regulations that purport to impose burdens on CPNI that are inconsistent with federal CPNI rules.

I. Background – The Commission’s Failure to Preempt in the Third CPNI Order

In the Third CPNI Order, the Commission adopted an “opt-out” rule for intra-company use of CPNI to market communications-related services to their customers. Third CPNI Order, ¶ 44.³ This decision brought national policy in line with the Tenth Circuit decision, which had vacated, on First Amendment grounds, that portion of the Second CPNI Order that had required

³ Carriers do not need to obtain express customer approval in order to use CPNI to market services of the same type already subscribed to by customers, or that are used in or necessary to the provision of the same type of services (known as “in-bucket” services). This is called the “total services approach.” Opt-out approval is required before a carrier can use CPNI to market different types of services than those subscribed to by the customer – *i.e.*, those that are “out-of-bucket.” Third CPNI Order, ¶ 140.

opt-in approval before carriers could use their own CPNI to market out-of-bucket services. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

In recognizing that an opt-out rule would balance First Amendment concerns with customers' privacy interests, the Commission noted that "[c]arriers have demonstrated on the record that use of CPNI to develop . . . targeted offerings can lower costs and improve the effectiveness of customer solicitations." Third CPNI Order, ¶ 41. The Commission also recognized that allowing carriers to more broadly use CPNI would likely benefit customers by allowing for more targeted marketing campaigns. "Enabling carriers to communicate with customers in this way is conducive to the free flow of information, which can result in more efficient and better-tailored marketing and has the potential to reduce junk mail and other forms of unwanted advertising." *Id.* ¶ 35. Thus, the Commission recognized that "consumers may profit from having more and better information provided to them, or by being introduced to products or services that interest them." *Id.*

Despite the fact that the Commission articulated a comprehensive regime for regulating CPNI, in the Third CPNI Order it stated that it would not presumptively preempt inconsistent state CPNI regulation. Rather, the Commission held that it would "exercise preemption authority on a case-by-case basis." Third CPNI Order, ¶ 69. Although the Commission recognized that it "might still decide that such [state] requirements could be preempted," the Commission declined "to apply an automatic presumption that they will be preempted" and theorized that states "may" find additional evidence or balance First Amendment concerns differently than the Commission. *Id.* ¶ 71.

II. The Commission Must Preempt More Restrictive State Regulation of CPNI

In response to the Tenth Circuit decision, the Commission conducted an exhaustive review of its CPNI rules and policies. The Commission received comments from every corner of the industry, including carriers, marketing experts, state and local regulators and consumer groups. Based upon this evidentiary record, compiled from nationwide sources, the Commission ultimately concluded that it could not, consistent with the First Amendment, adopt an opt-in regime for intra-company communications.⁴ As Chairman Powell explained, “despite the laudable efforts of the parties to generate such an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court.”⁵

Although the Commission expressly found that an “opt-in” CPNI regime would violate the First Amendment, it declined to expressly preempt state regulators from enacting more restrictive CPNI regulations. Instead, the Commission elected to exercise its preemption authority on a case-by-case basis, reasoning that states might be able to enact more restrictive CPNI regulations based on “different records.”⁶

Emboldened by the Commission’s inaction, several states have proposed new CPNI rules that are more restrictive than, and inconsistent with, the Commission’s regulations. Those rules are expressly designed to be an exercise in reverse preemption, and to override the federal statute and the FCC’s rules. For example, the state of Washington has proposed regulations that

⁴ The Commission concluded that, “[i]n formulating the required approval mechanism . . . [opt-out], we carefully balance[d] 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.” *See* Third CPNI Order, ¶ 1.

⁵ Third CPNI Order, Separate Statement of Chairman Michael K. Powell.

⁶ Third CPNI Order, ¶ 71.

expressly override Section 222 and the Commission’s rules, and are inconsistent with the new federal regulations in several respects.⁷ Indeed, the proposed Washington rules frankly declare that they are *intended* to supersede inconsistent federal CPNI rules: “Customer proprietary network information may be used as permitted by 47 U.S.C. Section 222, *except where sections 480-120-202 through 216 require otherwise.*”⁸ One of the provisions of the proposed Washington CPNI rules would require opt-in consent to use CPNI within the same corporate entity or among affiliates.⁹ Likewise, pending regulations in California require written consent before carriers can use CPNI for intra-company communications.¹⁰ Indeed, *existing* rules in Washington *already* require opt-in consent for carriers to market out-of-bucket services. *See* Wa. Admin. Code §§ 480-120-151 through 480-120-153. A chart comparing the provisions of existing federal CPNI rules with the existing Washington CPNI rules and proposed Washington and California rules is attached hereto as Appendix D.

Because carriers such as Verizon employ national or regional CPNI-based marketing strategies, and because separating “interstate” from “intrastate” CPNI would be economically infeasible, if not operationally impossible, the effect of more restrictive state CPNI regulations is

⁷ A copy of the Washington proposed CPNI regulations is attached hereto as Appendix B. The Washington proposed rules would rewrite the definition of CPNI, by creating two new sub-categories of CPNI known as “call detail” and “private account information.” *See* Wa. Admin. Code § 480-120-201 (proposed). In addition, they purport to override the Commission’s total service or bucket approach by requiring opt-in consent for the use of CPNI to market upgrades or new pricing plans to existing subscribers. *Id.* §§ 480-120-203; 480-120-205 to 207 (proposed). They also would require opt-in consent to use “call detail” CPNI within the same corporate entity or among affiliates. Wa. Admin. Code § 480-120-203 (proposed).

⁸ Wa. Admin. Code § 480-120-202 (proposed) (emphasis added).

⁹ Wa. Admin. Code § 480-120-203 (proposed).

¹⁰ *See Order Instituting Rulemaking on the Commission’s Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, CA PUC Rulemaking 00-02-004, Appendix B, General Order (dated July 17, 2002), attached hereto as Appendix C. The full text of the Consumer Rights Order is available at www.cpuc.ca.gov/static/industry/telco/billofrights.htm.

to force carriers to comply with the *most* restrictive state regime.¹¹ Thus, more restrictive state regulation has the effect of frustrating the Congressional goal of a uniform national CPNI policy and negating the balance struck by the Commission in this proceeding. Nor could the economic and regulatory costs of a patchwork of conflicting CPNI regulations come at a worse time for the telecommunications industry as a whole.

Not only would more restrictive state CPNI regulations thwart Congressional objectives and Commission policy choices, but they would most certainly run afoul of the First Amendment in precisely the same way as did the Commission's initial CPNI regulations. Indeed, by granting states the unfettered discretion to enact more stringent CPNI regulations, even if those regulations are only in effect until the Commission has completed its case-by-case preemption review, the Commission infringes on carriers' First Amendment rights. This impact is compounded to the extent speech is chilled in anticipation of states' action. Because the Commission's "case-by-case" preemption policy results in the violation of carriers' First Amendment rights, it is an interpretation of Section 222 that must be avoided.

Accordingly, in order to effectuate the Congressional goal of a national CPNI policy, to protect the marketing of interstate services, and to avoid constitutional violations, the Commission must preempt inconsistent and more restrictive state CPNI regulations across the board.

¹¹ See Declaration of Maura Breen, ¶¶ 6, 8, 13-15 ("Breen Decl.") (attached hereto as Appendix E).

A. Because Intrastate and Interstate Portions of CPNI Are Intertwined, Inconsistent State Regulations Will Negate the Commission’s Exercise of its Lawful Authority

In enacting Section 222, Congress gave the Commission – not the states – the authority to implement national, uniform CPNI rules. With this authority comes the Commission’s ability and duty to preempt state regulations. As the Commission has already stated in the context of CPNI, it may preempt state regulation of interstate 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.”¹² Because “compliance with conflicting state and federal [CPNI] rules would in effect be impossible,” the Commission should exercise its authority to preempt across the board inconsistent state regulations.¹³

Indeed, the Commission has routinely preempted state regulations in areas where it would be impossible to separate the interstate and intrastate portions of telecommunications, and courts have consistently upheld this preemption authority. For example, in the *Computer II Further Reconsideration Order*, the Commission made clear that its *Computer II* decisions served to preempt any state regulation of CPE and enhanced services.¹⁴ The D.C. Circuit upheld

¹² *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 13 FCC Rcd 8061, ¶¶ 16-18 (1998) (“Second CPNI Order”); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, ¶ 112 (1999).

¹³ *People of the State of California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) (“California III”).

¹⁴ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, ¶ 83 n.34 (1981).

this exercise of preemptive authority on petitions for review from *Computer II* decision, explaining that “[f]or the federal program of deregulation to work, state regulation of CPE and enhanced services ha[ve] to be circumscribed.” *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982). Accordingly, that court held, “state regulatory power must yield to the federal.” *Id.* at 216.

Similarly, the Commission’s *Computer III* rules expressly preempted inconsistent state regulation of interstate and jurisdictionally mixed enhanced services, and that decision too was ultimately upheld on appeal by the Ninth Circuit because, as the Court explained, state regulation of jurisdictionally mixed services would effectively negate the FCC’s policies. *See California III*, 39 F.3d at 932 (recognizing that contrary state regulation would “essentially negat[e] the FCC’s goal”). Finally, in the BellSouth *Memory Call* proceedings, the Commission applied these principles to the voice mail market, explicitly acting to preempt state regulation of voice mail services, because “it is impossible as a practical matter to separate the interstate and intrastate provision of BellSouth voice mail service.”¹⁵ The Commission recognized that state regulation of voice mail services would thwart federal policy by improperly displacing the “comprehensive regulatory framework governing BOC participation in the enhanced services marketplace,” and preempted the Georgia order regulating BellSouth’s provision of voice mail services. *Memory Call Order*, ¶ 20.

As in these other cases, the Commission should exercise its preemption authority here because the interstate and intrastate portions of CPNI are intertwined, and allowing states to regulate CPNI would thwart federal CPNI policy. Most carriers do not market services using

¹⁵ *See Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, ¶ 19 (1992) (“*Memory Call Order*”).

CPNI on a state-by-state basis. On the contrary, carriers such as Verizon use a centralized marketing organization that serves all of its states, which reduces costs and facilitates the development of national or regional marketing plans. Breen Decl., ¶¶ 2-5, 8. It “would not be economically or operationally feasible for” carriers to revamp their entire marketing efforts to accommodate 50 different CPNI regulations.¹⁶ Indeed, the Commission has long-recognized the inefficiencies and substantial costs associated with requiring such separations. For example, in the context of CPNI rules under *Computer III*, the Commission found that “[a]ccess to CPNI permits effective integrated marketing of enhanced services and permits the efficient use of carrier resources to provide enhanced services to a broad spectrum of customers. Personnel subject to a state prior authorization rule would not be able to access to CPNI when it is permitted under federal rule. Carrier implementation of a state prior authorization rule where it is not required under the federal rule would effectively require the separation of marketing and sales personnel.”¹⁷ Such separation is inefficient and imposes substantial costs on carriers resulting from the duplication of facilities and personnel, limitations on joint marketing, deprivation of economies of scope, and increased transaction and production costs.¹⁸

In addition to the costs associated with switching carriers’ regional marketing operations to state-by-state campaigns, it is not at all clear that carriers could separate intrastate and interstate CPNI. For example, Verizon’s systems do not distinguish between the portions of

¹⁶ *California III*, 39 F.3d at 933; see also Breen Decl., ¶¶ 15-18.

¹⁷ *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, ¶ 130 (1991) (“Computer III Remand Proceedings”), *vacated in part on other grounds and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

¹⁸ See Breen Decl., ¶¶ 15-18; see also *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, ¶¶ 47, 56 (1998).

CPNI that are related to interstate versus intrastate services. *See* Breen Decl., ¶ 6. The Commission has recognized the difficulty of doing so, explaining that “varying state [CPNI] regulations” could affect “carriers’ ability to operate on a multi-state or nationwide basis.”¹⁹ In addition, the Commission has rejected the suggestion that it require different approval requirements for different types of CPNI, because it was “not convinced that carriers would be able to implement such a distinction in their existing customer service, operations support, and billing systems, where facilities information and call detail may reside without distinction.”²⁰ Because CPNI currently collected from individual customers includes data regarding intrastate and interstate services and is sorted by customer and not into separate interstate and intrastate services, it would be practically infeasible, if not virtually impossible, for carriers to implement such a jurisdictional distinction. Breen Decl., ¶¶ 6, 15. Perhaps the most telling evidence of the practical inseparability of intrastate and interstate CPNI is the fact that neither Washington State nor California has incorporated any such distinction in their proposed rules. On the contrary, both states’ proposed rules appear to apply to *all* CPNI collected from services used within their borders, regardless of whether those services are purely intrastate services or are interstate services, such as long distance, special access, or DSL. *See* Wa. Admin. Code § 480-12-201; Appendix C at 23, Rule 12.

Moreover, even if it were somehow feasible to separate the interstate from intrastate portions of CPNI, that would not solve the problem of state CPNI regulations trumping federal rules. That is because restrictions on marketing of intrastate services necessarily restrict Verizon’s ability to market interstate services as well. For example, Verizon cannot provide

¹⁹ Third CPNI Order, ¶ 71.

²⁰ *Id.* at n.279.

interstate or jurisdictionally mixed services (such as interstate access, long distance services, voice mail, or any number of other services) on a given line without complying with state requirements governing sale of the line itself.

Given the effective impossibility of complying with separate and inconsistent state and federal regulations, carriers will be forced to comply with the most restrictive state CPNI regulations, in disregard of the delicate balance the Commission has struck between competitive and consumer privacy interests. Breen Decl., ¶ 14.²¹ This necessarily undermines the Commission’s jurisdiction over interstate CPNI. As the Commission recognized in the context of its pre-1996 CPNI regulations, “[c]arrier implementation of a state prior authorization rule where it is not required under the federal rule . . . effectively would negate federal policies.”²²

For example, with respect to Washington’s proposed rules, carriers would be forced to ignore the Commission’s total services approach, as well as its definition of CPNI, and to seek opt-in approval for *all* CPNI. Wa. Admin. Code § 480-120-203 (proposed); Breen Decl., ¶ 22. And, in order to comply with California’s proposed rules, Verizon would have to abandon its use of opt-out because the rules require opt-in consent for out-of-bucket marketing. *See* Appendix C at 23, Rule 12; Breen Decl., ¶ 24. To avoid this result, the Commission must, as it has in the

²¹ Given the need for a uniform national CPNI policy and the reality that more restrictive state CPNI regulations will burden carriers’ interstate services and marketing strategies, inconsistent state regulations would likely violate the dormant commerce clause in the absence of Commission action. *See, e.g., Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583-84 (1986).

²² Computer III Remand Proceedings, ¶ 130; *see also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 11 FCC Rcd 12513, ¶ 16 (1996).

past, preempt state CPNI rules that would impose more restrictive approval requirements on carriers than do the Commission's rules.²³

B. The Commission Is Infringing Upon Carriers' First Amendment Rights by Failing to Preempt State CPNI Regulations

CPNI is important commercial information, which carriers use to improve customer service by offering innovative, custom-tailored services. *See* Breen Decl., ¶¶ 5, 8-10. This use of CPNI advances the public interest, increases effective competition, and aids consumers by increasing available information and thereby enhancing competitive choices. Indeed, the Supreme Court has held that the use of such information is “indispensable” to a free enterprise economy.²⁴ Because CPNI “fits soundly” within the definition of commercial speech protected by the First Amendment,²⁵ the government cannot restrict its use unless such regulations are narrowly tailored to protect a “substantial” state interest.²⁶ The Commission has now found, on

²³ Computer III Remand Proceedings, ¶ 130.

²⁴ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1994) (“the free flow of commercial information is ‘indispensable to the proper allocation of resources in a free enterprise system’ because it informs the numerous private decisions that drive the system. Indeed, we observed that a ‘particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate’”) (*quoting Virginia Bd. of Pharmacy v. Virginia Citizens Consumers Counsel*, 425 U.S. 748, 763, 765 (1976)).

²⁵ *U.S. West v. FCC*, 182 F.3d 1224, 1233 (10th Cir. 1999). Likewise, the Court found that the First Amendment protects not only a speaker’s right to solicit customers, but also the audience’s right to receive information. Thus, a “restriction on either of these components is a restriction on speech.” *Id.* at 1232; *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

²⁶ In addition, intra-company CPNI rules restrict internal speech among carriers’ employees and affiliated entities that does not directly propose a commercial transaction and is therefore fully protected speech. Although carriers may have an ultimate, or even central, economic motivation for the speech, that in and of itself is insufficient to render these internal communications commercial speech. *See Bolger v. Youngs Drug Prod., Inc.*, 463 U.S. 60, 67 (1983); *Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1987). Instead, the very purpose of lesser protection for commercial speech – to protect consumers from the risk of deceptive advertising

the basis of the extensive record before it, that only an opt-out mechanism for intra-carrier use of CPNI can pass constitutional muster. It is telling that the Commission, in its invitation to states to conduct their own CPNI fact-finding inquiries, was unable to articulate what type of additional evidence a state might produce to overcome the Commission’s own findings with respect to the First Amendment balance. In fact, given the Commission’s exhaustive study of the issue, and the fact that it does not have any “state specific” aspect, no state record can be compiled that will satisfy the First Amendment. The Commission has a duty to interpret Section 222 in a manner that will not result in Constitutional violations. And by inviting states to attempt to implement rules that will violate carriers’ First Amendment rights, the Commission is itself infringing on First Amendment rights.

1. *Opt-out is the only mechanism that will not violate the First Amendment.*

The government bears the burden of demonstrating that a regulation restricting commercial speech is justified. Under the *Central Hudson* test, the threshold question is whether the speech is lawful and nonmisleading.²⁷ In this case, there is “no . . . dispute[] that the commercial speech based on CPNI is truthful and not misleading.”²⁸ Accordingly, the government may restrict CPNI-based speech only if it proves each of the following: “(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially

or other peculiarly commercial harms – is inapplicable to speech conducted within and between carriers’ organizations. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.). Because CPNI regulations of internal speech are content-based, they can be upheld only if they survive strict scrutiny – the regulation is narrowly tailored to meet a compelling state interest. *See Brown v. Hartlage*, 456 U.S. 45, 54 (1982). While our analysis demonstrates that opt-in violates the lesser standard for commercial speech, there is no question that such regulations would also fail the more protective, stricter standard as well.

²⁷ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 564-65 (1980).

²⁸ *U.S. West*, 182 F.3d at 1234.

advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.”²⁹ Here, the FCC has conducted an exhaustive *national* review of the problem and balanced consumer and commercial interests under the First Amendment. The consumer and competitive interests simply do not vary state-to-state, and thus, given the FCC’s clear findings, there is no chance that a state commission could compile a record in support of an opt-in regime that could satisfy First Amendment scrutiny.

First, in finding that customers expect companies to use CPNI to offer services,³⁰ the Commission already has acknowledged that there is no substantial government interest in protecting intra-company disclosures of CPNI. Second, in addition to that fact, the Tenth Circuit made clear that any opt-in regime for intra-carrier communications violates the First Amendment because it is more restrictive than necessary to serve this interest. Try as they might, the states cannot create a record for an opt-in regime sufficient to bear their burden of satisfying each prong of the *Central Hudson* test.

2. *There is no substantial state interest.*

To demonstrate a substantial state interest, “the government cannot ... merely assert[] a broad interest in privacy. It must specify the particular notion of privacy and interest served.”³¹ In the case of CPNI, the Tenth Circuit explained that the government must identify “specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or

²⁹ *Id.* at 1233 (citing *Revo v. Disciplinary Bd. of the Supreme Ct.*, 106 F.3d 929, 932 (1997)).

³⁰ The Commission has found that “customers expect their carriers to offer related offerings within the total service to which they subscribe.” Second CPNI Order n. 372; *see also* Third CPNI Order, Separate Statement of Commissioner Kathleen Q. Abernathy, “intracompany disclosures of CPNI generally are consistent with consumers’ expectations of privacy.”

³¹ *U.S. West*, 182 F.3d at 1234.

harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity.”³²

The comprehensive evidence evaluated by the Commission demonstrates that there is no substantial government interest in limiting intra-company sharing of CPNI. The Commission has acknowledged on several occasions that sharing of information within one entity does not raise significant privacy concerns. For example, in its Second CPNI Order, the Commission concluded “that sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings.”³³ Likewise, as Commissioner Abernathy explained, “intracompany disclosures of CPNI generally are consistent with consumers’ expectation of privacy.”³⁴ The Commission’s findings are supported by common industry practice, Congress’s intent,³⁵ the findings of other government agencies,³⁶ and Supreme

³² *Id.*

³³ Second CPNI Order, n.203.

³⁴ Third CPNI Order, Separate Statement of Kathleen Q. Abernathy.

³⁵ “Congress recognized ... that customers expect carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer’s existing service.” Second CPNI Order, ¶ 54.

³⁶ Studies by the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”) and the Privacy Working Group of the Clinton Administration’s National Information Infrastructure Task Force concluded that an opt-out method of customer approval was appropriate with respect to the commercial use of individually-identifiable information. See U.S. Department of Commerce, *NTIA Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* (Oct. 1995); *Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information*, A Report of the Privacy Working Group (Oct. 1995), available at <http://www.ntia.doc.gov/ntiahome/privwhitepaper.html>.

A study on the use of CPNI conducted under the direction of Dr. Alan Westin, Professor of Public Law and Government at Columbia University reinforces that customers have no expectation of privacy regarding such information. In particular, that study found that customers believe it is acceptable for local phone companies to communicate with their customers using

Court precedent.³⁷ Moreover, companies that have access to far more personal information, such as credit card companies and banks, are free to share customer information using an opt-out mechanism.³⁸

Against this backdrop, the states cannot, under any conceivable standard, satisfy their burden of demonstrating a “substantial” government interest in protecting the privacy of consumers against the sharing of CPNI within the same company.

3. *Neither the Commission nor the states can demonstrate that opt-in is no more extensive than necessary to protect any government interest.*

In addition, as Commissioner Abernathy has put it, “an opt-in requirement for intra-company disclosures of information would be more restrictive than necessary to protect consumers’ expectations of privacy.”³⁹ Opt-in unduly restricts speech by dissuading even those customers who would prefer to receive CPNI-based marketing from manifesting their approval. In contrast, opt-out protects any genuine privacy interests while minimizing the infringement on carriers’ protected speech generated by customers’ inadvertent failure to approve use of their

CPNI data. Further, the study confirmed that customers understood the “notice and opt out procedures” and that many consumers have used them in the past. *See* Public Attitudes Toward Local Telephone Company Use of CPNI: Report of a National Opinion Survey Conducted November 14-17, 1996 by Opinion Research Corporation, Questions 5, 6, 10-11, Analysis at 9-10, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, Sponsored by Pacific Telesis Group (now SBC).

³⁷ The Supreme Court has held that individuals have no reasonable expectation of privacy in the telephone numbers dialed from their phones. *Smith v. Maryland*, 442 U.S. 735 (1979).

³⁸ *See infra* note 41. Further, any privacy interest consumers have in CPNI is not constitutionally protected. The Tenth Circuit held that the privacy interest in CPNI is “distinct and different” from the constitutional right to privacy. *U.S. West*, 182 F.3d at 1234, n.6.

³⁹ Third CPNI Order, Separate Statement of Kathleen Q. Abernathy. *See also id.* (“[W]hile some may have preferred to reinstate an opt-in requirement for *all* uses of CPNI, I do not believe that such a decision could withstand scrutiny under the standard espoused by the 10th Circuit”).

CPNI. Consequently, it is inconceivable that a state could demonstrate that opt-in is “no more extensive than necessary” to protect the government’s interest.⁴⁰

Indeed, Congress has determined that a notice and opt-out regime adequately protects consumers’ privacy interest in situations involving far more sensitive privacy information.⁴¹ Thus, both opt-in and opt-out can effectively protect any conceivable governmental interest, but opt-in deprives a substantial number of consumers of commercial information they desire to receive.⁴² Given that opt-out is an effective alternative, “[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government’s] goal.”⁴³

⁴⁰ *U.S. West*, 182 F.3d at 1238 (quoting *Rubin*, 514 U.S. at 486).

⁴¹ Under the 1996 Consumer Credit Reporting Reform Act, for example, credit reporting agencies may furnish consumer credit information for marketing credit or insurance opportunities to consumers, so long as the agency establishes a toll-free number so that consumers can call and opt-out by having their names removed from lists for direct marketing purposes. 15 U.S.C. § 1681b(e)(5). Further, the Video Privacy Protection Act of 1988 allows the disclosure of data about customer viewing habits for marketing purposes if the customer has been given the opportunity to opt-out. 18 U.S.C. § 2710(b)(2)(D).

⁴² Third CPNI Order, ¶¶ 36, 71. In addition, consumers understand and utilize the opt-out procedures when they desire to protect their privacy. *See* Public Attitudes Toward Local Telephone Company Use of CPNI: Report of a National Opinion Survey Conducted November 14-17, 1996 by Opinion Research Corporation, Questions 5, 6, 10-11, Analysis at 9-10, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, Sponsored by Pacific Telesis Group (now SBC).

⁴³ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996); *see also id.* at 529 (O’Connor, J., concurring) (“[T]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature’s ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny”); *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479 (1987) (“Almost all of the restrictions disallowed under *Central Hudson*’s fourth prong have been substantially excessive, disregarding ‘far less restrictive and more precise means’”) (citing *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 476 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R. M. J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

Moreover, in evaluating restrictions on protected speech, courts examine the “practical effect” of statutes.⁴⁴ The Commission has acknowledged that opt-in effectively prevents carriers from using CPNI.⁴⁵ Here, the practical impact of the Commission’s decision not to expressly preempt is that the sharing of non-sensitive information within the same company will not be permitted. The resulting infringement of carriers’ First Amendment rights will be exacerbated as more states propose or adopt regulations akin to those now under consideration in California and Washington State. Under those regimes, carriers will be unable to take advantage of the Commission’s “total service approach” even for the marketing of interstate services under the Commission’s jurisdiction.

The devastating impact of inconsistent state regulation on protected speech is not speculative, but real. Because most carriers market on a regional or nationwide basis, and cannot separate intra- and interstate CPNI, they will be forced to comply with the most burdensome state CPNI regulations, including state redefinitions of CPNI itself and restrictive “opt-in” regimes. In effect, the state with the most restrictive regulations could end up governing the marketing practices for all telecommunications services in its region, or even the entire nation. The practical reality is that there will be a chilling of protected commercial speech nationwide. Consequently, the public interest and the Commission’s duty to give practical effect to Section 222 and protect First Amendment values require it to preempt the states from adopting any CPNI rules that are more restrictive than the Commission’s own.

⁴⁴ *Meese v. Keene*, 481 U.S. 465, 489 (1987) (“The fact that the statute’s practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities”) (*quoting FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 255 (1986)).

⁴⁵ *See, e.g.*, Computer III Remand Proceedings, n.155 (recognizing that “a large majority of mass market customers are likely to have their CPNI restricted through inaction Thus, a prior authorization rule would vitiate a BOC’s ability to achieve efficiencies through integrated marketing to smaller customers”).

4. *The Commission has a duty to preempt because it must interpret Section 222 in a manner that will not result in unconstitutional action*

The Commission has more than once recognized that “we have an obligation under Supreme Court precedent to construe a statute where fairly possible to avoid substantial constitutional questions . . .”⁴⁶ For example, in 1995 the Commission was faced with a situation where two appellate courts had held Section 613(b) of the Act, 47 U.S.C. § 533(b), unconstitutional under the First Amendment because “the statute unnecessarily limits speech by telephone companies . . .”⁴⁷ In reaching that conclusion, the courts relied upon a prior recommendation by the Commission that had proposed a “more speech-friendly plan.” *Id.* Thus, the statute “burden[ed] substantially more speech than is necessary, especially since there appeared to be an obvious less-burdensome alternative . . .” *Id.* (internal quotation marks omitted). In order to avoid a construction of the statute that raised serious constitutional concerns, the Commission ruled that telecommunications companies would be granted a waiver from the troublesome portion of the rules. *Id.* ¶ 4.

As stated above, if the Commission construes Section 222 as not requiring it to preempt inconsistent state regulations at the outset, even the potential of state regulation will chill speech and violate carriers’ First Amendment rights. Thus, under one construction of its preemptive authority under the Act – *i.e.*, allowing preemption to be considered on a “case-by-case” basis –

⁴⁶ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Second Report and Order, 12 FCC Rcd 3824, ¶ 24 (1997) (footnote and internal quotation marks omitted). *See also Telephone Company-Cable Television Cross-Ownership Rule*, Third Report and Order, 10 FCC Rcd 7887, ¶ 4 (1995) (noting that, “as the agency charged with implementing the Communications Act,” the Commission is required to “construe [the Act] in a manner that renders it constitutional”); *United States v. X-Citement Video*, 115 S.Ct. 464, 467, 469 (1994); *Alma Motor Co. v. Timken Co.*, 329 U.S. 129, 136-37 (1946).

⁴⁷ *Telephone Company-Cable Television Cross-Ownership Rule*, Third Report and Order, 10 FCC Rcd 7887, ¶ 2 (1995).

constitutional harm will result. Under the other construction – *i.e.*, blanket preemption of inconsistent requirements – it will not. Therefore, the Commission has a duty to adopt the construction of Section 222 that will avoid constitutional violations. That construction requires it to preempt inconsistent state regulation of CPNI.

5. *By allowing states to enact CPNI regulations that infringe on carriers' First Amendment rights, the Commission is itself violating the First Amendment.*

Even before states enact conflicting CPNI rules, carriers' First Amendment rights are being infringed because their speech is being chilled. *See* Breen Decl., ¶ 24. Because the Commission's preemption policy regarding CPNI would allow states to effectively preempt federal policy for at least some period of time, and sets no standards to guide the states or carriers on determining how the Commission will conduct its "case-by-case" review of whether to preempt state regulations, the Commission's preemption policy itself violates the First Amendment.

After inviting comments and conducting an extensive study of the record, the Commission determined that it could not adopt an opt-in policy without running afoul of the First Amendment. *See* Third CPNI Order, ¶ 31. Nonetheless, if states implement more stringent CPNI rules than those allowed by the Commission, carriers will be forced to comply with the more stringent rules for all aspects of CPNI pending further review by the Commission. *See* Section II.A, *supra*. In other words, by failing to preempt state CPNI regulations that are inconsistent with the Commission's rules, the Commission is essentially delegating federal policy decisions to the states in the first instance. Under a long line of Supreme Court precedent, this delegation of unfettered discretion to allow others to make decisions that may violate the

First Amendment is itself a First Amendment violation.⁴⁸ By leaving the door open to such unfettered discretion, the Commission is itself infringing on First Amendment rights.⁴⁹

By failing to set forth a clear preemption standard and stating that preemption will occur only on a case-by-case basis, the Commission is chilling the speech of carriers and their marketing agents even before states implement conflicting CPNI regulations. That is because even uncertainty of *potential* inconsistent state CPNI regulations is enough to chill carriers' speech.⁵⁰ And that is in addition to the chilling of speech that will occur during the interim period between the time states adopt more restrictive CPNI rules and the time that the Commission completes its "case-by-case" review of such rules. The Supreme Court has stated

⁴⁸ See, e.g., *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992) (striking down county ordinance permitting government administrator to set various fees for parade permits because the ordinance did not contain "narrow, objective, and definite standards to guide the licensing authority" (international quotation marks and citation omitted)); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988) ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) ("It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." (Internal quotation marks and citation omitted)).

⁴⁹ See, e.g., *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (holding that where California state officials entered plaintiffs' land under authority granted by the EPA, the activities of the state within the scope of the order were attributable to the federal government for purposes of the takings claim); *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (holding that the State of Vermont's conversion of private land into a recreational trail under authority of the Rails-to-Trails Act and by order of the Interstate Commerce Commission was a taking for which the federal government was liable).

⁵⁰ See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("Where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.").

that even creating the fear of unjustified liability is enough to produce a chilling effect antithetical to First Amendment protected speech.⁵¹

The Commission cannot avoid responsibility for the actions of the states by presuming that the states will not act in an unconstitutional manner.⁵² That is particularly the case here, as the Commission has explicitly found that an opt-in regime could not be justified as satisfying First Amendment concerns, and states already are proposing – or have in place – rules that violate the First Amendment, and are contrary to Section 222 and the federal CPNI rules.⁵³

* * * * *

The Commission should preempt state CPNI regulation that is inconsistent with the approach adopted by the Commission.⁵⁴ Preemption is necessary here in order to effectuate the Congressional goal of a uniform, national CPNI policy, and to avoid frustration of the rules adopted by the Commission. The telecommunications industry can ill-afford the administrative and economic nightmare of patchwork restrictions on marketing practices.

⁵¹ See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). See also *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995) (recognizing the “danger to liberty” that results from the government’s “chilling of individual thought and expression”).

⁵² See *City of Lakewood*, 486 U.S. 750, 770 (1988) (rejecting the “presumpt[ion] the mayor will act in good faith and adhere to standards absent from the ordinance’s face” because it “is the very presumption that the doctrine forbidding unbridled discretion allows”).

⁵³ Compare Third CPNI Order, ¶ 31 (finding that the record would not support an opt-in regime that passed First Amendment scrutiny) with Wash. Admin. Code § 480-120-152; proposed Washington CPNI regulations, attached hereto as Appendix B; CA PUC Rulemaking, attached hereto as Appendix C.

⁵⁴ Of course, federal courts could find that state CPNI regulations are preempted in individual cases, regardless of what the Commission does with respect to the preemption issue. See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). For the reasons discussed in the text, however, the Commission must act globally to avoid violation of the First Amendment.

The First Amendment also mandates preemption. The Commission has an independent duty to protect First Amendment values in the context of its CPNI policy, and its failure to do so itself constitutes a First Amendment violation.

Conclusion

The Commission must preempt state CPNI regulations that are inconsistent with federal CPNI rules.

Respectfully submitted,



Ann H. Rakestraw

Michael E. Glover
Edward Shakin
Of Counsel

1515 North Courthouse Road
Suite 500
Arlington, VA 22201
(703) 351-3174

Andrew G. McBride
Kathryn L. Comerford
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, D.C. 20006
(202) 719-7000

October 21, 2002

Counsel for the Verizon telephone companies

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.