

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**OPPOSITION OF THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES
TO VERIZON PETITION FOR RECONSIDERATION**

I. INTRODUCTION

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these comments in opposition to Verizon’s petition for reconsideration (“Verizon

¹ NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA previously filed *Ex Parte* comments in this docket. Letter of April 20, 2002.

petition” or “petition”).² The Federal Communications Commission (“FCC”) published a notice on December 12, 2002, inviting comments on the petition.³ The Verizon petition challenges the Third CPNI Order⁴ and urges the Commission to preempt any state CPNI rules that are “inconsistent” with the rules adopted by the FCC.⁵

The petition merely reargues a position already raised by Verizon and specifically rejected by the Commission.⁶ Not content with the FCC’s reservation of the right to preempt in an appropriate situation on a case-by-case basis, Verizon would require the FCC to prejudge, without a record, any conceivable state approach that differs in any way from the FCC’s rules, no matter what its basis. Clothing its argument in a questionable First Amendment analysis does not make Verizon’s case any more persuasive. This challenge to the prudent approach taken by the FCC should again be rejected.

II. COMMENTS

A. There Is A Substantial State Interest In Consumer Protection And Privacy; State Regulatory Commissions Have A Crucial Role In Protecting Those Interests For Telecommunications Customers.

As recognized by the FCC, state regulatory commissions have both experience and significant expertise in adopting effective consumer protection standards for the

² Verizon Petition for Reconsideration of Third Report and Order in CC Docket No. 96-115, October 21, 2002.

³ Federal Register, Vol. 67, No. 239, p. 76406, December 12, 2002.

⁴ *In the Matter of the 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 Nos. 96-115, 96-149, 00-257, FCC 02-214 (rel. July 25, 2002) (“Third CPNI Order”). CPNI is “customer proprietary network information.” 47 U.S.C. § 222(f)(1).

⁵ Verizon petition at 1.

⁶ Third CPNI Order, n. 161

benefit of telecommunications customers.⁷ State commissions are well situated to respond directly to concerns raised by their own consumers, to develop records regarding local conditions and policy preferences, and to fashion solutions which address specific state concerns and legal requirements. Neither consumer protection in general, nor privacy in particular, are matters solely of federal concern. Federal law makes clear, in addition, that regulation of telecommunications is the shared responsibility of federal and state government.⁸ State commissions and the FCC have been partners in the pursuit of industry practices that are in the best interest of customers. There is no basis in law or in the record of this proceeding for the FCC to depart from that approach.

Contrary to the suggestion of Verizon in its petition,⁹ states have a substantial interest in protecting the privacy of their citizens. Many states have constitutional and statutory protections for privacy which differ from or provide stronger protection than federal law.¹⁰ The FCC expressly recognized this in the Third CPNI Order and has properly permitted states to adopt their own rules consistent with such provisions, subject to the FCC's reserved right to review and preempt on a case-by-case basis.¹¹

Verizon's attack on the legitimate role of states is perhaps best answered by the statement of Commission Chairman Powell upon the issuance of the Third CPNI Order:

The states continue to be uniquely positioned to assess the proper scope of

⁷ Third CPNI Order, ¶ 71 and note 165.

⁸ 47 U.S.C. § 152(b); *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 370, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); *National Association of Regulatory Utility Commissioners v. F.C.C.*, 880 F.2d 422, 428-429 (D.C. Cir. 1989).

⁹ Verizon petition at 14.

¹⁰ See, e.g., Arizona Corporation January 28, 2002, *Ex Parte* Letter; California Public Utility Comments at 6 (California Constitution makes privacy an inalienable right); Washington Constitution, Article I, Section 7; Montana Public Service Commission, Letter of February 21, 2002 (citing the "express right of privacy" contained in Article II, Section 10 of the Montana Constitution).

¹¹ NASUCA reserves the right to argue the propriety of preemption in any future proceeding.

CPNI use and *may adopt more stringent notification requirements where those can be squared with the First Amendment based upon state-specific facts on which we lack the opportunity to rely here.* I take comfort that these avenues will enable the Commission or our state colleagues to protect consumers from unwarranted invasions of privacy where the evidence supports more stringent consent requirements in the manner the Constitution requires.¹²

B. The FCC’s Allowance Of Flexibility To The States Is A Reasonable Approach Which Does Not Negate The Commission’s Exercise Of Its Lawful Authority.

Significantly, Verizon points to no provision of Section 222, or any other statute, that takes away the right of states to regulate the CPNI practices of its incumbent telecommunications companies or that would require preemption. Verizon describes the Third CPNI Order as adopting a “comprehensive national CPNI policy,” inaccurately implying that the FCC intended to adopt an exclusively national policy applicable to both inter- and intrastate communications. In actuality, this FCC rulemaking has never been based on the premise that a uniform national standard was being adopted that would preclude any state variation.¹³ Chairman Powell’s statement quoted above is consistent with this openness to individual state approaches.

The Commission pointed out that its conclusions regarding the balance between privacy and First Amendment concerns are “based upon 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.*”¹⁴ In adopting its Third CPNI Order and in announcing its approach to preemption in this area, the FCC was aware of the fact that a

¹² Third CPNI Order, Separate Statement of Chairman Michael K. Powell, p. 2.

¹³ *See, in this docket*, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (rel. February 26, 1998)(“Second Report and Order”), ¶18; Order on Reconsideration and Forbearance, 14 FCC Rcd 14409, (adopted August 16, 1999), ¶¶ 112-113.

¹⁴ Third CPNI Order, ¶71(emphasis added).

number of states were considering different approaches, as reflected in the record.¹⁵

Adopting Verizon's request for automatic and blanket preemption would nullify the legitimate and lawful efforts of state regulators and citizens to address privacy concerns in their own rulemaking proceedings.

Verizon's arguments are also premature and speculative. The FCC has not ruled that it will not preempt any inconsistent state rule, only that it will consider preemption at a later time, on a case-specific record. Thus Verizon's interests are protected, and can be asserted in any review proceeding before the Commission. Nevertheless, Verizon asks the Commission to rule, in the abstract, that any possible state inconsistency, based upon any conceivable record that a state might develop, and adopted to accommodate any potential state legal requirements, is presumptively an improper interference with federal authority. Verizon's position precludes consideration of any and all justifications that states might put forward for rules either already adopted, or yet to be developed.

Inconsistency with federal law is not by itself a basis for preemption of state action unless the state action necessarily thwarts or negates the exercise of federal authority.¹⁶ Indeed, when a state's rules are more stringent than the FCC rules, companies can comply with both by complying with the law in that state for operations within the state. Both state and federal agency authority is therefore complied with.

Adopting Verizon's uniform approach would eliminate any possibility of flexibility on the part of the Commission to consider case specific circumstances and

¹⁵ See *e.g.*, Third CPNI Order, n. 163; Qwest *Ex Parte* Letter and Attachments, May 14, 2002; Comments of the California Public Utilities Commission at 24 (also discussing pre-existing California CPNI restrictions that require written customer notification, Comments at 6).

¹⁶ *NARUC v F.C.C.* at 430-431. The burden of proof is on the agency to show the federal policy is negated. *Id.*

would result in a significant diminution of the consumer protection authority traditionally exercised by the states. The flexibility that the Commission has announced in the Third CPNI Order allows state regulators, with input from consumers and industry in their jurisdictions, to balance interests appropriately in their own intrastate realm.¹⁷

Verizon does not explain how it knows in advance that there is no chance that states will develop an adequate record upon which to lawfully base alternate approaches to CPNI protection. The FCC has wisely chosen to respect the states' role by allowing this process to take place first, and to reserve any judgment about inconsistency or the need for preemption until it has a full and complete record. The FCC has thus concluded, on a record that enabled it to consider the issues raised in the reconsideration petition, that this flexible approach does not interfere with the lawful exercise of its authority.

C. Verizon Makes No Persuasive Case That National Uniformity Must Be Achieved At The Expense Of Other Important Interests.

Verizon makes the shop-worn argument that it is economically infeasible to comply with federal and state laws that differ from each other.¹⁸ This argument is unpersuasive. This argument ignores the fact that regional and national companies in many industries routinely operate within the legal structure of our federal system, subject to a wide variety of federal, state, and local laws. A mere preference by Verizon for uniformity does not require the FCC to exercise preemption. Notably, Verizon does not argue that it is operationally impossible to comply with different state requirements, only

¹⁷ Verizon mischaracterizes the FCC's carefully considered approach as "inaction" which "emboldened" states to adopt inconsistent regulations. Verizon petition at 4. In fact, as noted above, some state proceedings examining CPNI issues were already well under way before the Third CPNI Order was issued.

¹⁸ Verizon petition at 9.

that it will increase company costs.¹⁹ Verizon, of course, already successfully operates in multiple jurisdictions in compliance with the differing requirements of those jurisdictions, as do other companies affected by this rule.

D. The First Amendment Does Not Require Automatic Preemption

The Verizon petition devotes extensive attention to an attempt to find constitutional implications in the FCC’s failure to automatically preempt all inconsistent state regulations. The company’s arguments are without merit.²⁰

As noted above, states can undeniably demonstrate a substantial interest in privacy issues in the telecommunications context. Verizon’s focus is on preventing states from requiring “opt-in.”²¹ Neither the Tenth Circuit, nor any other court, however, has held that the First Amendment requires “opt-out” as the only permissible mechanism for obtaining customer consent for use of private information. Indeed, no constitutional challenge to Section 222 itself has been considered by a court to our knowledge. The Tenth Circuit decision merely concluded that the FCC had not properly evaluated whether opt-in was sufficiently narrowly tailored to pass muster under the *Central Hudson* test.²²

Verizon’s petition asserts that the Third CPNI Order would allow states to “adopt CPNI regulations that the Commission has expressly found would not pass constitutional

¹⁹ Verizon petition, App. E, Breen Declaration, ¶ 25.

²⁰ By addressing Verizon’s First Amendment argument, NASUCA does not concede that the Third CPNI Order properly resolves the First Amendment issue, or that the Tenth Circuit decision in *U.S. West v. FCC*, 182 F.3d 1244 (10th Cir. 1999), *cert. denied* 530 US 1213 (2000) correctly decided the First Amendment issues before it.

²¹ *See e.g.*, Verizon petition at 13.

²² 182 F.3d at 1239.

muster.”²³ This is simply incorrect. The FCC made no finding, express or implied, that any actual or potential state regulation would fail a constitutional test. Quite to the contrary, as noted above, the FCC’s decision as to its own interstate rules was carefully based on the record before it. What the Third CPNI Order does expressly state is that states can make the constitutional analysis themselves, based on their own records, and that such an analysis could yield a different result.²⁴

Verizon’s First Amendment arguments -- taking a carrier perspective -- give short shrift to equally if not more compelling interests on the consumer side of the question. States have recognized that a customer’s interest in maintaining control of his or her personal and private information is not only substantial but may have a constitutional dimension as well.²⁵ States may well determine that the commercial interest in a specific type of marketing practice either has no constitutional dimension at all, or that the practice must accommodate a stronger interest in personal privacy.

Finally, even if Verizon is correct that the FCC has a duty to preempt to prevent states from enacting unconstitutional rules, Verizon does not explain how the FCC can do so without an adequate record. The very nature of the First Amendment analysis used by the Tenth Circuit requires a review of the analysis conducted by the administrative agency to determine, *inter alia*, if the least restrictive means has been adopted.²⁶ Given this fact, there is no basis for the FCC to say, as Verizon asks it to, that “try as they

²³ Verizon petition at 2.

²⁴ Third CPNI Order, ¶ 71

²⁵ See footnote 10 above citing examples of state privacy concerns expressed in the record.

²⁶ 182 F.3d at 1238-1239.

might, the states cannot create a record”²⁷ sufficient to withstand constitutional scrutiny.

III. CONCLUSION

For the foregoing reasons, the National Association of State Utility Consumer Advocates urges the Federal Communications Commission to reject the Verizon petition for reconsideration and reaffirm its announced commitment to a partnership role with states and their citizens in crafting effective privacy protections.

Respectfully submitted,

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²⁷ Verizon petition at 14.