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**Ex Parte
VIA ECSF**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Notice in CC Docket No. 96-115 – Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; and RM-11277 – Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information

Dear Ms. Dortch:

Verizon supports the Commission’s goal of preventing pretexting and protecting confidential customer data against unauthorized release. Verizon has long emphasized the importance of protecting confidential customer data, and our commitment to customer privacy and to preventing pretexting is a matter of public record. For example, the company proactively trains its employees on CPNI safeguarding procedures. When new threats emerge, this training evolves; as the threat of pretexting increased, for example, Verizon provided additional training to our customer service personnel about ways to detect and report conduct that is indicative of pretexting. The company is also working closely with other companies in our industry to share best practices related to safeguarding customer information. Verizon has also attacked the data theft problem at its source by filing civil actions to uncover and stop otherwise anonymous pretexting operations.

Verizon has safeguards and procedures in place for guarding against improper disclosure or theft of customer information. We review and modify these procedures on a regular basis to minimize the possibility of improper disclosure of customer information while still providing quality service to our customers. Consistent with this commitment to customer privacy, Verizon has proposed balanced security procedures that are designed to frustrate would-be pretexters without frustrating legitimate customers. Under the Verizon proposal, access to the most sensitive data that is the most valuable to pretexters would always require a password, but many routine business transactions would not. We believe this consumer-focused approach will

effectively meet the goal of protecting customer data and avoid concerns about First Amendment rights.

Verizon also supports proposals requiring consumers to provide a password in order to access their account over the Internet. The use of passwords in the online environment is routine and readily accepted by customers. A requirement to provide customers the *option* of password protecting telephone access to their account information also is reasonable and minimally burdensome. Indeed, Verizon already permits its customers, at their own discretion, to password protect telephone access to their confidential account information.

However, the Commission should reject proposals that impose certain requirements directly (or through a safe harbor) on carriers and their customers that would broadly require customers to provide a password before gaining access to any or all of their information or broadly require customers to re-initialize their online accounts before regaining access to any customer information online. As we have explained elsewhere, to the extent the FCC does impose new requirements on carriers, in the form of a safe harbor or otherwise, it is important to craft them narrowly so that they do not impose unnecessary burdens on the ability of customers to obtain information about their services or on the ability of carriers to provide it. Not only is it important to avoid imposing unnecessary costs and burdens on the customers and carriers who are victims of pretexting, but it is also important if any requirements that the FCC adopts are to pass muster under the First Amendment.

I. Any New Requirements that Restrict the Ability of Carriers and Customers To Communicate Are Subject to Heightened Constitutional Scrutiny.

The new requirements that some parties seek to impose on carriers and their customers will necessarily restrict a form of protected speech. The various proposed requirements directly interfere with speech between customers and carriers by forcing them to take required actions before carriers may communicate certain information to their customers. Restrictions on what information can or cannot be communicated—whether through a mandatory password requirement, a requirement that customers re-initialize their online account, a requirement that carriers contact their customers via their home telephone regarding various issues, or other means—by their terms restrict speech and implicate the First Amendment. *See Verizon Nw., Inc. v. Showalter*, 282 F. Supp. 2d 1187, 1191 (W.D. Wash. 2003) (striking down Washington’s CPNI restrictions because “the regulations at issue here directly affect what can and cannot be said” and “[s]uch a restriction, no matter how indirect, implicates the First Amendment”).

Indeed, the various proposed requirements necessarily will restrict customers’ ability to obtain information that they want from their service provider and carriers’ ability to provide information they desire to provide to their customers. *See, e.g., U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (“Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (explaining that communications are protected under the First Amendment whether the restriction is applied at the source or impedes the listener’s reciprocal right to hear the communication).

Just as a restriction on a carrier's ability to speak can violate the First Amendment, so too can a barrier to a customer's willing receipt of speech. See, e.g., *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (1991); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) ("We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him."); *U.S. West*, 182 F.3d 1224 (striking down on First Amendment grounds the FCC's CPNI restriction that required customers to take the affirmative step of opting-in to receive carriers' CPNI-based speech); *Verizon Nw.*, 282 F. Supp. 2d 1187 (same for Washington's opt-in scheme).

Because any such requirements will restrict speech, they are subject to heightened constitutional scrutiny under the First Amendment. Indeed, regardless of whether a particular restriction is ultimately deemed to be content based or not, or to apply in a given case to commercial or non-commercial speech, any such restriction must at a minimum be crafted narrowly and restrict no more speech than is necessary.

As an initial matter, to the extent any new requirements limit or burden the ability of customers to obtain, or carriers to provide, specific information, they arguably are *content-based* restrictions on fully protected non-commercial speech and are, therefore, subject to strict scrutiny. This is because such requirements limit directly the ability of carriers to communicate certain content—particular account information, CPNI, or some other category of information—and not other communications with customers that involve different, permissible content. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based."). A content-based speech restriction is subject to strict scrutiny. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002). Under strict scrutiny, the government "ha[s] the burden to prove that [its restriction on speech] is (1) narrowly tailored, to serve (2) a compelling state interest." *Id.* Thus, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.")).

Even if any new requirements are not deemed to be content-based and subject to strict scrutiny, they are nonetheless subject to heightened scrutiny under either the intermediate scrutiny standard articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), or under the standard that applies to constitutionally protected truthful commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *O'Brien* intermediate scrutiny would apply to any restriction that is deemed to be a content-neutral restriction on non-commercial speech. See *Turner Broad. Sys.*, 512 U.S. at 662. Under *O'Brien*, any rule that restricts speech will be sustained only if it "furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free

expression; and if the incidental restriction on alleged First Amendment freedoms is *no greater than is essential to the furtherance of that interest.*” 391 U.S. at 377 (emphasis added).

Moreover, much of the speech at issue would appropriately be classified as non-commercial, or, at the very least, contain a mix of commercial and non-commercial speech. The key test for identifying commercial speech is speech that merely proposes a commercial transaction, such as advertising. *See, e.g., Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (identifying the proposal of a commercial transaction as “the test for identifying commercial speech”); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (commercial speech “does no more than propose a commercial transaction” (internal quotation marks and citations omitted)). Customers, however, seek information from their carriers on a wide range of topics relevant to the customers, which can include questions regarding their bills, repair, service offerings and quality, and pricing and may not include any proposal of a commercial transaction. Communications also frequently involve a mix of more than one topic, and, where communications involve a mix of commercial and non-commercial speech, the standards governing non-commercial speech apply. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“apply[ing the] test for fully protected expression” where “the component parts of a single speech are inextricably intertwined” and “applying one test to one phrase and another test to another phrase . . . would be both artificial and impractical”).

But even if particular speech were deemed to be commercial speech, any restriction on commercial communications between carriers and customers still is subject to heightened scrutiny under *Central Hudson*. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366-68 (2002). Under the Supreme Court’s standards for restricting commercial speech, if the regulated speech is not misleading and does not concern unlawful activity, it can only be limited if the restriction (1) is in support of a substantial government interest, (2) “directly advances the governmental interest asserted,” and (3) “is *not more extensive than is necessary to serve that interest.*” *Central Hudson*, 447 U.S. at 566 (emphasis added).

Therefore, regardless of the First Amendment standard that applies to a particular restriction, at a minimum, it must be crafted narrowly if it is to pass constitutional muster.

II. Any New Requirements at a Minimum Must Be Narrowly Crafted To Pass Constitutional Muster.

As explained above, even in the commercial speech context, “the First Amendment mandates that speech restrictions be narrowly drawn.” *Central Hudson*, 447 U.S. at 565 (internal quotation marks and citation omitted); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (commercial speech restriction must be “no more extensive than necessary to serve [the stated] interest”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O’Connor, J., concurring) (“The 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.”). As the Supreme Court has recently reiterated, “if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” *W. States*, 535 U.S. at 371. In other words, even where the interest the government seeks to advance is legitimate and

substantial, the government has an obligation to explore and consider alternative means that would restrict substantially less speech. *U.S. West*, 182 F.3d at 1238 (“This is particularly true when such alternatives are obvious and restrict substantially less speech.”).

Here, the Commission’s stated interest is in preventing the use of pretexting to obtain particular types of customer information and specifically customer call detail information. *See Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, 21 FCC Rcd 1782, 1782-83 (¶ 1) (2006) (“This Notice directly responds to the petition filed by the Electronic Privacy Information Center (EPIC) As the EPIC petition points out, numerous websites advertise the sale of personal telephone records for a price. . . . [D]ata brokers advertise the availability of cell phone records, which include calls to and/or from a particular cell phone number, the duration of such calls, and may even include the physical location of the cell phone. . . . [M]any data brokers also claim to provide calling records for landline . . . numbers.”); Petition of the Electronic Privacy Information Center for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115, at 1 (Aug. 30, 2005) (“In implementing Section 222, the Commission . . . did not adequately address third party data brokers and private investigators that have been accessing CPNI without authorization . . . through pretexting, the practice of pretending to have authority to access protected records”).

Accordingly, any requirements, whether imposed through a safe harbor or otherwise, must be carefully crafted to directly advance that interest and sweep no more broadly than necessary to serve that interest. For example, some parties have suggested that the Commission should impose a broad mandatory password requirement that would apply before the customer could obtain essentially *any* information from a carrier. Such a sweeping requirement would raise serious constitutional issues because it sweeps far more broadly than necessary to protect against the harm the Commission has identified, the use of pretexting to obtain sensitive *call detail* information. *See Rubin*, 514 U.S. at 490-91 (striking down a prohibition on displaying alcohol content on beer labels where the government could have considered “prohibiting marketing efforts emphasizing high alcohol strength”); *see also Riley*, 487 U.S. at 800 (striking down a compelled disclosure requirement as not “narrowly tailored” where “[a]lternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements”); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-16 (1973) (articulating overbreadth doctrine under the First Amendment). At a minimum, therefore, any password requirement would have to be narrowly crafted to address the specific problem of pretexters fraudulently obtaining call detail information.

Similarly, some parties have proposed that the Commission should broadly require every customer to take affirmative steps to re-initialize their online accounts. This requirement would restrict carrier-customer communications online unless and until the customer were to affirmatively re-initialize his or her online account. Again, however, overly broad requirements along these lines could create significant First Amendment issues. The federal courts have repeatedly struck down restrictions on speech that place unnecessary burdens on willing

recipients of speech to take an affirmative step before receiving lawful communications. *See, e.g., Project 80's*, 942 F.2d 635; *U.S. West*, 182 F.3d 1224; *Verizon Nw.*, 282 F. Supp. 2d 1187. This is especially so where an “obviously” less speech restrictive alternative is available, as is true where a would-be speaker could provide notice to the would-be recipient of speech and an opportunity to “opt out” of receiving it or, in this case, to opt out of the ability to receive it online. *See, e.g., U.S. West*, 182 F.3d at 1238 (striking down the FCC’s “opt-in” restrictions on carriers’ use of a customer’s information where the government could instead simply allow customers to “opt-out” of use of their information for marketing purposes after receiving notice); *Verizon Nw.*, 282 F. Supp. 2d at 1194 (same as to Washington’s “opt-in” restrictions). As a result, the First Amendment requires the Commission to give serious consideration to alternatives short of an across the board re-initialization requirement, such as a process by which carriers mail notice of the online accounts to customers and afford customers an opportunity to deactivate any online account they wish to cancel.

Likewise, in order to avoid burdening more speech than necessary, it is important that the Commission also provide carriers with flexibility to satisfy any requirements in the manner that places the least burden on speech given the technical and other capabilities available to the particular carrier. For example, some parties have urged the Commission to adopt various notice requirements that would obligate carriers to notify customers regarding certain account-related changes or events, such as when the customer’s password has been changed. If the Commission were to require all carriers to adopt precisely the same method of notifying customers, regardless of the underlying technology at issue, such a one-size-fits-all requirement could also run afoul of the First Amendment. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (stating that First Amendment requires government to “‘carefully calculat[e]’ the costs and benefits associated with the burden on speech imposed by its prohibition”). For example, if wireline carriers were required to notify customers regarding account-related changes via the telephone number that is registered to their account—often a residential phone to which the customer has no access during business hours—such a requirement could severely hamper the ability of wireline carriers to complete notification. Unless and until such notification could be completed, the carriers would be foreclosed from communicating with their customers regarding their customers information. Such a burdensome barrier to carrier-customer communications could not be sustained under the First Amendment in light of the Commission’s ability to adopt a more flexible approach that would tailor the notice requirement more specifically to each type of technology. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-64 (2001) (striking down under the First Amendment broad restrictions on tobacco advertising where the government did not take into account their full impact in various geographical regions and as to particular businesses); *id.* at 563 (“The degree to which speech is suppressed—or alternative avenues for speech remain available—under a particular regulatory scheme tends to be case specific.”). Such methods could include notification by text message to the wireless customer’s handset and by U.S. mail to the wireline customer’s billing address. *See, e.g., id.* at 565 (“[T]o the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.”).

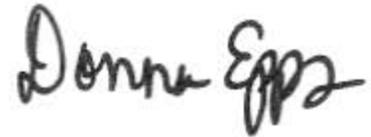
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In short, if any requirements the FCC adopts are to withstand any level of scrutiny under the First Amendment, the Commission must, at a minimum, narrowly craft them to minimize any impediment to customers' right to receive, and carriers' right to provide, customer information.

Sincerely,

A handwritten signature in black ink that reads "Donna Epps". The signature is written in a cursive, flowing style.