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VIA ECFS

January 29, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
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:

Please file the attached white paper and accompanying declaration in the above-captioned docket.

Should you have any questions about this filing, kindly contact me at (202) 515-2527.

Respectfully submitted,

A handwritten signature in black ink that reads "Donna Epps".

cc:
Michelle Carey
Ian Dillner
John Hunter
Scott Deutchman
Scott Bergmann
Sam Feder
Tom Navin
Renee Crittendon

REQUIRING “OPT-IN” PRIOR TO SHARING CPNI WITH MARKETING VENDORS: UNCONSTITUTIONAL AND UNWISE

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. In adopting any restrictions on the use of CPNI, the Commission must be mindful of its duty to tailor regulatory mandates to avoid impinging on the protected rights of carriers to speak to their customers, as well as the rights of those customers, as willing listeners, to receive protected speech about communications services.

This docket contains proposals for balanced security procedures that are designed to directly address the deceptive practices used by would-be pretexters without frustrating legitimate customers. We understand that one proposal under consideration by the Commission would require a password for access to particular data – namely, “call detail” records such as the date, time, called and calling party number, or duration of specific calls – sought out by pretexters. At the same time, this proposal would leave many routine business contacts outside the new password mandate. This approach directly targets the means and methods used by pretexters and is sensitive to the ability of subscribers to communicate their service needs and billing concerns to their carrier. Moreover, because the password proposal is a narrowly tailored solution aimed directly at the problem at hand, it strikes a balance between regulation and the First Amendment rights of carriers and customers.

Unfortunately, other proposals now before the Commission are not aimed with precision at the problem of pretexting and impinge unnecessarily on the First Amendment

rights of both carriers and customers. For example, proposals to require carriers to obtain opt-in consent prior to sharing any CPNI with independent contractors for marketing purposes (rather than the smaller category of call detail records which pretexters actually target) would jettison clear, established and functional rules in favor of an overbroad approach that would confuse consumers, increase costs, and violate the First Amendment. Such an approach would disrupt established business practices to the detriment of consumers and carriers. The use of CPNI to engage in target marketing increases the amount of information available to consumers of telecommunications services, resulting in more informed choices and lower prices. Indeed, many of Verizon's target marketing campaigns are aimed at *reducing* a customer's overall bill by offering new, less expensive services or service plans.

Forcing carriers to reconfigure marketing relationships to avoid the use of independent contractors by bringing the operations in-house or converting independent contractors to agents is neither viable nor constitutional. Attempting to reconstruct in-house the marketing expertise and dissemination capability available from the myriad independent contractors on the market today would be a substantial new undertaking for Verizon as a telecommunications carrier. And converting an independent contractor to an agent is much more than a semantic exercise; it could involve Verizon in the direct management of marketing activities and deprive it of the specialized expertise that is the core value provided by marketing contractors. As a practical matter, therefore, opt-in would end targeted marketing using independent contractors, taking away Verizon's preferred means of communicating with its desired audience. From a consumer standpoint, the end of targeted marketing could result in increased costs and unwanted

marketing materials, because it would eliminate the focused marketing that is made possible by the use of CPNI. Thus, both the cost of marketing campaigns that must be borne by consumers and the amount of unwanted marketing materials would increase, without improving data security.

As discussed below, the Supreme Court has made clear that a commercial speaker is entitled to select its audience, the content of its message, and its preferred means of dissemination in order to maximize the impact and effectiveness of its commercial speech. The Commission's own findings in its previous CPNI orders, the Supreme Court's numerous decisions striking down restrictions on the use of third parties, such as paid solicitors, for the dissemination of protected speech, and the *U.S. West* and *Showalter* decisions which are directly on point, all lead to the conclusion that a broad opt-in restriction on the sharing of all CPNI with marketing vendors would fail the *Central Hudson* test.

Nor would reliance upon the recent emergence of the pretexting problem serve to distinguish prior judicial precedent or save an overbroad opt-in regime. While new problems may have arisen, Supreme Court precedent continues to dictate that the government must demonstrate that any response "directly advances" solution of the problem and is narrowly tailored to avoid any unnecessary burdens on commercial speech. An opt-in mandate for sharing of all CPNI with outside contractors cannot pass this test—there is no evidence in the record that pretexters are targeting marketing vendors or have obtained CPNI from marketing vendors, and there is no evidence that the Commission's present system for controlling marketing vendor handling of CPNI has failed. In addition, there are several obvious and more effective alternatives to an

undifferentiated opt-in requirement that burden less speech and are more likely to advance the Commission's goals.

Verizon, like other carriers, uses marketing vendors extensively, including in outbound telemarketing and direct mail campaigns, because it is the most effective and lowest cost means to speak to its desired audience. These campaigns involve sharing customer information, some of which is CPNI, with marketing vendors (subject to appropriate confidentiality protections), who then tailor campaigns to the particular interests of consumers, making marketing speech more effective and avoiding unnecessary or redundant speech. The most sensitive information – social security and credit card numbers, for example – is not shared, and the CPNI used in marketing is limited to information such as the services to which a customer subscribes. Verizon does not provide the call detail records sought by pretexters to its marketing vendors.¹ An opt-in requirement would effectively end most forms of targeted marketing, denying Verizon the right to engage in protected commercial speech and deny willing listeners the right to receive that speech, in violation of the First Amendment.

¹ Verizon does not provide its independent contractor marketing vendors with call detail records or access to call detail records for marketing purposes. In a few limited instances, independent contractors that perform general customer care services, such as handling billing inquiries over the telephone, are permitted to inform customers about other Verizon services when customers ask about them. In the process of providing that information, these customer care vendors may access a customer's account, including call detail records. It is important to note, however, that these vendors are hired to perform customer care services, not to conduct marketing or sales.

I. REQUIRING CARRIERS TO OBTAIN OPT-IN CONSENT PRIOR TO SHARING INDIVIDUALLY IDENTIFIABLE CPNI WITH INDEPENDENT CONTRACTORS FOR MARKETING PURPOSES IS UNWISE AS A MATTER OF POLICY.

Requiring opt-in authorization prior to sharing any CPNI with independent contractors for marketing purposes (as opposed to the call detail records targeted by pretexters) would run counter to the public interest. Current rules, which permit a carrier to use CPNI in marketing its own services or those of its affiliates unless the customer elects otherwise,² are consistent with customer expectations. Imposing an opt-in requirement would impede the flow of useful information desired by consumers and increase the burden imposed on them by carrier marketing campaigns. Moreover, an opt-in approach would reduce the efficiency of marketing campaigns and increase costs for consumers and carriers without improving the security of CPNI. The current rules already prohibit knowing disclosure to third parties,³ carriers already take appropriate steps to safeguard confidential information when using independent contractors for marketing purposes, and opt-in would do nothing to address the deceptive practices used by so-called “databrokers” to obtain unlawful access to call detail records.

A. An “Opt-In” Rule Applicable To All CPNI Would Disrupt The Existing, Efficient Carrier Practice Of Making Extensive Use Of Independent Contractor Marketing Vendors To Conduct Marketing Campaigns.

Like other carriers, Verizon uses third party marketing vendors (subject to appropriate confidentiality protections) to conduct telemarketing and direct mail

² In the case of independent contractors and joint venture partners, Commission rules also require a confidentiality agreement. 47 C.F.R. § 64.2007(b)(2).

³ Section 222 and the Commission’s rules establish a carrier duty to safeguard customer data. 47 U.S.C. § 222(a); 47 C.F.R. § 64.2005.

campaigns, along with other advertising and outreach, because it does not have these capabilities in-house and because marketing vendors have greater creative resources and distribution expertise in these matters and can provide these services more efficiently and at lower cost.⁴

The tailoring of Verizon's outbound marketing campaigns through the use of CPNI creates tremendous benefits for consumers and for competition. First, knowledge is essential to informed choices in a competitive market. The use of CPNI to inform consumers of their present services and charges allows those consumers to make informed choices regarding both service preference and carrier preference. Second, a large percentage of Verizon's outbound target marketing is aimed at offering customers a better deal based on an analysis of their service profile and usage patterns using CPNI. The marketing of "one rate" plans and new technologies often depends upon Verizon's ability to target those customers whose CPNI profile indicates they could save money or achieve superior or additional services for the same cost.

The use of outside marketing vendors plays a critical role in Verizon's ability to execute target marketing campaigns and to speak effectively to its preferred audience. In fact, 95 percent of Verizon's outbound telemarketing, which involves contacting customers to alert them to new service offerings, is done by outside marketing vendors, accounting for approximately ten million total contacts in 2006.⁵ Verizon also used marketing vendors to handle three million of its inbound telemarketing calls. These calls

⁴ Decl. of Judy K. Verses, Senior Vice President of Retail Markets, ¶ 4-5 ("Verses Decl.") (attached).

⁵ *Id.* ¶ 7.

result from customers initiating contact with Verizon or a marketing vendor, often in response to an advertisement or mailing.⁶

In addition to inbound and outbound telemarketing, Verizon's direct mail marketing vendors distributed approximately 135 million stand-alone pieces of targeted direct mail in 2006.⁷ Over the same period, Verizon's door-to-door sales marketing vendors made more than 1.3 million sales pitches and customer contacts.⁸ Verizon would have to significantly increase its marketing and sales staff, by hundreds or even thousands of employees, if it were required to use employees for direct mail, outbound telemarketing, inbound telemarketing, and door-to-door sales. Such an increase in personnel would increase Verizon's costs substantially, ultimately increasing the prices consumers must pay for communications services.⁹

Sharing CPNI with these marketing vendors enables them to target campaigns to particular consumer interests, narrowing the group contacted to those most likely to be interested in a particular offering and lowering costs, but it does not involve the sharing of information likely to be of interest to pretexters, who seek call detail information. In fact, for the majority of its marketing campaigns, Verizon provides its marketing vendors only summary information about a customer, and only some of that information may fit the broad definition of CPNI. Specifically, Verizon's direct mail, outbound and inbound

⁶ *Id.* ¶¶ 4, 9.

⁷ *Id.* ¶ 13.

⁸ *Id.* ¶ 14.

⁹ *Id.* ¶ 5.

telemarketing, and door-to-door¹⁰ marketing vendors have access to general account information, including name, address, billing telephone number, as well as specific information about what the customer purchases from Verizon, some of which is CPNI. The information that Verizon provides to its marketing vendors includes: the type of service and service package that a customer has (*e.g.*, the customer's current local, long distance, and/or international calling plans); price of those services; the presence of any vertical features on a customer's account; the average amount spent on those services over a period of time; DSL/FiOS speed; total billed revenue; whether international calls are placed; average minutes of calling over some period of time; contract expiration date; and whether the customer is a Lifeline customer. Significantly, Verizon does not provide its marketing vendors with call detail records or access to the Verizon databases that contain them.¹¹

In all cases, Verizon subjects marketing vendors in possession of confidential customer data, including summary CPNI information, to strict safeguarding requirements.¹² Telemarketing, direct mail, and door-to-door marketing vendors must execute confidentiality agreements requiring them to abide by Verizon's confidentiality standards and policies.¹³ For example, a typical telemarketing contract provides:

To the extent Supplier is authorized to use, or provided with access to or with a customer list derived from, customer proprietary network information ("CPNI"), Supplier shall at all times comply with all applicable laws, rules and regulations,

¹⁰ Verizon uses door-to-door vendors to market services such as its FiOS product and small business services.

¹¹ Verses Decl. at ¶¶ 7, 8, 10, 14.

¹² *See Id.* ¶¶ 3, 12, 13, 14.

¹³ *Id.*

and all of Verizon’s policies, methods and procedures, regarding treatment and use of CPNI as communicated to Supplier.¹⁴

Moreover, this same contract requires that marketing vendor employees with access to confidential Verizon consumer information, including CPNI, must execute a “Treatment of Information” form acknowledging and agreeing to Verizon’s confidentiality policies, including disciplinary action up to and including their own termination for violation of such policies.¹⁵ Requiring opt-in prior to sharing CPNI with such marketing vendors would chill productive, efficient speech, resulting in less focused marketing campaigns, increased costs, and greater consumer confusion.

By contrast, use of this information, under strict controls, allows marketing vendors to target consumers who would be interested in a given service offering, consult with a customer about their current services, and ensure that any new services purchased neither conflict with nor duplicate services already provided to that customer. Customers reasonably expect sales representatives to have sufficient knowledge of their current services to be able to explain how any new services will add overall, incremental, or replacement value.¹⁶ Indeed, if the sale representative does not have such information, the customer may become frustrated, leading to the potential loss of a sale and an erosion of consumer goodwill associated with the Verizon brand – an invaluable corporate asset.¹⁷

¹⁴ *Id.* ¶ 11.

¹⁵ *Id.* ¶ 12.

¹⁶ *Id.* ¶ 15.

¹⁷ *Id.*

Use of CPNI and summary account information has been at the heart of several recent – and successful – Verizon marketing campaigns. A few years ago, Verizon launched a revolutionary new fiber optic broadband Internet access service called “FiOS.” To market the product, Verizon used CPNI to identify customers that already subscribe to Verizon’s DSL or dial-up Internet access services and would likely be interested in switching to FiOS. Without the ability to share CPNI with marketing vendors, the successful marketing for FiOS would not have been possible, and many interested customers would not have become aware of the service.¹⁸ Likewise, many consumers interested in Verizon’s ONE BILL® program – a free convenience that enables customers that subscribe to Verizon’s wireless and local services to receive a single bill for both services – would not have been identified absent marketing vendor use of CPNI (in this case, the identity of a customer’s existing services).¹⁹ Finally, Verizon’s “Freedom” calling plans offer customers the ability to receive discounts when they combine several services, such as local, regional and long distance calling.²⁰ Verizon could not have identified interested customers without providing marketing vendors the CPNI necessary to identify those most likely to benefit.

The primary reason for the success of each of these campaigns is two-fold. First, Verizon was able to design marketing campaigns that were targeted to customers whose current service profile and other CPNI directly matched that of the product being sold.²¹ Second, Verizon was able to implement these marketing campaigns efficiently and cost

¹⁸ *Id.* ¶ 21.

¹⁹ *Id.* ¶ 22.

²⁰ *Id.* ¶ 23.

²¹ *Id.* ¶ 24.

effectively by using outside marketing vendors specializing in large-scale marketing efforts.²² An opt-in requirement compromising either of these components would prevent such efficient – and successful – campaigns in the future.

An opt-in requirement also may undermine the Commission’s objective of enhancing consumer privacy. Adopting opt-in restrictions on the use of any CPNI may lead to consumers receiving *more* untargeted and potentially unwanted marketing. If carriers are not able to share CPNI with independent contractors involved in marketing, they may have to engage in broader, mass-market campaigns, based on demographic data supplied by third parties. An opt-in regime that limits Verizon’s ability to share with these marketing vendors the CPNI necessary to conduct targeted campaigns will force Verizon to: (1) bring some or all of these functions in-house, an expensive and time-consuming undertaking that would increase costs to consumers; (2) use outside marketing vendors to conduct broad, unfocused campaigns unguided by the use of CPNI; or (3) attempt to convert all the marketing vendors Verizon uses or may use in the future into Verizon’s agents. The last of these options – entering into a principal-agent relationship with a marketing vendor – would involve Verizon in the general business affairs of its marketing vendor-agents.

There are many reasons why Verizon has not entered into principal-agent relationships with its independent contractors. For example, at present Verizon is not responsible for the hiring, employee promotion and discipline, and internal governance of its independent contractors. Some marketing vendors are required to hire modeling or other talent for Verizon advertisements, and those marketing vendors, not Verizon, are

²² *Id.*

required to pay associated Screen Actors Guild (“SAG”) or other fees and comply with the associated regulations. Verizon’s independent contractors who develop national advertising are responsible for getting permission to use images in the advertisements they develop. And Verizon relies on its independent marketing vendors to understand and comply with the many state and local marketing-related laws, such as the need to obtain the proper permits for marketing initiatives like selling Verizon’s fiber broadband service (“FiOS”) door-to-door.

Based on prior experience with opt-in regimes, Verizon regards another possibility – seeking individual customer opt-ins – as both practically and economically infeasible. Verizon’s experience has shown that obtaining opt-in consents from the mass market is extremely costly, ineffective, and confusing to customers.²³ In practice, opt-in amounts to a ban on target marketing.²⁴

Both of the remaining options disrupt existing, efficient business practices while increasing the burden on consumers from carrier marketing campaigns. If carriers cannot use CPNI to target offers for new products, services, and packages to those customers most likely to want them, this will lead to an increase in marketing to those consumers for whom the product or service is inappropriate or who are not interested in purchasing it.²⁵ A rule change that will have the practical impact of requiring such an unfocused approach to marketing will harm the customer-carrier relationship and infringe on consumers who must expend time and effort to filter a greater volume of marketing

²³ *Id.* ¶ 16.

²⁴ *Id.*

²⁵ *Id.* ¶ 18.

materials to find what they want. It will also reduce competition in the market for communications services and increase consumer prices. As noted above, much of Verizon's target marketing is aimed at *lowering* customers' monthly bills to reduce churn and increase customer retention in the face of competition.

While requiring opt-in prior to sharing any CPNI with independent contractors for marketing would not increase the security of consumers' confidential information, because that information already is protected by contractual provisions and because Verizon does not provide its marketing vendors with the most sensitive information (call detail records), it would increase costs both in the short and long term. As an initial matter, the costs associated with changing carrier systems and processes to conform to an opt-in regime would be significant. The process of administering an opt-in campaign would be very costly and time-consuming because it would require adapting carriers' computer systems and internal business practices to new rules. In addition, limiting carriers ability to share CPNI with independent contractors would severely curtail targeted marketing campaigns and require more expensive mass marketing efforts.²⁶ Not being able to use CPNI and instead relying on demographic data supplied by third parties increases customer acquisition costs, as well as the cost of unproductive marketing directed to customers for whom an offering is inappropriate.²⁷ The costs of such campaigns ultimately would be borne by customers in higher rates – and result in more unwelcome marketing, eroding consumer goodwill.

²⁶ *Id.*

²⁷ *Id.*

B. An “Opt-In” Requirement For All CPNI Would Impede The Flow Of Useful Information Desired By Customers.

As the Commission has recognized, the opt-out approach embodied in the current rules is consistent with customer expectations and provides many consumer benefits. Consumers expect that, having entered into a customer-carrier relationship, their data will be used by their carrier to offer them discounts and market new or additional service offerings. Customers want to be advised about other services their carrier may offer.²⁸ Information about service and usage patterns enables carriers to tailor marketing to a consumer’s needs, improving efficiency.²⁹ At the same time, the practice reduces inefficient and unwanted advertising, enhancing consumer privacy.³⁰ Indeed, it is not surprising that customers want to receive targeted notices regarding carrier service offerings, as they expect to benefit from them.

²⁸ See *Implementation of the Telecomms. Act of 1996: Telecomms. Carriers’ Use of Customer Proprietary Network Info. & Other Customer Info.; Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Commc’ns Act of 1934, As Amended; 2000 Biennial Regulatory Review – Review of Policies & Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, Third Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 14,860, 14,876-77 (¶ 35) (2002) (citing Comments of Cincinnati Bell Telephone, App. A at 2 (June 11, 1996) (indicating that 81.5% of respondents wanted to be advised of the services that Cincinnati Bell Telephone offers)) (“*Third CPNI Order*”). Surveys offered by the Electronic Privacy Information Center (“EPIC”) purporting to show that individuals support opt-in arrangements concern driver’s license information, financial information and information collected online – not CPNI. Comments of EPIC at 9-10 (Apr. 14, 2006); see also Reply Comments of the National Association of State Utility Consumer Advocates (“NASUCA”) at 13-14 (June 2, 2006)..

²⁹ *Third CPNI Order*, 17 FCC Rcd at 14, 876 (¶35) (citing Letter from Michael D. Alarcon, SBC, to William Caton, Acting Secretary, FCC, CC Docket Nos. 96-115, 96-149 (Apr. 12, 2002) (stating that interim opt-out approval has resulted in “[c]ustomized offerings of SBC’s products and services based on customers’ CPNI”).

³⁰ *Id.* (citing Comments of AT&T at 5 n.3 (Nov. 1, 2001) (“Indeed, limiting the use of CPNI may have the effect of increasing the number of solicitations by telecommunications carriers.”)).

The Commission has long recognized the consumer benefits of the current opt-out approach. As the Commission previously found, “[e]nabling 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.”³¹ The record before the FCC made “evident that a majority of customers...want to be advised of the services that their telecommunications providers offer” and can “reap significant benefits [from] more personalized service offerings.”³² 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.”³³

By contrast, an opt-in requirement frustrates consumer expectations and impedes the flow of useful information. Opt-in deprives consumers of commercial information they desire to receive.³⁴ For example, an opt-in requirement might prevent a carrier from marketing a bundle of services to a consumer – including services to which the consumer does not currently subscribe. Such bundles often reduce the overall costs of existing services while adding desired new services. Reducing carriers’ ability to tailor marketing materials to those most likely to be of interest and benefit to particular consumers does not serve the public interest.

³¹ *Id.*(citations omitted).

³² *Id.*

³³ *Id.* (citations omitted).

³⁴ *Id.* at 14,876-77 (¶¶ 35-36).

C. Adding “Opt-In” To Existing Requirements Would Decrease Transparency And Increase Consumer Confusion.

Adding a requirement of consumer opt-in consent for certain uses of CPNI will complicate carrier implementation and increase consumer confusion. Under current rules, if a carrier elected to share CPNI with an affiliate to market out-of-bucket services, such sharing would require an opt-out notice to consumers. Under an opt-in regime, if the same carrier were also to share CPNI with an independent contractor marketing vendor, Commission rules would require an opt-in notice. These repeated notices will confuse consumers, increasing the likelihood that all notices will be ignored and causing consumers to forego useful information they may well wish to receive. In the *Showalter* decision, rejecting a state opt-in regime, the court declared that “the state’s interest will not be advanced if consumers cannot understand the complicated regulatory framework sufficiently to effectively implement their preferences.”³⁵

I. II. A REQUIREMENT THAT CARRIERS OBTAIN “OPT-IN” CONSENT PRIOR TO SHARING ANY CPNI WITH INDEPENDENT CONTRACTORS FOR MARKETING COMMUNICATIONS SERVICES DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY.

Requiring opt-in authorization prior to a carrier sharing any CPNI with independent contractors for the purpose of marketing communications services would unnecessarily restrict substantially more speech than current rules and run afoul of the First Amendment. Federal courts have consistently rejected federal and state-level opt-in requirements as unconstitutional. Under those cases and the Supreme Court’s *Central*

³⁵ *Verizon Nw., Inc. v. Showalter*, 282 F. Supp. 2d 1187, 1193 (W.D. Wash. 2003).

Hudson decision,³⁶ opt-in restrictions on CPNI transfers to independent contractors cannot withstand constitutional scrutiny.

Whether opt-in is appropriate is not a question of first impression for the Commission, which must operate against the backdrop of decisions of the Tenth Circuit and the Federal District Court for the Western District of Washington addressing this very question. Both courts found that opt-in burdens protected speech in contravention of the First Amendment.³⁷

In *U.S. West, Inc. v. FCC*,³⁸ the Tenth Circuit considered an appeal of the FCC's 1998 *CPNI Order*, under which carriers were required to obtain opt-in consent from customers before they could use CPNI to market out-of-bucket services.³⁹ The Tenth Circuit concluded that the rules established in the *CPNI Order* impermissibly regulated protected commercial speech in violation of the First Amendment. This was so both because the Commission presented no evidence showing that the restriction directly advanced its asserted privacy interest and because the FCC failed to carry its burden of demonstrating that the opt-in authorization was narrowly tailored given the available

³⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

³⁷ The Public Utilities Commission of Ohio ("Ohio PUC") argues that Section 222(c)(2) essentially requires written opt-in absent a use of CPNI qualifying for one of the exceptions listed in 222(c)(1)(A) or (B). See Comments of the Ohio PUC at 27 (Apr. 13, 2006). The Ohio PUC mis-reads the statute. Section 222(c)(1) allows disclosure of CPNI "with the approval of the customer," which opt-out authorization confers. 47 U.S.C. § 222(c)(1).

³⁸ See *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

³⁹ See *Implementation of the Telecomms. Act of 1996: Telecomms. Carriers' Use of Customer Proprietary Network Info. & Other Customer Info.; Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Commc'ns Act of 1934, As Amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8128-8150 (¶¶ 87-114) (1998) ("*CPNI Order*").

alternative of using an opt-out approach.⁴⁰ In the wake of the Tenth Circuit’s ruling, the FCC conducted an exhaustive proceeding to examine whether *any* empirical evidence existed to support an opt-in regime. Finding no such evidence, it concluded that an opt-in regime was overly restrictive of carrier speech and could not survive First Amendment scrutiny.⁴¹ Accordingly the Commission adopted the opt-out approach in force today, codified in Section 64.2007(b) of the Commission’s current rules.⁴²

The Federal District Court for the Western District of Washington followed the same approach as the Tenth Circuit and the FCC in striking down a Washington State opt-in rule on First Amendment grounds.⁴³ The invalidated rule sought to regulate disclosures to “third parties outside the carrier’s organization,” just as the proposal at issue here would do with respect to transfers to “independent contractors.”⁴⁴

As in those cases, an opt-in requirement for sharing any CPNI with independent contractors and joint venture partners for purposes of marketing communications-related services, would restrict protected speech. As an initial matter, federal courts have recognized the lawful means utilized to deliver speech as integral to the speech itself and

⁴⁰ *U.S. West*, 182 F.3d at 1238.

⁴¹ *Third CPNI Order*, 17 FCC Rcd at 14,874 (¶ 31) (noting that “[a]lthough 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”).

⁴² 47 C.F.R. § 64.2007(b).

⁴³ *Verizon Nw.*, 282 F. Supp. 2d 1187.

⁴⁴ *Id.* at 1189.

entitled to protection.⁴⁵ In this case, Verizon chooses to speak to its customers, and potential customers, via third party marketing vendors.

An opt-in restriction that, as a practical matter, requires Verizon to reconfigure its marketing relationships to eliminate the use of independent contractors violates the First Amendment. Under Supreme Court precedent, a regulation that denies a speaker the preferred means of communicating with his or her desired audience is unconstitutional.⁴⁶ In this case, Verizon has determined that using independent contractors as marketing vendors is the most effective manner of speaking to its desired audience. The alternatives – bringing marketing operations in-house or converting independent contractors used in marketing to agents of Verizon – are cost prohibitive, deprive Verizon of the experience and expertise for which third party marketing vendors are hired, and increase Verizon’s liability exposure. *Meyer* and *Riley* proscribe such burdens on protected speech.⁴⁷

Moreover, an opt-in requirement, at a minimum, would be a restriction on commercial communications between carriers and customers subject to heightened scrutiny under the Supreme Court’s *Central Hudson* decision. The restriction would affect Verizon’s right to use CPNI to select its desired audience and the content of its

⁴⁵ See *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (treating restrictions on use of paid petition circulators as a restriction on speech); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 n.5 (1988) (rejecting argument that revenue limitations on professional firms that solicited for charities was “economic regulation” because “a statute regulating how a speaker may speak directly affects that speech.”).

⁴⁶ See *Meyer*, 486 U.S. at 424 (striking down a regulation prohibiting the use of paid petition circulators because it “restricts access to the most effective, fundamental, and perhaps economical avenue” for delivering the plaintiff’s speech).

⁴⁷ *Id.* (the fact that a regulation “leaves open more burdensome avenues of communications does not relieve its burden on the First Amendment”); see *Riley*, 487 U.S. at 787-795 (rejecting a regulatory scheme that allowed charitable solicitation by professional firms but restricted the percentage of collected donations such firms could retain).

message. It would also affect the right of willing listeners to receive carrier speech containing truthful information about costs and services derived from CPNI. The fact that other, more costly and less effective means of speaking exist is irrelevant to the First Amendment analysis.⁴⁸

Under *Central Hudson*, 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.*”⁴⁹ The government bears the burden of establishing that all three prongs of the *Central Hudson* test are satisfied. Moreover, once it is shown that the regulation at issue impacts constitutional rights under the First Amendment—a fact the Commission has conceded in its prior CPNI orders⁵⁰—then *Chevron* deference has no place in the analysis of the constitutionality of the regulation.⁵¹

A requirement that carriers obtain opt-in authorization prior to sharing any CPNI with independent contractors and joint venture partners does not satisfy *Central Hudson*’s heightened scrutiny standard. The governmental interest asserted in the 2006 *NPRM* is in

⁴⁸ *E.g., Meyer v. Grant*, 486 U.S. 414, 424 (“The First Amendment protects [the speaker’s] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.”); *U.S. West*, 182 F.3d at 1232 (“[A] restriction on speech tailored to a particular audience, ‘targeted speech,’ cannot be cured by the fact that a speaker can speak to a larger indiscriminate audience, ‘broadcast speech’”).

⁴⁹ *Cent. Hudson*, 447 U.S. at 566 (emphasis added).

⁵⁰ *Third CPNI Order*, 17 FCC Rcd at 14,879 (¶ 40) (“We ... 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”); *id.* at ¶ 41 (“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.”).

⁵¹ *U.S. West*, 182 F. 3d at 1231 (citing cases).

preventing pretexting to obtain particular types of customer information and, specifically, call detail information.⁵² While that interest in protecting privacy or deterring pretexting may be substantial in the abstract, that is not the question a court will ask in evaluating an opt-in requirement. Rather the Commission will have to demonstrate with evidentiary support that the specific regulation at issue “directly advances” the interest in deterring or reducing unlawful pretexting.⁵³ But the record is devoid of any evidence that restricting the sharing of all CPNI with independent contractors and joint venture partners will directly advance the objective of preventing pretexter access to call detail information. In fact, there is no evidence that pretexters are more likely to target third parties than employees. Pretexters use deception to achieve unauthorized access to customer accounts, often by setting up online accounts using fraudulently obtained personal information – such as an account number – or deceiving customer service

⁵² See *Implementation of the Telecomms. Act of 1996; Telecomms. Carriers’ Use of Customer Proprietary Network Info. & Other Customer Info.*, 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.”) (“*NPRM*”); Petition of EPIC for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information 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 . . .”).

⁵³ Thus, the FCC would have the burden of showing “that the challenged regulation advances the Government’s interest ‘in a direct and material way.’” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). This burden “is not satisfied by mere speculation or conjecture; [the government] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

representatives.⁵⁴ There is no reason to believe that independent contractor marketing vendors are particularly susceptible to these tactics, especially because Verizon does not provide its marketing vendors with the call detail information sought by pretexters.⁵⁵

Moreover, requiring opt-in consent prior to sharing CPNI with independent contractors is not narrowly tailored to addressing the pretexting threat because less restrictive means are available. Indeed, carriers that share information with independent contractors already do so subject to confidentiality protections to ensure the information is protected. Nothing in this record demonstrates that the present regime for outside marketing vendors—adopted by this Commission after careful consideration—has failed to protect consumer privacy. The Commission would, at a minimum, have to show that the existing system had failed before it could adopt a more speech-restrictive alternative.

In addition, this record contains other proposals, such as password protection for call detail information and requiring opt-in consent prior to sharing call detail with independent contractors, that would thwart pretexters and impose much less burden on protected commercial communications between a carrier and its customers. Other more narrowly tailored alternatives exist, including amending the Commission’s CPNI regulations to make carriers liable for the mishandling of CPNI by their chosen marketing vendors. As Justice O’Connor has put it: “If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.”⁵⁶ As we demonstrate in a

⁵⁴ See, e.g., Pui-Wing Tam, *A Reporter’s Story: How H-P Kept Tabs on Me for a Year*, Wall St. J., Oct.19, 2006, at A1 (“H-P’s investigators also used the last four digits of my Social Security number to impersonate me in order to obtain my phone records...”).

⁵⁵ See Verses Decl. at ¶¶ 7, 8, 10, 14.

⁵⁶ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

more detailed analysis of the *Central Hudson* factors below, the Commission cannot meet its burden to justify a broad, undifferentiated opt-in restriction on the sharing of all CPNI with marketing vendors under controlling Supreme Court precedent.

A. An “Opt-In” Requirement For Any CPNI Does Not Directly Advance The Government’s Interest in Preventing Pretexting.

To meet the “direct advancement” requirement, the government must prove “that the challenged regulation advances the Government’s interest ‘in a direct and material way.’”⁵⁷ This burden “is not satisfied by mere speculation or conjecture; [the government] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁵⁸ Restrictions will fail this prong if they “provide[] only ineffective or remote support for the government’s purpose.”⁵⁹

The Commission’s opt-in rule does not provide an effective solution to the data broker problem. As an initial matter, there is no evidence in the record that data brokers obtain information from independent contractors or joint venture partners. Arguments in support of an opt-in approach rely on the reasoning that wider dissemination of CPNI inherently increases the risk of disclosure.⁶⁰ But if this line of reasoning were valid,

⁵⁷ *Rubin*, 514 U.S. at 487 (citation omitted).

⁵⁸ *Edenfield*, 507 U.S. at 770-71.

⁵⁹ *Cent. Hudson*, 447 U.S. at 564.

⁶⁰ See Comments of EPIC at 6-7; Comments of the National Ass’n of Attorneys General (“NAAG”) at 8 (Apr. 8, 2006); Comments of the Ohio PUC at 25; Reply Comments of NASUCA at 15. EPIC also argues that, since the Tenth Circuit decision, “every major challenge to privacy law based on commercial speech has failed.” Comments of EPIC at 11 (citing Privacy Rights Clearinghouse, *Opt Out of Releasing Customer Proprietary Network Information (CPNI)*, Apr. 2004, <http://www.privacyrights.org/fs/fs1aplus-cpni.htm>). But the Western District of Washington decision post-dates the Tenth Circuit case, and that court found that opt-in infringes on protected commercial speech. *Verizon Nw.*, 282 F. Supp. 2d 1187. In addition, unlike the Western District of Washington case, none of the cases that EPIC cites involves CPNI or Section 222 of the Act. Instead, these cases involve the Fair

pretexters would have to know the identity of these carriers' independent contractors and joint venture partners, target them, and be more successful in achieving unauthorized access from them than other sources. There is no evidence this is the case. NAAG asserts that "once . . . CPNI information leaves a carrier, that carrier loses effective control of it,"⁶¹ and in support cites to "152 major security breaches."⁶² Yet the cited incidents do not involve independent contractor marketing vendors and they are completely unrelated to pretexting. NAAG argues that such breaches "*may* be one of the links in the chain that results in data brokers having the personal information needed to acquire private telephone records."⁶³ Far from being evidence of theft of CPNI from independent contractor marketing vendors, NAAG does not show these incidents resulted in *any* consumer harm – from pretexting, identify theft or otherwise. This is the kind of sheer speculation that the Supreme Court has consistently rejected in its commercial speech jurisprudence.

In Verizon's case, the type of information shared with third party marketing vendors makes them an unlikely target for pretexters. Verizon does not provide its third party marketing vendors with call detail information. Instead, they have general account information, including name, address, billing telephone number, and in some cases information about specific services that a customer currently purchases and average

Credit Reporting Act, the Telephone Consumer Protection Act, and the Gramm-Leach-Bliley Act. Comments of EPIC at 11-12 n.21; *see also* Comments of NAAG at 8 (citing an opt-in requirement in the Driver's Privacy Protect Act of 1994); Reply Comments of NASUCA at 15 (citing a number of statutes unrelated to CPNI).

⁶¹ Comments of NAAG at 7

⁶² *Id.* at 7-8.

⁶³ *Id.* at 8 (emphasis added).

amount spent on those services. These marketing vendors are already required to maintain the confidentiality of that information pursuant to contract and Commission rules. Thus, independent contractor marketing vendors do not even have the type of information that pretexters want, and they are already subject to confidentiality protections for the information that they do have. NAAG advocates a drastic, speech-restrictive solution to a problem that does not exist.

B. An “Opt-In” Requirement For Any CPNI Is Not Narrowly Tailored To Addressing the Pretexting Threat.

A regulation that, as a practical matter, forbids companies from sharing any CPNI with independent contractors for marketing purposes is not narrowly tailored to the asserted governmental interest. Opt-in, as explained above, is unrelated to the objective of preventing unauthorized pretexter access to call detail information. In addition, preventing pretexting may be achieved via more narrowly tailored means – such as password protection of call detail or nondisclosure agreements with third parties. At a minimum, therefore, any opt-in requirement would have to be narrowly crafted to address the specific problem of pretexters fraudulently obtaining call detail information. Alternatively, the Commission could address the pretexting problem at its source by directly penalizing the companies and individuals involved in the theft of CPNI by pretexting.⁶⁴

More narrowly tailored alternatives are available that directly advance the government’s interest in curtailing pretexter theft and burden less protected commercial

⁶⁴ NASUCA argues that opt-in is narrowly tailored because opt-out is ineffective, and an industry task force to address pretexting also would be ineffective. *See Reply Comments of NASUCA at 16-21.* This line of argument ignores more narrowly tailored approaches that directly address the pretexting threat, such as confidentiality agreements, password protection of call detail records, and directly penalizing companies and individuals involved in pretexting.

speech – *e.g.*, password protection of call detail information or requiring opt-in prior to sharing call detail with independent contractors. Requiring customers to provide a password before accessing call detail in an online or inbound calling environment, unlike opt-in, may directly increase the security of the call detail information targeted by databrokers. Moreover, such an approach imposes no burden on carriers’ legitimate marketing activities involving independent contractors and joint venture partners. In addition, it avoids chilling protected expressive activities that would not be of interest to pretexters or susceptible to their tactics, such as direct mail campaigns.⁶⁵ Similarly, a requirement that carriers secure opt-in authorization prior to sharing call detail with independent contractors addresses the information of greatest interest to pretexters while allowing for the continuation of targeted marketing activities that benefit consumers. In light of these less restrictive options, requiring opt-in authorization prior to sharing any CPNI with independent contractors is “more extensive than necessary” to advance the government’s interest⁶⁶ and accordingly unconstitutional.

Further, opt-in is not narrowly tailored to prevent pretexting if other regulatory approaches already advance this interest without curbing commercial speech. Since 2002, the Commission has required carriers that disclose CPNI to independent contractors and joint venture partners to bind these third parties to a confidentiality agreement.⁶⁷ The Commission’s rules detail safeguards that such agreements must contain, including requirements that the third party have procedures in place to “ensure

⁶⁵ Pretexters would not target CPNI shared with direct mail marketing vendors for the simple reason that they would not know when such campaigns are likely to occur or that the call detail of a specific subscriber they are targeting would be shared.

⁶⁶ *U.S. West*, 182 F.3d at 1238 (quoting *Rubin*, 514 U.S. at 486).

⁶⁷ *See* 47 C.F.R. § 64.2007(b)(2).

the ongoing confidentiality of consumers' CPNI.”⁶⁸ These affirmative data security requirements erect a direct defense against pretexting. Thus, it is unclear what, if any, pretexting risk is addressed by an opt-in disclosure standard that is not already addressed by a mandatory confidentiality agreement. As such agreements provide a less-restrictive, more effective regulatory option, an opt-in choice cannot be considered narrowly tailored. The Commission would bear the burden of demonstrating that its own prior regulations have failed in their purpose before any additional, more speech-restrictive alternatives could replace them.

Finally, opt-in places significant limitations on protected commercial speech. It deprives carriers, as speakers, of the right to select their audience and the right to use CPNI information to tailor their message to that audience. An opt-in requirement will also deprive a substantial number of consumers of commercial information they desire to receive.⁶⁹ From a First Amendment perspective, opt-in will deprive a large body of willing listeners of their First Amendment right to receive protected speech. Such regulation is the antithesis of narrow tailoring – it denies a vast majority of willing listeners access to truthful speech to “protect” a small minority.⁷⁰

⁶⁸ *Id.* § 64.2007(b)(2)(iii).

⁶⁹ *Third CPNI Order*, 17 FCC Rcd at 14,877 (¶ 36), 14,891-92 (¶ 71). In addition, consumers understand and utilize the opt-out procedures when they desire to protect their privacy. See Ex Parte Letter of Pacific Telesis (now AT&T) at Attachment A (Dec. 12, 1996) (Dr. Alan F. Westin, Opinion Research Corp. Survey Report, *Public Attitudes Toward Local Telephone Company Use of CPNI*, Dec. 11, 2006, at 9-10; Dr. Alan F. Westin, Opinion Research Corp. Survey, *Telephone Customer Information Uses and Privacy*, Nov. 1996, at Questions 5-6, 10-11)).

⁷⁰ See *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) (finding ordinances restricting door-to-door solicitation not narrowly tailored, in part, because the ordinances in question “do not protect . . . privacy when applied to residences whose occupants welcome uninvited solicitors”).

CONCLUSION

The Commission should not adopt a requirement that carriers obtain opt-in consent prior to sharing any CPNI with independent contractors for the purpose of marketing communications services. Such a requirement would deprive consumers of useful information they desire to receive while subjecting them to mass marketing appeals not targeted to their interests. Limiting carriers' ability to use CPNI to more closely tailor marketing appeals to consumers' particularized interests will increase costs to consumers and carriers, contrary to the public interest.

In addition, such a requirement does not directly advance the government's interest in preventing pretexting, nor is it as narrowly tailored to that purpose as other alternatives, such as password protection of call detail information or requiring opt-in authorization prior to sharing call detail with independent contractors. Accordingly, it is unconstitutional.