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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

COMMENTS OF QWEST SERVICES CORPORATION

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COMMENTS OF QWEST SERVICES CORPORATION

Pursuant to the Federal Communications Commission's ("Commission" or "FCC") request for comment with respect to its *Second Further Notice of Proposed Rulemaking* ("*Second Further Notice*")[2] in the above-captioned proceedings, Qwest Services Corporation ("Qwest") respectfully submits these comments on a constitutionally sound Customer Proprietary Network Information ("CPNI") approval process. Only an opt-out CPNI approval process accommodates constitutional considerations, customer privacy interests and legitimate commerce.

[1] The *Second Further Notice* states that parties should make filings in this proceeding in CC Docket 99-273 (*see Second Further Notice* ¶ 32), despite the fact that the caption of the proceeding does not reference such docket. Qwest assumes this is simply a typographical error.

[2] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket Nos. 96-115 and 96-149, *Second Further Notice of Proposed Rulemaking,* FCC 01-247, rel. Sep. 7, 2001.

I. INTRODUCTION AND SUMMARY

This proceeding was necessitated by the opinion issued by the Tenth Circuit Court of Appeals[3] at the conclusion of its review of the Commission's 1998 *CPNI Order*.[4] In that opinion, the Court held that the CPNI regulations adopted by the Commission "violate[d] the First Amendment" to the United States Constitution.[5] Accordingly, the Court "vacate[d]" those regulations.[6]

The Tenth Circuit's decision makes clear that the Commission's discretion is subject to significant constitutional restraints. Under that decision, the issue is whether, consistent with the Constitution, the government may prohibit carriers from exercising their First Amendment right to provide truthful information to customers, and deny to customers their First Amendment right to receive such information, absent compliance with mandated and burdensome procedures that purport to evidence customer approval to use CPNI as a foundation for such communications.

Under a proper reading of the Tenth Circuit's opinion -- which (a) emphasized the "important civil liberties"[7] that were "abridge[d]" or "restrict[ed]"[8] by the mandatory opt-in process, (b) expressed serious "doubts" whether either of the "government interests" proffered

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[3] *U S WEST, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999), *cert. denied,* 120 S.Ct. 2215 (June 5, 2000) (*"U S WEST v. FCC"*).

[4] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* 13 FCC Rcd. 8061 (1998) ("*CPNI Order*").

[5] *U S WEST v. FCC,* 182 F.3d at 1228, 1239.

[6] *Id.* at 1240.

[7] *Id.* at 1228.

[8] *Id.* at 1232.

by the Commission were "substantial,"[9] and (c) concluded in all events that the regulations were not "narrowly tailored" to minimize the burden on protected speech[10] -- the type of CPNI approval process sustainable under the Constitution is not a close question. The First Amendment interests at issue here dictate that the "burden" of overcoming inertia be placed not on truthful speakers and interested listeners, but on those unquantified members of the intended audience who prefer not to receive communications based on information provided to, or generated by, their chosen carriers.

A subsidiary question raised by the *Second Further Notice* is whether, in light of the constitutional hurdles to the adoption of an opt-in CPNI approval procedure, the Commission should revisit and reverse its prior determination that Section 272 of the Act '"does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their Section 272 affiliates.'"[11] The answer to that question is clearly "no," as the Commission must have realized when it took agency action on CPNI approvals subsequent to the Tenth Circuit's vacatur of the opt-in requirement.[12] In addition to raising First Amendment implications similar to those that

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[9] *Id.* at 1235 (doubts regarding privacy interests), 1236-37 (skepticism about competitive interests).

[10] *Id.* at 1238-39.

[11] *Second Further Notice* ¶ 25 and n.60 (quoting from and citing to the *CPNI Order* and *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409 (1999) ("*CPNI Reconsideration Order*")).

[12] In September, 1999 -- weeks after the Tenth Circuit handed down its opinion in *U S WEST v. FCC* -- the Commission confirmed its prior conclusion that Section 222 controlled CPNI use as between the BOC and its Section 272 affiliate. *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 137. And, in October, 2000 -- almost a year after the Tenth Circuit's decision, the Commission reiterated its decision that Section 222 controlled matters pertaining to CPNI for a variety of reasons. *See In the Matter of AT&T Corp. v. New York Telephone, d/b/a Bell Atlantic – New*

caused the Tenth Circuit to invalidate the Commission's CPNI opt-in regulations, replacing "opt-in" regulations with additional CPNI burdens or restrictions on BOCs would frustrate Congress' express endorsement of BOC joint marketing found in Section 272(g)(3).[13] Competitors' claims that BOCs benefit unfairly if they can use CPNI in truthful marketing of their products are overstated and, in all events, insufficient to justify further restrictions on joint marketing educated by CPNI.

The judicial framework of the Tenth Circuit opinion all but proscribes governmental action that would extend beyond an opt-out CPNI approval process for carrier-to-customer speech and carrier-to-carrier communications.[14] Even in other contexts, such as disclosures of CPNI to third parties, crafting a narrowly-tailored opt-in requirement poses formidable legal challenges for the Commission, particularly in light of the fact that the Commission itself has acknowledged the legitimacy of these types of information disclosures.[15]

There are two CPNI approval models that could accommodate the constitutional limitations articulated by the Tenth Circuit. The first is a model that allows carriers to decide the most appropriate CPNI approval model suitable to their situation and their customer

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York, 15 FCC Rcd. 19997, 20004-05 ¶¶ 18-19 (2000) (*"AT&T/Bell Atlantic Complaint"). See also* Section IV.A., *below*.

[13] 47 U.S.C. § 272(g)(3). *And see AT&T Corp. v. FCC,* 220 F.3d 607, 632 (D.C. Cir. 2000). *See also* Section IV.B., *below*.

[14] In 1999, Congress revised Section 222 to include an affirmative express approval requirement with respect to wireless location information. Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286, amending the Communications Act of 1934, 47 U.S.C. §§ 222, 251. *And see Second Further Notice* ¶ 22 and n.51. Qwest takes no position at this time on the lawfulness of the statutory amendment. As the Tenth Circuit noted, a critical factor in assessing the constitutionality of an opt-in provision is the costs and benefits associated with the implementation of the regime. *U S WEST v. FCC*, 182 F.3d at 1238-39. To the extent the Commission implements the Congressional mandate with respect to wireless location information, the constitutionality of the statutory requirement will be for the Court to decide, based on the law as applied to the record before the Commission.

constituency. This approach avoids government compulsion, minimizes burdening First Amendment rights and shifts the responsibility of crafting fair CPNI approval processes to carriers.[16] Carriers would, of course, be subject to government enforcement actions should they fail to craft reasonable processes.

An alternative model would have the Commission promulgate a narrowly-tailored CPNI approval rule. Such rule might entail two components. First, that carriers advise the Commission of the CPNI approval model they chose. Second, that carriers provide the Commission with documents associated with any notifications that carriers included in their approval process.[17] Qwest supports leaving the decisions on CPNI approval processes to carriers, but appreciates that some might find a more formal regulatory approval model in the public interest. Any Commission rule would, however, implicate protected speech and would have to conform to constitutional protections.

II. THE TENTH CIRCUIT'S DECISION FORECLOSES THE APPLICATION OF GOVERNMENT-MANDATED CPNI OPT-IN APPROVAL PROCESSES TO PROTECTED SPEECH

A. Future Judicial Review Is Unlikely To Sustain An Opt-In Mandate

Portions of the *Second Further Notice* suggest that "a more complete record on consent mechanisms"[18] can provide the requisite foundation for the Commission to re-adopt an opt-in

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[15] *See* Section II.B.4, *below*.

[16] This approval model appropriately accommodates the Constitution as well as Congress' express direction to carriers in Section 222, *i.e.*, "[e]xcept as required by law or with the approval of the customer, a telecommunications carrier . . . shall only use, disclose, or permit access" to CPNI according to certain requirements. 47 U.S.C. § 222(c)(1). *And see* Section II.A., *below*.

[17] Not all approval processes will require "notifications." If a carrier is a single product supplier, under the Commission's approval approach, that carrier already has approval from the customer to use the CPNI and no further notification would be necessary.

[18] *Second Further Notice* ¶ 16.

requirement. Any such suggestion is foreclosed by a careful reading of the Tenth Circuit's decision.

Most fundamentally, the Court's decision was not about a failure of "reasoned decisionmaking," the absence of "substantial evidence," or any of the other deferential standards that typically apply to review of agency orders. Rather, the Court held that opt-in CPNI approval requirements -- regardless of the substance of the agency record -- implicate fundamental First Amendment considerations and rights,[19] and thus are subject to the rule of "constitutional doubt."[20] In light of these considerations and rights, the Court struck down the Commission's CPNI rules, expressing doubt that the rules were supported by any reasonable demonstrated governmental privacy or competitive interest and skepticism that they promoted in any direct or material way legitimate government objectives. Nevertheless, the Court gave the Commission the benefit of the doubt and still it found that the CPNI rules "violate[d]" the First Amendment,[21] because they were not narrowly tailored. The Court therefore "vacate[d]" the regulations.[22] While not "advocating" a particular CPNI approval process,[23] had the Court believed there was a realistic possibility the Commission could on remand justify the restriction on protected speech

[19] *U S WEST v. FCC*, 182 F.3d at 1228 ("this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees . . . is at the heart of [the Court's] responsibility.").

[20] *Id.* at 1231.

[21] *Id.* at 1228, 1239.

[22] *Id.* at 1240.

[23] *Id.* at n.15

imposed by the opt-in process, it could simply have remanded the case back to the Commission without vacating the regulations.[24]

Although the Tenth Circuit's decision may not literally enjoin the Commission from re-adopting an opt-in CPNI approval process at the conclusion of this proceeding, it is clear that proponents of such government mandate will bear a heavy burden on appeal. Unlike other cases involving review of agency regulations, given the already established "serious constitutional questions" associated with a governmentally-mandated CPNI opt-in approval process,[25] the Court will review the record *de novo* and the Commission's conclusions. That judicial review will not be confined to whether the Commission considered First Amendment issues or whether it considered the propriety of an opt-out regime as well as an opt-in one. Rather, the Court will review the Commission's actions with a view to avoiding "serious constitutional problems," "ow[ing] the FCC no deference, even if its CPNI regulations are otherwise reasonable, and will apply the rule of constitutional doubt."[26] The Commission must reach the right conclusion to have a governmentally-mandated opt-in CPNI approval process -- or any CPNI approval rules -- upheld.

B. The Tenth Circuit's Analysis

Any doubt that a decision to retain the opt-in process would have difficulty surviving appellate review is foreclosed by a careful reading of the Court's decision. The Tenth Circuit made clear that both speech between carriers and their customers and speech within a carrier

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[24] The Tenth Circuit plainly knows the difference between a vacatur and a remand, as evidenced by its decision remanding, but not vacating, the Commission's universal services rules. *See Qwest Corporation v. FCC*, Case Nos. 99-9546, *et al.*, 258 F.3d 1191 (10th Cir. 2001). *And see Qwest Corporation v. FCC,* Case Nos. 99-9546, *et al.*, *Order of Clarification*, filed Aug. 27, 2001 (10th Cir.).

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

[26] *Id.*

enterprise constitute commercial speech.[27] In reviewing the constitutionality of government intrusions on such speech, the Tenth Circuit was correctly guided by the principles of *Central Hudson*.[28] A review of those principles demonstrates the heavy burden the Commission will bear defending any CPNI opt-in mandate.

1. The Nature of the Government's Interest

a. Privacy

The Tenth Circuit expressed substantial doubt that the Commission could articulate a legitimate governmental privacy interest that would support opt-in CPNI approval regulations. While the Court conceded that "in the abstract" privacy may constitute a legitimate and substantial governmental interest, it had considerable "concerns about the proffered justifications" particularly in light of the fact that "privacy . . . is multi-faceted."[29] The Tenth Circuit laid out the government's burden to justify its interest in the following language:

> In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict **specific** and **significant** harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity.[30]

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[27] *Id.* at 1230, 1232 (carrier-customer speech); 1230 and n.2, 1233 n.4 (addressing carrier enterprise speech).

[28] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) ("*Central Hudson*"). As outlined by the Tenth Circuit, assuming the lawfulness of the speech under consideration (a predicate factor), "the government may restrict the speech only if it proves: '(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.'" *U S WEST v. FCC,* 182 F.3d at 1233 (referencing *Central Hudson*, 447 U.S. at 564-65).

[29] *U S WEST v. FCC,* 182 F.3d. at 1234.

[30] *Id.* at 1235 (emphasis added).

Nothing about the *Second Further Notice* suggests the Commission could successfully articulate different informational privacy justifications for opt-in CPNI approval rules than it has done in the past,[31] for at least two reasons. First, the Tenth Circuit acknowledged the Commission's concern about CPNI possibly being "sensitive" to some customers,[32] yet expressed doubts that such interest was "substantial" in light of the openness of our society and ready access to information.[33] Second, despite the Court's doubts about the legitimacy of the government's proffered privacy interest, the Court gave the Commission the benefit of the doubt and assumed the Commission had met its burden on this element of the *Central Hudson* test.[34] It is unlikely that a court reviewing opt-in CPNI rules in the future would proceed as generously with respect to the Commission's burden of proof as did the Tenth Circuit. For this reason alone, the Commission should avoid this path.

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[31] The Commission questions whether it can claim that a legitimate government interest advanced by Section 222 is to limit marketing contacts by carriers to their customers. *Second Further Notice* ¶ 17. Given Congress' enactment of Section 227 and the Commission's implementing rules (47 C.F.R. § 64.1200), which expressly deal with marketing contacts, it is unlikely that this "interest" would be found to be a substantial governmental interest under Section 222.

[32] *U S WEST v. FCC,* 182 F.3d at 1235 (quoting from the Commission's *CPNI Order* ¶¶ 2, 94).

[33] *Id.* ("Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm.").

[34] *Id.* at 1235-36 ("notwithstanding our reservations, we assume for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information"), 1238 ("[e]ven assuming, arguendo, that the state interests in privacy and competition are substantial and that the regulations directly and materially advance those interests" the rules are not properly tailored) 1239 ("even assuming that respondents met the prior two prongs of *Central Hudson*, we conclude that based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests").

b. Competitive Interests

The Tenth Circuit expressed even greater skepticism that, in the context of CPNI, competition was a substantial governmental interest.[35] Because it disposed of the case on other grounds, however, it cautioned that "the interest . . . in protecting competition . . . is insufficient by itself to justify the CPNI" affirmative approval regulations under *Central Hudson*.[36] The Court's decision should not be read to suggest that the Commission may couple an ostensible legitimate government interest (such as privacy) with a government interest in competition and thereby enhance the competitive interest itself to a "substantial" one. Quite the contrary.

Moreover, in this particular case, the Commission cannot successfully defend burdensome CPNI approval rules for BOCs on some theory purporting that use of CPNI by a BOC's Section 272 affiliate would be anticompetitive.[37] The Commission's own advocacy and regulatory findings confirm just the opposite -- that sharing of CPNI between affiliates is pro-competitive, even in the absence of a customer approval requirement.[38] Any attempt to revise

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[35] *Id.* at 1238 (assuming that advancement of competitive interests was substantial).

[36] *Id.* at 1239 n.13.

[37] *Compare* the Commission's discussion that "under an opt-in approach, the CPNI requirements operate to make a carrier's anti-competitive use of CPNI more difficult [without ever articulating what that use might be] by prohibiting carriers from using CPNI unless and until they have obtained affirmative customer approval" (*Second Further Notice* ¶ 26) and its conclusion that it would "likely have to revisit its interpretation of the interplay between Sections 222 and 272 were it to adopt an opt-out approach." *Id.*

[38] *See In re Applications of McCaw and AT&T Co., Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd. 11786, 11792 (1995) ("we expect that permitting AT&T to disclose the information at issue to its cellular affiliates will increase competition for cellular customers as those affiliates, BOC cellular affiliates, and other providers seek to improve service and/or lower prices to attract and retain customers"); *In the Matters of Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order*, 2 FCC Rcd. 3072, 3094 (1987) ("*Phase II Order*") and *Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration*, 4 FCC Rcd. 5927, 5929-30 (1989) ("*Phase II Further Reconsideration Order*"), *vacated on other grounds, People of State of Cal. v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (restrictions on CPNI are not necessary to protect

regulatory precedent to impede the benefits of information sharing between a BOC and its Section 272 affiliate -- and the ultimate beneficiaries of that sharing, customers -- would be ripe for judicial reversal under a *Central Hudson* analysis.[39]

2. Direct and Material Advancement of the Government's Interest

For the Commission to re-impose an opt-in requirement for CPNI approvals, it must overcome the Tenth Circuit's finding that "[t]he government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI."[40] The Court faulted the Commission for failing to provide evidence of how a breach of privacy might "occur in reality" with respect to CPNI -- either in the context of a carrier's use within its corporate enterprise or with respect to third-party disclosures.[41]

In light of the constitutional significance of any opt-in requirement, proponents of such approval process must meet the existing strong and factual record[42] in kind -- with facts and data.

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competition). *And see SBC Communications Inc. v. FCC,* 56 F.3d 1484, 1495 (D.C. Cir. 1995) (agreed that allowing the sharing of CPNI would create an environment that would "lead to lower prices and improved service offerings"). *See also* Brief for Petitioner and Intervenors, *U S WEST, Inc. v. FCC*, No. 98-9518 (10th Cir. Aug. 13, 1998), at 4-9 (reciting numerous situations in which the Commission has made such remarks and observations).

[39] Additional reasons why the Commission should not impose such burdens are addressed below in Section IV.

[40] *U S WEST v. FCC,* 182 F.3d at 1237. *See also id.* at 1239.

[41] *Id.* at 1237-38 ("By its own admission, the government is not concerned about the disclosure of CPNI within a firm. . . . Yet the government has not explained how or why a carrier would disclose CPNI to outside parties, especially when the government claims CPNI is information that would give one firm a competitive advantage over another. . . . [T]he FCC can theorize that allowing existing carriers to market new services with CPNI will impede competition for those services, but it provides no analysis of how or if this might actually occur.").

[42] Attached, Qwest incorporates the briefs filed before the Tenth Circuit as part of this filing. Attachment A, *Brief for Petitioner and Intervenors (see* note 38, *supra);* Attachment B, *Reply Brief for Petitioner and Intervenors* (*U S WEST, Inc. v. FCC*, No. 98-9518 (10th Cir. Oct. 15, 1998)). These briefs express advocacy Qwest believes is salient with respect to the

What commentors might "think" about customer expectations or behavior, or arguments about how opt-in mandates would constitute "best regulatory policy," will prove insufficient in a future First Amendment challenge unless those arguments identify specific consumer harms and document how an opt-in regime will eliminate them in a manner that is narrowly tailored and appropriately balances costs and benefits.[43]

3. Narrowly Tailoring an Affirmative CPNI Approval Mandate

Should the Commission attempt to re-institute an opt-in CPNI approval process, it will have to refrain from speculation and attend to demonstrated evidence about consumer expectations and conduct. As the Tenth Circuit correctly stated when it rejected the Commission's prior opt-out CPNI approval process, the Commission "merely speculate[d] that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so."[44] It is unlikely that the Commission can produce any solid evidence to support its speculation, particularly in light of the current record evidence that individuals know and understand opt-out processes and use them.[45] Even more significantly in the current context, the Commission is highly unlikely to be able to rebut the current record evidence that the particular constituency that is familiar with opt-out

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Commission's *Second Further Notice*, as well as substantial references to the existing record and the legal principles that must be reconciled with any future Commission action.

[43] *U S WEST v. FCC,* 182 F.3d at 1235, 1238-39 (cost/benefit analysis required, and the costs may include real costs as well as societal costs of depressing information flows).

[44] *Id.* at 1239 ("Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.").

[45] *See also Public Attitudes Toward Local Telephone Company Use of CPNI:* Report of a National Opinion Survey, conducted November 14-17, 1996, by Opinion Research Corporation, Princeton, N.J.. and Prof. Alan F. Westin, Columbia University, sponsored by Pacific Telesis Group. Westin Survey, Question 5 (inquiring if the person being polled had ever been extended the opportunity to opt-out of having their name and address given to other organizations, to

practices approves of carriers' use of CPNI in greater numbers than the general population and has a heightened interest in receiving information from their telecommunications carriers.[46]

A government mandate that conditions the right to speak truthful information in an educated manner on a listener's lack of interest is calculated to fail the narrow tailoring required by *Central Hudson* and the Tenth Circuit's analysis. As the Court concluded, it is not possible to correlate an individual's failure affirmatively to opt-in to a carrier's use of CPNI with a considered decision by that individual, because the failure to act is too strongly associated with inertia or a notion of disinterest.[47] The failure to act, then, provides little evidence of an individual's true intentions, and no dispositive or compelling demonstration of a "decision."

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which 41% said "yes"); Question 6 (inquiring whether the person being polled had ever exercised an "opt-out" invitation, to which 62% said they had).

[46] Westin Survey, Executive Summary at 8 ("almost two out of three members of the public -- 64% -- say [a carrier's use of account information] would be acceptable to them. When the 35% who said it was NOT acceptable were asked whether providing an opt out procedure would make this record-based communication process acceptable, 45% said it would. Combining those initially favorable with those becoming favorable if an opt out is provided produces a majority of 80% for this customer-record based . . . telephone company communication process"); Executive Summary at 9 ("among the groups that scored well above the public's 64% in their interest in receiving . . . information [from their carrier] were . . . Persons who have used an opt out," raising the interest rating to 74%).

[47] *Compare U S WEST v. FCC,* 182 F.3d at 1239 (results of U S WEST study do "not provide sufficient evidence that customers do not want carriers to use their CPNI. The results may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally."). *See also* Letter from Elridge A. Stafford, Executive Director, U S WEST to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Dec. 16, 1997, referencing a teleconference meeting with Commission staff and attaching materials used during the discussion. The materials emphasized that when customers were focused on telecommunications matters of immediacy to them, CPNI approvals were very high. The lack of engagement in other contexts was noted, as well as the fact that "[f]lat response across options and customer types and segments" was "[a]typical of marketing promotions and indicative of lack of engagement.").

The Commission's repeated observations in support of this behavioral phenomena,[48] make it impossible for the Commission to overcome this "common sense" regulatory observation (akin to "judicial notice") while at the same time defend an opt-in approval requirement as necessary for its "regulations . . . [to] meet its stated goals."[49] It is precisely because of this predictable consumer conduct that an opt-out process is best calculated to accurately assess an individual's true concerns about his or her personal privacy in a context that permits reasonable commercial transactions to continue unencumbered by overreaching governmental barriers to speech. The Constitution requires that the burden of overcoming inertia be placed, in most circumstances, on those who wish to restrict the dissemination of information, not on speakers or interested audiences.

4. Third-Party Disclosures

The Commission is not free simply to craft an opt-out CPNI approval regime for internal carrier use and sharing and impose an opt-in requirement for carrier disclosures of CPNI to unaffiliated third parties,[50] because not all CPNI disclosures to third parties would compromise even legitimate government interests in protecting an individual's privacy. Were the Commission to mandate an opt-in approval requirement for carriers to disclose CPNI to third

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[48] *See, e.g., In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd. 7571, 7610 n.155 (1991) ("*Computer III Remand Order*") ("Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction."); *Public Notice, Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information*, 9 FCC Rcd. 1685 (1994). *And see People of State of Cal. v. FCC,* 39 F.3d 919, 931, 933 (9th Cir. 1994), *cert. denied,* 514 U.S. 1050 (1995) ("If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option").

[49] *U S WEST v. FCC*, 182 F.3d at 1239.

[50] The Tenth Circuit's opinion makes only occasional reference to third-party disclosures. *U S WEST v. FCC,* 182 F.3d at 1237-38.

parties, it would be required to successfully prove the elements required by *Central Hudson*, including those elements previously assumed by the Tenth Circuit in favor of the Commission. The Commission most likely could not overcome this evidentiary burden.

It is clear that not all sharing of CPNI with third parties is improper. Some disclosures are required by law.[51] Others are quite benign and commercially routine.[52] Such transfers

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[51] This information is required to be provided through Operations Support Systems ("OSS") in pre-ordering, ordering, provisiong, etc. contexts to competitive carriers. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15499, 15763-64, 15766-68 ¶¶ 518, 521-25 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997), *vacated in part on reh'g, as amended sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *further vacated in part sub nom. People of the State of Cal. v. FCC,* 124 F.3d 934 (8th Cir. 1997), *rev'd in part, aff'd in part and remanded sub nom. AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366 (1999); *Second Order on Recon.,* 11 FCC Rcd. 19738 (1996); *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3882-90 ¶¶ 421-37 (1999), *appeal pending sub nom. United States Telecom Ass'n v. FCC*, No. 00-1015 (D.C. Cir. pet. for rev. filed Jan. 19, 2000). *And see*, where the Commission has stated that a refusal to provide other carriers this information when they have less than written approval would most likely violate the Communications Act. *CPNI Order*, 13 FCC Rcd. 8125 ¶¶ 84-85 and n.315; *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 98.

Compare the Commission's determination that incumbent local exchange carriers are compelled by law to provide directory assistance information to third parties (47 U.S.C. § 251(b)) and cannot restrict the use of that information for the purpose for which it is provided. *In the Matter of Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, 16 FCC Rcd. 2736, 2748-50 ¶¶ 28-29 (2001). *And see* Petition for Reconsideration, filed by Qwest Corporation, Mar. 23, 2001, CC Docket No. 99-273.

[52] For example, information might be shared with agents selling the services of a carrier, or when joint offerings are involved. Or, information might be shared when a portion of a business (or an entire business) is sold or transferred. Indeed, the Commission has acknowledged that such commercial circumstances are quite likely to occur in the telecommunications industry: "Given the dynamic marketplace, and the **likelihood** that carriers will continue to buy, sell, and transfer customer lines in the future," the Commission modified its slamming rules "to ensure that [its carrier change rules] do not inadvertently inhibit **routine business transactions**." *In the Matter of 2000 Biennial Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129,* 16 FCC Rcd. 11218 ¶ 2 (emphasis added) ("*Bulk Transfer Order*"). These kinds of transactions might involve the

generally reflect situations where the transfer of the information is warranted based on the relationship between the transferor and the transferee and where arguments to restrict the information based on unsupported, overbroad assertions of "privacy interests" could well impede *bona fide* commercial and societal goals.[53]

Arguments may be made to the Commission that might support a finding that, in some circumstances, some carrier disclosures of CPNI to unaffiliated third parties might be privacy invasive. But no one has made any such particularized demonstration. And, even if some commentor comes forward with specific examples, such arguments would not provide sufficient foundation for the government to mandate an opt-in CPNI approval obligation with regard to all transfers of CPNI to any or all third parties. Situations involving idiosyncratic carrier "bad acts" can easily be regulated through the complaint process and other provisions of the Communications Act.[54] Even if market forces alone were inadequate to address this problem, the enforcement process provides an easily-identifiable, less intrusive governmental remedy to advance any legitimate privacy interests the Commission might be able to prove, as compared to a constitutionally questionable opt-in CPNI approval process.

III. AN OPT-OUT CPNI APPROVAL MODEL IS IN THE PUBLIC INTEREST

Application of the rule of "constitutional doubt" requires that the Commission decline to reinstate an opt-in CPNI approval process. That result, moreover, is consistent with other provisions of the Act and sound public policy. The Commission should either allow carriers to

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"acquisition of assets (such as customer lines or accounts) or through a transfer of corporate control." *Id.* at n.3.

[53] *See U S WEST v. FCC,* 182 F.3d 1235 n.7 (noting potential societal costs that can be caused by restrictions on information flows in the name of privacy protection).

[54] Individuals can complain to the Commission either informally or formally or the Commission can proceed against a carrier for engaging in an unreasonable practice. 47 U.S.C. §§ 208, 209; 47 C.F.R. §§ 1.716, *et seq.*, 1.720, *et seq.*

devise their own CPNI approval processes, subject to market forces and regulatory enforcement actions; or the Commission must promulgate a narrowly-tailored CPNI approval rule that conforms with constitutional protections of speech.

A. Section 222 Requires No Governmental Implementation

Section 222 was "immediately effective" upon passage, as the Commission has noted.[55] That Section invites private party implementation, directing carriers -- all carriers -- to behave in certain ways with respect to CPNI, *i.e.*, "[e]xcept as required by law or with the approval of the customer, a telecommunications carrier . . . shall only use, disclose, or permit access" to CPNI according to certain requirements.[56] The word "approval" is clearly subject to a variety of meanings within a broad range of reasonable interpretations. It can include oral, written or electronic approvals. It can include opt-in or opt-out approvals. In "its strictest etymological construction," the word approve "is an after-the-fact ratification,"[57] of the sort inherent in implied approvals.[58]

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[55] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking*, 11 FCC Rcd. 12513, 12514 ¶ 2 (1996). *And see In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards and Rules Governing Telephone Companies' Use of Customer Proprietary Network Information,* 11 FCC Rcd. 16617, 16619 ¶ 4 (1996).

[56] 47 U.S.C. § 222(c)(1).

[57] *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company,* No. A 96-CA-397 SS, at 9-10 (W.D. Tex. 1996). Indeed, the Commission itself cited a dictionary definition of "approve" as meaning "ratify." *CPNI Order,* 13 FCC Rcd. at 70 ¶ 91 n.336.

[58] *See Griggs-Ryan v. Smith,* 904 F.2d 112, 116-17 (1st Cir. 1990) (noting that implied consent "inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights. . . [I]mplied consent is not constructive consent [but, rather] 'consent in fact' which is inferred 'from surrounding circumstances['] . . . [I]mplied consent -- or the absence of it -- may be deduced from 'the circumstances prevailing' in a given situation." (citations omitted)). In the *CPNI Order*, the Commission acknowledged that customer approval "can be *inferred* in the context of an existing customer-carrier relationship" in some circumstances. *CPNI Order*, 13 FCC Rcd. at 8080 ¶ 23 (emphasis in the

Allowing industry implementation of Section 222 unencumbered by formal Commission rules avoids government compulsion and the First Amendment implications such compulsion entails. It is, therefore, a CPNI approval model with much to be said for it.[59] This is particularly the case since such model would minimize burdens on single product carriers, in light of the fact that their subscribers only would be in one service category and approval would be presumed.[60] No further action would be required for this portion of the industry. Only carriers offering multiple products across Commission-defined service categories (local, wireless and long distance) would need to fashion a more formal approval process, including customer notifications.

A carrier notice outlining the types of CPNI transfers that might occur within the carrier's corporate enterprise and to unaffiliated third-parties,[61] coupled with the extension of reasonable customer choices in response to that notification, adequately protects customers' privacy interests. This type of full and fair disclosure, in conjunction with the fact that carriers who release CPNI haphazardly or without regard to the customer's legitimate privacy interests are

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original). Thus, the Commission agreed that "Congress recognized . . . that customers expect that 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" (*id.* at 8102 ¶ 54). *Compare Clarification Order* (*Clarification Order*, CC Docket Nos. 96-115 and 96-149, FCC 01-247, rel. Sep. 7, 2001 included in the release of the *Second Further Notice*) ¶¶ 8-9 (where the Commission acknowledges that customer consent can be gleaned from a notice and opt-out regime).

[59] This is <u>not</u> a "self-regulation" regime, since carriers would be complying with legislative regulation buttressed by Commission reporting rules.

[60] *See* note 17, *supra.*

[61] "[E]ven if [a] customer does not currently subscribe to service from [the] affiliates" (*Second Further Notice* ¶ 26) or if a carrier makes no third-party disclosures, an opt-out notice can be crafted that makes clear that such activity might occur. It is also true, of course, that the affiliate might never use the information to market to the individual or that the CPNI may not prove particularly relevant in crafting a communication to the individual.

subject to market reactions as well as governmental enforcement, assures that individual consumers suffer no harms at the hands of unscrupulous carriers.[62]

Qwest's recommended approach is supported by the language of Section 222 itself. That section, unlike other Congressional consumer protection initiatives that expressly call for Commission rulemaking,[63] does not suggest, let alone compel, governmental participation in its implementation; nor does it "elaborate as to what form that approval should take."[64] Given that Section 222 applies to all carriers (a legislative extension of CPNI privacy protection beyond the prior Open Network Architecture ("ONA") BOC/GTE regulatory regime), Congress correctly did not prescribe a single approval mechanism. Wireline carriers, for example, might find one type of approval mechanism feasible, wireless carriers another.[65] Incumbent carriers with substantial numbers of customers might choose one approval mechanism, new entrants with limited customers might choose a different mechanism. There is nothing demonstrating that

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[62] *Compare* a similar process employed by the Federal Trade Commission ("FTC"). That agency has no substantive privacy rules directed to private industry. However, based on encouragement from that Commission, large numbers of businesses have established privacy policies. The FTC does not directly regulate the content of the policies, but it has declared its expectation that companies will truthfully say what they do with respect to privacy in those policies and do what they say. If a company does not, the FTC will proceed against them in an enforcement action, on the grounds that the "misrepresentation" by the business amounts to an "unfair" or "deceptive" trade practice, which the FTC can address through its existing legislatively-delegated authority.

[63] *Compare* 47 U.S.C. § 227(c) ("[w]ithin 120 days after [the date of enactment of this section], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object"), Section 258 (certain actions are to take place "in accordance with such procedures as the Commission may prescribe"). *Compare* a predecessor bill to Section 222, H.R. 1555 (104th Congress, First Session, 1995) that would have required a rulemaking on privacy matters over and above the general language similar to Section 222(c)(1) regarding customer approvals.

[64] *U S WEST v. FCC*, 182 F.3d at 1230.

[65] Other than with respect to wireless location information (*see* note 14, *supra*), wireless carriers are not required to treat CPNI differently than other carriers.

Congress applauded one type of approval mechanism[66] and frowned on another. The Commission should approach the approval process with the same liberality and flexibility.

B. Any Commission Rules Must Be Narrowly-Tailored

Should the Commission persist in promulgating CPNI approval rules, any such rules -- impacting as they do lawful speech -- must be narrowly tailored. In light of the fact that carriers have choices among a wide variety of approval mechanisms, a Commission rule requiring carriers to advise the Commission of the approval mechanism chosen would not be inappropriate. And, in those situations where a notification was a necessary aspect of the approval process, the Commission could require carriers to provide it with information about the notification process, perhaps even requiring submissions of scripts used or notifications sent.[67]

The Commission must be careful to avoid unwarranted mandates for affirmative customer approvals for CPNI use and disclosure. A narrowly-tailored government-mandated CPNI approval mechanism is one that places the burden to act on those individuals who might be keenly interested in the matter of privacy generally, and the issue of privacy within the carrier-customer relationship specifically. Only if an individual affirmatively "opts-out" can the "true" meaning of the individual's intentions with respect to privacy "protection" be understood unambiguously.[68]

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[66] With the exception of wireless location information. *See* note 14, *supra.*

[67] *Compare Bulk Transfer Order*, 16 FCC Rcd. at 11218 ¶¶ 12-13.

[68] Indeed, this is why the Commission chose the "per-call blocking" mechanism in the Caller ID proceeding as reflecting the best balance of privacy interests as between the called and calling party. Per-call blocking required the calling party to reflect on whether the identifying information should flow or be blocked in a specific situation. Unless the individual consciously chose to block information, the information passed unimpeded, allowing the called party to better manage his or her own privacy interests and accommodating the "promot[ion] [of] technological innovation and new applications that will foster economic efficiency and provide new employment, manufacturing and investment opportunities." *In the Matter of Rules and*

The type of regulation described here is simple and easy to administer. It would provide the Commission with basic information about carrier practices such that, should the Commission disagree with those practices, it can institute enforcement proceedings to protect specific consumers against specific carrier-initiated harms. Such limited rules -- without "devilish details" and improper burdens -- are the most calculated to withstand constitutional challenge.

C. Foregoing An Opt-In Mandate Is Consistent With Sound Policy

The 1996 Act, which included the CPNI provisions that became codified in Section 222, was intended to implement a pro-competitive, "deregulatory" era in telecommunications.[69] A process that requires carriers to solicit, and customers to provide, affirmative evidence of their consent to the receipt of information epitomizes the kind of burdensome regulation the Commission has, at least in other contexts, been attempting to eliminate.[70]

Construing Section 222 not to mandate an opt-in process for communications that use CPNI not only reflects solid First Amendment jurisprudence, but also is the most "deregulatory" approach available to the CPNI inquiry. In addition, the matter of CPNI approvals and carriers' use and disclosure of this information has now been pending for several years, damming

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Policies Regarding Calling Number Identification Service, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd. 1764, 1766 ¶ 8 (1994).

[69] *U S WEST v. FCC,* 182 F.3d at 1236-37 and n.9.

[70] The Commission has been engaged in a number of proceedings established to meet Congress' expectations in adopting 47 U.S.C. § 161 (Section 11 proceedings). That section has two subdivisions. The first requires a comprehensive review of Commission regulations every two years to aid the Commission in determining "whether any . . . regulation[ ] [is] no longer necessary in the public interest as the result of meaningful competition between providers of such service." 47 U.S.C. § 161(a). Regulations failing to meet this standard (*i.e.*, the "Effect of [the Commission] Determination") shall be repealed or modified. *Id.* at § 161(b). This mandated statutory regulatory reform regime changes, to a large extent, traditional notions of rulemaking proceedings. As Commissioner Furchgott-Roth accurately stated during his tenure, if the Commission cannot demonstrate that a rule is actually necessary then, according to subsection (b) of the statute, it must be repealed or modified. *See* Commissioner Furchtgott-Roth

information flows and creating uncertainty among carriers and customers. Rolling the appellate dice based on the unlikely possibility that the Tenth Circuit can be convinced to sustain an opt-in process will, at best, perpetuate that uncertainty. In sum, rejection of an opt-in CPNI approval process is mandated by the First Amendment, would further the Commission's deregulatory objectives, and end uncertainty in this area.

IV. THE COMMISSION IS NOT FREE TO LIMIT THE USE OF CPNI BETWEEN THE BOC AND A SECTION 272 AFFILIATE

As discussed above, the Tenth Circuit's decision addressed speech within a common corporate enterprise.[71] Speech within such enterprise is protected speech, all the more so in the context of speech by a BOC concerning long distance services since (a) like carriers' wireless

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Issues Comprehensive Report on FCC's Biennial Review Process, 1998 FCC LEXIS 6409, Dec. 21, 1998 at 8.

[71] *See U S WEST v. FCC,* 182 F.3d at 1230 and n.2 (observing that the Commission's "regulations treat affiliated entities of a carrier as separate for the purposes of use or disclosure. Thus, the regulations permit unapproved disclosure of CPNI between affiliated entities of a telecommunications carrier only when the carrier provides different categories of service and the customer subscribes to more than one category of service."); 1233 n.4 (where the Court stated that "the [intra-carrier] speech is properly categorized as commercial speech").

See also Brief for Petitioner and Intervenors at 20-21 (referencing two different corporations and service categories in two different examples, *i.e.,* "Under the FCC's so-called 'total service approach,' a carrier providing only local service to a particular customer would not be able to use CPNI, without prior affirmative customer consent, to speak to the customer regarding cellular or long distance service. A carrier providing only long-distance service would be similarly constrained with respect to local or wireless services not currently provided to its customer.") (footnote omitted), 26 ("In addition to the barrier the *CPNI Order* imposes on carrier-customer communications, it also restricts the right of common corporate affiliates and divisions, and of personnel within the same carrier, to share CPNI . . . By preventing carriers' separate divisions or affiliates from communicating CPNI to each other, even where Congress has explicitly granted the right for those divisions or affiliates to engage in joint marketing, the *CPNI Order* operates as a classic restriction on speech."); Reply Brief for Petitioner and Intervenors at 4 (arguing with respect to "Intra-Carrier Speech" -- "CPNI-related communications within a telecommunications carrier, and within the carrier's corporate family[,]" and providing an additional example of communications between two different corporations involving two different service categories).

services, Congress has expressly permitted joint marketing,[72] and (b) Congress has affirmatively acted to eliminate any nondiscrimination obligations with respect to such joint marketing of a Section 272 affiliate's long distance services.[73]

Any future attempt to circumscribe speech within a corporate family would have to be defended under a *Central Hudson* test. For that reason, it is unlikely that the Tenth Circuit's determination that CPNI use and communication is constitutionally protected would change. Nor would the Court's determination that burdening the speech of the BOC and its affiliate, and the speech of these companies with customers, is constitutionally impermissible.

A. Interplay Between Sections 222 And 272

Both before and since the issuance of the Tenth Circuit opinion, the Commission has interpreted the interplay between Sections 222 and 272. A change in interpretation at this point would be not only arbitrary and capricious but constitutionally infirm. Like courts faced with serious constitutional problems, that are required to construe statutes to avoid such problems,[74] if possible the Commission must construe legislative pronouncements in a manner that avoids constitutional consequences.[75] A reconciliation of the statutory provisions, such that Section 222 controls all affiliate sharing of CPNI (whether BOC or not) once necessary customer approvals

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[72] *See* 47 U.S.C. § 152 note (Section 601(d) of the Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, 110 Stat. 56, 114 (Feb. 8, 1996)) (wireless) and § 272(g)(3) (interexchange long distance). *And see AT&T Corp. v. FCC,* note 13, *supra,* 220 F.3d at 632.

[73] 47 U.S.C. § 272(g)(3).

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

[75] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking,* 12 FCC Rcd. 5361, 5376 ¶ 37 (1997); *Second Report and Order*, 12 FCC Rcd. 3824, 3834 ¶ 24 (1997) (both

are secured, is the best legal and policy resolution. The Commission is not in a position to change course.

After having preliminarily concluded that Section 272 took some kind of precedence over Section 222 with respect to CPNI,[76] in its *CPNI Order* the Commission "revisit[ed] and overrule[d]" that position.[77] In language that could not be clearer, the Commission provided its rationale and justification for its change of position:

- We agree with the BOCs that the specific balance between privacy and competitive concerns struck in section 222, regarding all carriers' use and disclosure of CPNI, sufficiently protects those concerns in relation to the BOCs' sharing of CPNI with their statutory affiliates.[78]

- Although we find that section 222 envisions a sharing of customer CPNI among those related entities . . . , such a sharing among BOC affiliates would be severely constrainted or even negated by the application of the section 272 nondiscrimination requirements.[79]

- [A]pplying section 272 to the BOCs sharing of CPNI with their statutory affiliates would not permit the goals and principles of section 222 to be realized fully as we believe Congress contemplated.[80]

- [W]e conclude that the most reasonable interpretation of sections 222 and 272 is that section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates.[81]

Orders citing to *United States v. X-Citement Video, Inc.,* 115 S.Ct. 464, 467, 469 (1994)(513 U.S. 64, 68-69, 72-74)).

[76] *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking,* 11 FCC Rcd. 21905, 22010 ¶ 222 (1996) ("*Non-Accounting Safeguards Order*").

[77] *CPNI Order*, 13 FCC Rcd. at 8172 ¶ 154, 8179 ¶ 169.

[78] *Id.* at 8172 ¶ 154.

[79] *Id.* at 8174 ¶ 158.

[80] *Id.* at 8179 ¶ 168.

[81] *Id.* at 8179 ¶ 169.

Later, after the Tenth Circuit's opinion was issued, the Commission confirmed its position that Section 222 controlled the matter of CPNI use and sharing with respect to the BOC and its affiliate, not Section 272. The Commission stated:

- We affirm our conclusion in the *CPNI Order* that the **most reasonable** interpretation of the interplay of sections 222 and 272 is that section 272 does not impose any additional obligations on the BOCs when they share CPNI with their section 272 affiliates.[82]

- We affirm the *CPNI Order*'s conclusion that the term "information" in section 272(c)(1) does not include CPNI.[83]

- While the legislative history is silent about the meaning of "information" in section 272(c)(1), . . . **we believe that the structure of the Act** belies petitioners' contention that the term "information" has a plain meaning that encompasses CPNI. In enacting section 222, Congress carved out very specific restrictions governing consumer privacy in CPNI and consolidated those restrictions in a single, comprehensive provision. We believe that the specific requirements governing CPNI use are contained in that section and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating with those constraints. As a practical matter, the interpretation proffered by petitioners would bar BOCs from sharing CPNI with their affiliates . . . [W]e find it a more **reasonable interpretation** of the statute to conclude that section 222 contemplates a sharing of CPNI among all affiliates (whether BOCs or others), consistent with customer expectations that related entities will share information so as to offer services best tailored to customers' needs.[84]

Finally, almost a year after the Tenth Circuit's decision was handed down, the Commission reiterated and endorsed its prior statutory interpretations. Rejecting an AT&T challenge to Bell Atlantic's use of CPNI subsequent to the time Bell Atlantic had been authorized to provide interexchange long distance, the Commission stated:

> [T]he Commission's construction of section 222 as expressing pro-competitive concerns was only one of the several reasons why the Commission construed section 272(c)'s reference to "information" not to include CPNI. The Commission also so concluded in order to "further the principles of customer convenience and control," and "protect

[82] *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 137 (emphasis added).

[83] *Id.* ¶ 141.

[84] *Id.* ¶ 142 (emphasis added).

customer's privacy interests." Moreover the Commission was concerned that a reading of section 272 such as advocated by AT&T here [requiring nondiscriminatory treatment of CPNI] would lead the BOCs to "simply choose not to disclose their local service CPNI," which would "not serve the various customer interests envisioned under section 222." . . . Accordingly, because we conclude that section 272(c)'s reference to "information" does not include CPNI, we deny AT&T's . . . claim.[85]

The above interpretations that Section 222 controls the use and sharing of CPNI and that Section 272 does not are clearly the correct ones. Not only does such reconciliation avoid agency action that would pose serious constitutional problems, the reconciliation accommodates the rule of statutory construction that within a piece of integrated legislation, the more specific statutory provisions control over the more general.[86] The more specific CPNI provision, Section 222, should control the CPNI customer approval process with respect to both the BOC and the Section 272 affiliate, as well as how CPNI is used or shared after such approval has been secured.

B. Joint Marketing Exception Allows CPNI Sharing

Even if Section 272(c)(1) had some statutory relevance to CPNI usage and sharing between a BOC and its Section 272 affiliate, Congress' determination that "joint marketing and sale of services permitted under [272(g)(3)] shall not be considered to violate the nondiscrimination provisions" of (c)(1) would wrest CPNI "information" from the hard grasp of Section 272(c)(1)'s nondiscrimination obligation regarding the sharing of "information." Prior

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[85] *AT&T/Bell Atlantic Complaint,* note 12, *supra*, 15 FCC Rcd. at 20004-05 ¶¶ 18-19.

[86] *In re Applications of Ameritech Corp. and SBC Communications, Inc., [For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd. 14712, 14940 n.1047 (citing to *HCSC-Laundry v. United States*, 450 U.S. 1, 6 ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned") (1981); *In the Matter of the Federal-State Joint Board on Universal Service, Report to Congress,* 13 FCC Rcd. 11501, 11646 (1998) ("typical statutory construction requires that specific directions in a statute trump any general admonitions").

Commission observations and adjudications clearly demonstrate the connection between CPNI and joint marketing, as well as the adverse impact to joint marketing when CPNI is not available.[87] Quite simply, CPNI is often the predicate or foundation for marketing,[88] including joint marketing.

Other considerations associated with carrier marketing also support allowing CPNI use for joint marketing of the BOC and its Section 272 affiliate. As the record shows, the two major national interexchange carriers have touted the depth and breadth of their customer information.[89] These carriers clearly have substantial information on customers across the nation with respect to actual (as well as predicted) interexchange calling. The BOCs should have a similar benefit with respect to what local service CPNI might be able to predict (if anything) with respect to the joint marketing of local and long distance services. There is no real discrimination in such allowance, since both the BOCs and interexchange carriers are in predictive modes with respect to one customer constituency (either local or long distance). Only in this way can the Commission realize its (and Congress') expectation that, upon securing Section 271 relief, a "BOC [should]

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[87] *See, e.g.*, Brief for Petitioner and Intervenors at 5-8 and nn.6-7, 10-11 (citing to proceedings in which the Commission has found CPNI necessary or useful in joint marketing and one-stop shopping.

[88] *U S WEST v. FCC,* 182 F.3d at 1233 n.4 ("when the sole purpose of intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers . . . the speech [is] integral to and inseparable from the ultimate commercial solicitation.").

[89] Letter from Elridge A. Stafford, Executive Director, U S WEST to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, Jan. 27, 1998, Attachment at 10 ("AT&T boasts: 'We now have a database with information about nearly 75 million customers. We know their wants, needs, buying patterns, and preferences;'" "MCI claims databases that contain more than 300 million sales leads and up to 3,500 fields of information about 140 million customers and prospects[.]" *See also* Letter from Kathryn Marie Krause, Senior Attorney, U S WEST to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, Nov. 14, 1997, at 12 n.39 (providing references to where AT&T and MCI touted their substantial and "rich" consumer data).

be permitted to engage in the same type of marketing activities as other service providers."[90] Thus, should the Commission determine that Section 272(c)(1) has any relevance to CPNI, it must simultaneously find that the CPNI "information" can be used without regard to the nondiscriminatory requirements of that Section, in light of the exemption in Section 272(g)(3) permitting its use in joint marketing.

V. CONCLUSION

The Tenth Circuit's decision makes clear that the Commission's discretion with respect to the promulgation of CPNI approval rules is subject to significant Constitutional constraints. The Commission's actions must respect both the speech rights of carriers as well as their customer audiences. Government mandates with respect to CPNI approvals can survive future appellate challenge only if the government successfully articulates and defends a legitimate governmental interest, demonstrates that the means it chooses to advance that legitimate interest does so in a direct and material way, and successfully proves that the means chosen to advance the government interest are narrowly-tailored to achieve the government's objective. The Commission should not underestimate the evidentiary burden imposed on it, since few government regulations burdening speech have been upheld under the *Central Hudson* test.

The Commission, in no event, should attempt to burden the speech of BOCs *vis a vis* their Section 272 affiliates. Such action would be contrary to the Tenth Circuit's analysis and First Amendment principles. In addition to raising First Amendment implications similar to those that caused the Tenth Circuit to invalidate the Commission's CPNI opt-in regulations, replacing "opt-in" regulations with additional CPNI burdens or restrictions on BOCs would be at

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[90] *Non-Accounting Safeguards Order,* 11 FCC Rcd. at 22046 ¶ 291. *And see CPNI Order,* 13 FCC Rcd. at 8178 n.580 (noting symmetry between marketing provisions for interexchange carriers and BOCs).

odds with the Commission's prior statutory interpretations of the interplay between Sections 222 and 272. Those interpretations, as conceded by the Commission, were invited and endorsed by the structure of the Telecommunications Act itself. Moreover, burdening communications between a BOC and its Section 272 affiliate would frustrate Congress' express endorsement of BOC joint marketing found in Section 272(g)(3). Nothing about the Tenth Circuit's opinion requires a revisitation of this matter and the Commission should decline to undertake such action.

The Commission can avoid continued and unsettling controversy over the proper format and scope of CPNI approvals by deferring to the Congressional directive of Section 222. The language of that Section runs directly to carriers, imposing restrictions on carrier conduct (*e.g.*, that CPNI be used only in certain ways) and anticipating actions that would warrant carrier use of CPNI beyond those restrictions (*e.g.*, legal requirements or customer approvals). A CPNI approval model which imposes directly on carriers the responsibility for compliance with Section 222, yet promotes that compliance through Commission enforcement actions in those instances of carrier misfeasance, represents a fundamentally sound CPNI approval model. It benefits from simplicity, ease of administration, and the avoidance of government compulsion.

Should the Commission determine that reliance on market forces and regulatory enforcement capabilities is insufficient for proper administration of Section 222 and that more formal regulations are required, those regulations must conform to constitutional imperatives. The rules must be narrowly-tailored and avoid unduly burdening speakers of truthful information and interested audiences. The CPNI approval mechanism most calculated to withstand constitutional scrutiny as applied to multi-product carriers wishing to use CPNI across service categories in those cases where their customers do not subscribe to service in each category, is an

opt-out approval model. Carriers might be asked to provide the Commission with written information regarding the CPNI approval method chosen and the notification information provided customers. Such a limited CPNI approval rule might well accommodate sound First Amendment principles.

Qwest urges the Commission to adopt the proposals and recommendations contained in these comments. The approach outlined herein fairly balances governmental, privacy and commercial interests in a manner consistent with the constitution and sound public policy. No one could expect more.

Respectfully submitted,

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