ORAL ARGUMENT NOT YET SCHEDULED

No. 07-1312

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Cable & Telecommunications Association,

Petitioner,

v.

Federal Communications Commission and United States of America,

Respondents.

On Petition for Review of a Final Order of the Federal Communications Commission

BRIEF FOR PETITIONER

Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
Steven F. Morris
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431
Tel: (202) 222-2445
Fax: (202) 222-2446

Matthew A. Brill
J. Scott Ballenger
Melissa B. Arbus
Lori Alvino McGill
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

Counsel for Petitioner

CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to D.C. Circuit Rule 28(a)(1).

(A) *Parties and Amici*

Petitioner. The Petitioner is National Cable & Telecommunications Association.

Respondents. The Respondents are the Federal Communications Commission and the United States of America.

Intervenors. Verizon Communications, Inc. and Qwest Communications International, Inc., have intervened in support of Petitioner.

Amici. Sprint Nextel Corp. has notified this Court of its intention to participate as *amicus curiae.*

(B) *Ruling Under Review*

Petitioner seeks review of a final order of the Federal Communications Commission entitled *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket

No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-22 (adopted March 13, 2007 and released April 2, 2007) ("*Order*").

(C) ***Related Cases***

A comparable FCC opt-in rule was previously before the United States Court of Appeals for the Tenth Circuit in *US West, Inc. v. FCC*, 182 F. 3d 1224 (10th Cir. 1999).

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the National Cable & Telecommunications Association respectfully submits this disclosure statement. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 90 percent of the nation's cable television customers as well as more than 200 cable program networks. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries, or affiliates whose listing is required by Rule 26.1.

Respectfully submitted,

Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
Steven F. Morris
NATIONAL CABLE &
TELECOMMUNICATIONS
ASSOCIATION
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431
Tel: (202) 222-2445
Fax: (202) 222-2446

Matthew A. Brill
J. Scott Ballenger
Melissa B. Arbus
Lori Alvino McGill
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

Counsel for Petitioner

March 14, 2008

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GLOSSARY

CPNI – Customer Proprietary Network Information

EPIC – Electronic Privacy Information Center

MoPSC – Missouri Public Service Commission

NAAG – National Association of Attorneys General

NASUCA – National Association of State Utility Consumer Advocates

NCTA – National Cable & Telecommunications Association

WUTC – Washington Utilities and Transportation Commission

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the petition for review of the National Cable & Telecommunications Association ("NCTA") pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2343(1) and 2344. The *Order* became final and subject to review upon its publication in the Federal Register on June 8, 2007. NCTA filed a timely petition for review on August 7, 2007. 47 C.F.R. § 1.4(b)(1).

STATEMENT OF ISSUES

1. Whether the FCC's *Order* violates the First Amendment by restricting protected speech in a manner that does not directly or materially advance a real and substantial governmental interest and is not narrowly tailored to the governmental interests at stake.

2. Whether the FCC's *Order* is arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because it (a) imposes an "opt-in" approval requirement despite the absence of record evidence to support its departure from the prior "opt-out" regime, (b) fails to establish any nexus between the threat of unauthorized CPNI disclosures and the form of customer approval, and (c) neglects to

evaluate the significant competitive disadvantages of the selective opt-in requirement for new entrants in the telephone services marketplace.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in a Statutory Addendum attached hereto.

STATEMENT OF FACTS

For the second time in ten years, the FCC has adopted a rule that requires a customer affirmatively to give approval (opt-in) before a telecommunications carrier[1] can share certain information about the customer's services, for marketing purposes, with its joint venture partners and independent contractors. The first time the Commission adopted an opt-in rule, the United States Court of Appeals for the Tenth Circuit invalidated it on First Amendment grounds, holding that it restricted protected speech, did not directly advance the Commission's

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1 The Commission extended the rule under review to providers of Voice over Internet Protocol (VoIP) services, without deciding whether those providers are "carriers" within the meaning of Section 222 of the Telecommunications Act of 1996, 47 U.S.C. § 222. Petitioner uses the term "carriers" generically herein to refer to all entities subject to the *Order*, and expresses no opinion as to whether VoIP providers are "carriers" within the meaning of the Act.

stated interest in protecting consumer privacy, and was not narrowly tailored to further that interest. The Commission then studied the issue, and after careful consideration adopted a rule that gave customers the opportunity to opt out of sharing with those parties, along with safeguards designed to increase the security of consumers' service-related information.

The Commission has now decided to revert to an opt-in rule with justifications and on a record that are not meaningfully different from those squarely rejected by the Tenth Circuit. In many cases, that rule will effectively prevent carriers from using this lawfully obtained information to engage in targeted marketing of their services, significantly affecting the way they conduct their businesses.

Cable's Entry Into the Market For Voice Services

The Telecommunications Act of 1996 paved the way for cable operators and telephone companies to compete with each other for voice and video services, among other offerings. More recently, with advancements in technology, cable operators have started to provide telephone services using Voice over Internet Protocol, or VoIP, technology. Cable VoIP does not travel over the public Internet, so

customers need not separately purchase broadband Internet access service (although many choose to do so). Typically, cable VoIP offerings include local and long distance calling for a flat monthly fee, which is often lower than the rates for traditional (circuit-switched) telephone services, while also providing an array of innovative service features. Cable operators' entry into the residential voice marketplace has accelerated rapidly with the development of the "triple play" offering—a bundle of video, data, and voice services offered at a single price. They discovered quickly that the convenience and savings associated with these bundled offerings are very attractive to consumers.

Cable operators currently provide voice service to over 14 million customers, and more than 100 million homes nationwide have cable-provided voice services available to them. Even with this initial success, however, the market for voice services continues to be led by incumbent telephone carriers like AT&T and Verizon, which collectively serve almost 100 million customers.

As new entrants in the telephone marketplace, cable operators may lack the large in-house marketing teams—and relevant expertise—of more established providers. Moreover, most cable operators do not

provide wireless services, which prevents them from unilaterally matching the bundled service packages offered by their larger rivals. Accordingly, most cable operators rely heavily on independent contractors and joint venture relationships to provide and market telephone services and bundles that include wireless offerings.[2] Cable operators are therefore disproportionately impacted by rules that single out independent contractor and joint venture arrangements for special treatment.

Customer Proprietary Network Information ("CPNI")

Customer proprietary network information ("CPNI") is defined as "(A) information [that] relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship;" and "(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer or a carrier." 47 U.S.C.

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2 *See, e.g.*, M. Reardon, Cable Companies Call on Sprint Nextel, (Nov. 2, 2005), *available at* http://www.news.com/Cable-companies-call-on-Sprint-Nextel/2100-1039_3-5928037.html (last visited Mar. 14, 2008).

§ 222(h)(1). As a practical matter, CPNI includes information such as the services purchased by the consumer (*e.g.,* particular calling plans); the average amount spent on those services; contract expiration date; the presence of features like call waiting; the phone numbers called by a customer; and average calling volume. *Order* ¶ 5; JA__ (Verizon Jan. 29, 2007 Letter at 8). The statutory definition of CPNI excludes "subscriber list information," such as customers' names and addresses. 47 U.S.C. § 222(h)(3).

Although some CPNI is potentially sensitive, it is truthful information obtained lawfully and in a manner fully consistent with the carriers' contractual obligations to their customers. Petitioner's members and other telecommunications providers would like to be able to share some of this information for marketing purposes, pursuant to safeguards designed to prevent unauthorized disclosures, not only with employees and affiliates but also with independent contractors and joint venture partners. For example, a carrier may want to use CPNI to offer a VoIP customer a better rate, service upgrade, or "triple play" option based on an analysis of her service and usage profile. A carrier might want to use CPNI to market a Spanish language video tier to current

subscribers of a particular international calling plan. Or, a cable operator may want to use CPNI relating to cable VoIP service to facilitate a wireless joint venture partner's marketing of wireless services, and vice versa. Such targeted marketing allows companies to offer packages or services they have good reasons to believe a particular customer might want, while avoiding wasteful and intrusive mass-mailing campaigns or similar non-targeted advertising. Often, these marketing efforts cannot be conducted as effectively (or at all) in house; smaller carriers and new entrants, in particular, depend on independent contractors and joint venture partners for their success.

The Commission's Prior Attempt To Require "Opt-In" Approval for Sharing CPNI with Joint Venture Partners and Independent Contractors

Section 222 of the Communications Act of 1934, as amended, governs carriers' use of CPNI. Section 222(c)(1) provides that a carrier "shall only use, disclose, or permit access to individually identifiable" CPNI "as required by law"; "with the approval of the customer"; or in its provision of the telecommunications service from which such information is derived and services incidental thereto. 47 U.S.C. § 222 (c)(1). The term "approval" is not defined.

In a 1998 order, the culmination of its initial attempt to implement Section 222, the Commission acknowledged that the statute does not specify the method by which consumer approval must be obtained, but decided to mandate an "opt-in" approach, under which a carrier must obtain prior express approval from a customer through written, oral, or electronic means before disclosing the customer's CPNI for the purpose of marketing additional communications services. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) ("1998 Order"). The Commission found that an opt-out method of soliciting consent, in which customers are informed of their rights and given an opportunity to object if they do not want their CPNI shared, would not adequately protect CPNI. The Commission asserted that an opt-out approach would be less effective at ensuring informed consent "because customers may not read their CPNI notices." 1998 Order ¶ 91.

US West and other carriers challenged the FCC's order, arguing that deference to the FCC's interpretation of the Act was inappropriate

in light of the serious First Amendment implications of the opt-in requirement. The Tenth Circuit agreed and vacated the order. *US West, Inc. v. FCC*, 182 F. 3d 1224 (10th Cir. 1999). Applying the Supreme Court's decision in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980), the court held that the FCC's rule violated the First Amendment. The court first held that the CPNI regulations restricted protected speech by limiting carriers' ability to communicate truthful, lawfully obtained information. *US West,* 182 F. 3d at 1232-33. It then expressed doubt as to whether the asserted governmental interests—privacy and promoting competition—were "legitimate" and "substantial" in the context of the CPNI regulations. *See id.* at 1234-36. Notwithstanding the court's reservations, it assumed without deciding that the government had asserted a substantial state interest. *Id.* at 1236. The court went on to conclude that the rule did not "directly and materially advance" the asserted governmental interests. *Id.* at 1237. It further held that the rule was not narrowly tailored, because the Commission had failed "to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy." *Id.* at 1238. The court

noted that the Commission could not overcome the paucity of evidence in the rulemaking record by "rely[ing] upon its common sense judgment." *Id.* at 1239.

The Commission's 2002 Order

In the wake of *US West*, the Commission commenced a new rulemaking proceeding and developed an extensive record regarding the potential need to reinstate an opt-in requirement as well as the opt-out alternative. After that careful review, the Commission could not articulate any constitutional basis to retain its prior opt-in requirement. Instead, it concluded that opt-*out* "directly and materially advances the government's interest in ensuring that customers have an opportunity to approve such uses of CPNI, while also burdening no more carrier speech than necessary." *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, ¶ 32 (2002) ("2002 Order").

Whereas "[o]pt-in could immediately impact the way carriers conduct business," opt-out would "avoid[] unnecessary and

inappropriate burdens on commercial speech" while still constituting an "appropriate approval mechanism for the sharing of CPNI with, and use by, a carrier's joint venture partners and independent contractors in connection with communications-related services that are provided by the carrier (or its affiliates) individually, or together with the joint venture partner." *Id.* ¶¶ 44-45. The Commission concluded that, with appropriate safeguards, disclosure of CPNI to joint venture partners and independent contractors posed no greater risk of unauthorized disclosure than use of such information by the carriers themselves. *Id.* ¶¶ 32, 45-59.

Accordingly, the Commission adopted a rule requiring carriers to enter into confidentiality agreements with joint venture partners and independent contractors which: (1) limited CPNI use to marketing the communications-related service for which the CPNI had been provided, (2) disallowed disclosure to other parties except as permitted by law, and (3) required the independent contractor or joint venture partner to adopt comprehensive safeguards to protect the ongoing confidentiality of the consumers' CPNI. *See* 47 C.F.R. § 64.2007(b)(2) (2002). As the FCC explained: "[t]hese requirements place independent contractors

and joint venture partners on a similar footing as the carriers themselves in terms of incentives, thus obviating the need for more stringent approval requirements such as opt-in." 2002 Order ¶ 48.

The Commission also recognized commenters' concern that customers might not read or understand opt-out notices and "respond[ed] to these specific problems with requirements . . . designed to increase the effectiveness of opt-out without burdening more carrier speech than necessary." *Id.* ¶ 42. Specifically, all CPNI notifications are required, *inter alia*, to (a) "state that the customer has a right, and the carrier has a duty, under federal law, to protect the confidentiality of CPNI," (b) "specify the types of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time," and (c) "advise the customer of the precise steps the customer must take in order to grant or deny access to CPNI." 47 C.F.R. § 64.2008(c)(1)-(3). Additionally, all notifications "must be comprehensible and not misleading," "clearly legible," in "sufficiently large type," "readily apparent to the customer," and "proximate to the

notification of a customer's CPNI rights." *Id.* § 64.2008(c)(4)-(5), (10). Carriers also must wait 30 days before inferring customer approval, notify customers of such a waiting period, and provide notices every two years. *Id.* § 64.2008(d). These requirements directly "address[ed] the known shortcomings of opt-out in a targeted manner in lieu of adopting a more restrictive approach such as opt-in." 2002 Order ¶ 43.

Verizon Northwest, Inc. v. Showalter

Undeterred by the *US West* decision and the Commission's well-reasoned 2002 Order, the Washington Utilities and Transportation Commission ("WUTC") subsequently adopted an opt-in requirement for CPNI disclosure. Carriers argued that the restriction violated the First Amendment, and the District Court for the Western District of Washington agreed. *Verizon Northwest, Inc. v. Showalter,* 282 F. Supp. 2d 1187 (W.D. Wash. 2003). Applying *Central Hudson*, the court held that "the protection . . . of privacy is a substantial state interest," but the opt-in regulation failed to advance that interest in a "direct and material way" because the regulations—which "requir[ed] consumers to opt-in in some cases and opt-out in others"—were "dauntingly confusing." *Id.* at 1191-93. The court also concluded that there were

"other means," short of an opt-in requirement, "available to achieve the same purpose that impact less speech"—namely, "the state could more stringently regulate the form and content of opt-out notices and combine those regulations with educational campaigns to inform consumers of their rights." *Id.* at 1194.

The Commission's 2006 Notice of Proposed Rulemaking

In 2006, EPIC asked the Commission to investigate the security practices of telecommunications carriers and to consider establishing more stringent standards regarding disclosures of CPNI. EPIC was concerned specifically with the practice of "pretexting," by which data brokers pretend to be a particular customer in order to obtain access to that customer's CPNI. It asserted that data brokers' advertisements for private phone records demonstrated that existing safeguards were inadequate, and proposed a variety of measures (*e.g.,* password protection, audit trails, data encryption, mandatory notice of security breaches, and data retention limits) to combat this harm. JA __ (EPIC Aug. 30, 2005 Petn. at 10-12). Notably absent from those proposed security measures was any suggestion that the Commission should require opt-in approval for sharing CPNI.

On February 14, 2006, the Commission issued a Notice of Proposed Rulemaking seeking comment on EPIC's petition. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, 21 FCC Rcd 1782 (2006). On its own initiative, and without explanation, the Commission also sought comment "on whether our existing opt-out regime sufficiently protects the privacy of CPNI in the context of CPNI disclosed to telecommunications carriers' joint venture partners and independent contractors." *Id.* ¶ 12. In particular, the Commission focused on whether "there is a greater possibility of dissemination of customers' private information in this situation." *Id.*

At the end of 2006, while EPIC's petition was pending, Congress responded to the problem at the heart of the rulemaking proceeding by making pretexting a federal crime punishable by fines and imprisonment. *See* Telephone Records and Privacy Protection Act of 2006, Pub. L. No. 109-476, 120 Stat. 3568 (2007) (codified at 18 U.S.C. § 1039) (making it a criminal offense to intentionally obtain, or attempt to obtain, confidential phone records of another person based on false

representations or to sell or transfer such information without prior authorization from the customer).

The Order Under Review

On April 2, 2007, the Commission released the order under review. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 07-22 (2007) ("*Order*"). In the *Order*, the Commission adopted a variety of new CPNI requirements to respond to the identified security threat:

- Companies are prohibited from releasing call detail information (*i.e.,* any information that pertains to the transmission of specific telephone calls, including the calling and called phone numbers, and the time, location, and duration of the call) during a customer-initiated telephone call unless the customer provides the carrier with a pre-established password.
- Companies must implement password protection for online access to any CPNI (not just call detail information).

- Companies are required to notify customers immediately when certain types of changes are made to their accounts, including whenever a password or address of record is changed or created.
- Upon discovering that CPNI has been disclosed to a third party without authorization from the customer, companies must notify the Secret Service and the FBI.

In addition to these requirements (none of which is challenged by Petitioner), the Commission decided to revert to an opt-in requirement for sharing CPNI with joint venture partners and independent contractors for the purpose of marketing communications-related services. (The Commission maintained the existing opt-out regime for CPNI disclosures to affiliates or agents of the carrier.) The Commission conceded that "the record does not include specific examples of unauthorized disclosure of CPNI by a joint venture partner or independent contractor." *Id.* ¶ 46. But it nevertheless asserted a "substantial need" to limit this sharing "to protect a customer's privacy." *Id.*

Recognizing that the prior CPNI opt-in rule was declared unconstitutional just eight years earlier, the Commission sought to justify its changed course based on "new circumstances." *Id.* ¶¶ 37, 44. It pointed to a record supposedly "replete with specific examples of unauthorized disclosure of CPNI and the adverse effects of such disclosures on customers," as well as "substantial evidence . . . that current opt-out rules do not adequately protect consumer privacy because most customers either do not read or do not understand carriers' opt-out notices." *Id.* ¶ 44.

The fact that none of these "specific examples" had any remote connection to joint venture partners or independent contractors was deemed inconsequential because "that does not mean unauthorized disclosure has not occurred or will not occur in the future." *Id.* ¶ 46. Likewise, the Commission discounted the established safeguards "for sharing CPNI with joint venture partners and independent contractors," concluding they "do not adequately protect a customer's CPNI in today's environment," because "once the CPNI is shared with a joint venture partner or independent contractor, the carrier no longer has control over it and thus the potential for loss of this data is

heightened." *Id.* ¶ 39. For the same reason, the Commission refused to adopt additional contractual safeguards that would have been less restrictive of speech. *Id.* ¶ 49. The Commission purported to consider, but ultimately rejected, every other less-restrictive alternative proposed, including "simply modifying our existing opt-out notice requirements" to increase readability and customer comprehension. *Id.* ¶ 40; *see also* ¶¶ 48-50.

SUMMARY OF ARGUMENT

The record before this Court today no more supports an opt-in regime than the one before the Tenth Circuit in 1999, the record before the Commission in 2002, or the record before the *Showalter* court in 2003. There remains a crucial and constitutionally fatal disconnect between the identified harm and the chosen cure, and between what the Commission asserts and what the record supports. Both the First Amendment and the Administrative Procedure Act ("APA") require that the Commission establish the proper nexus between its means and asserted ends, and support its assertions with *evidence* before it may restrict the communication of truthful, lawfully obtained information between carriers and their marketing partners, and the ways that

carriers may communicate with their existing customers. The FCC failed in this endeavor in several respects.

First, the FCC failed to demonstrate that sharing with third-party marketing partners poses any "real" threat to the security of CPNI, or that the selective opt-in requirement would directly and materially alleviate the supposed problem it identified. This rulemaking proceeding was prompted by the Commission's desire to prevent CPNI from getting into the hands of bad actors—namely, pretexters. That is a laudable goal in the abstract, but it is not directly and materially advanced by restricting dissemination of CPNI to *authorized* marketing partners. The Commission concedes that it has been unable to identify even *a single example* of unauthorized disclosure resulting from sharing with authorized third parties. Nor is there any evidence suggesting that joint venture partners or independent contractors are *more* susceptible to pretexting threats (indeed, if a distinction is to be drawn, there is every reason to believe they are less susceptible). And there is no evidence that CPNI has *ever* been obtained through computer intrusion or intentional disclosure by insiders—let alone any evidence that third-party marketing partners have experienced such breaches.

Second, the Commission insists that an opt-in approval requirement is necessary (prior to sharing CPNI with joint venture partners and independent contractors, only) but fails to point to record evidence suggesting that an obvious alternative, the less restrictive opt-out approach, would be any less effective in advancing the Commission's goals. Extensive regulations concerning form and content already apply to CPNI opt-out notices. Those requirements were deemed sufficient to overcome any concern with readability or customer comprehension just six years ago and are *today* deemed adequate for sharing between a carrier and its affiliates. There are already additional safeguards designed to protect CPNI shared with marketing partners—and the Commission points to no record evidence showing that these safeguards have proven insufficient. The FCC cannot justify its restriction on protected speech when suitable and obvious less restrictive alternatives exist, such as improving opt-out notices and adopting additional measures to safeguard the data or deter would-be pretexters. At the very least, the opt-in rule raises a grave constitutional question that warrants a narrowing construction of Section 222 and concomitant invalidation of the rule.

Third, for many of the same reasons the CPNI opt-in rule violates the First Amendment, it is also arbitrary and capricious under the APA. The Commission failed to justify its abandonment of the opt-out consent regime, its "findings of fact" are not supported by substantial evidence, and there is no rational connection between these "findings" and the decision to revert to a selective opt-in rule. Moreover, the Commission failed entirely to consider the significant competitive harms that would ensue from its arbitrary and legalistic distinction between agents and affiliates, on the one hand, and independent contractors and joint venture partners, on the other. The rule is therefore arbitrary and capricious and should be vacated.

STANDING

Petitioner NCTA is the principal trade association of the cable television industry. Its members include owners and operators of cable television systems that provide VoIP services. Such companies are aggrieved by the *Order* under review and would have standing in their own right. NCTA therefore has representational standing to challenge the *Order*. *See Library Ass'n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a final order of the FCC to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)-(B). Additionally, this Court owes no deference to the Commission's interpretation of the statute it is charged with administering if that interpretation raises a serious constitutional question. *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995).

II. THE CPNI OPT-IN RULE VIOLATES THE FIRST AMENDMENT

A. The CPNI Opt-In Rule Regulates Protected Speech and Is Subject to at Least Intermediate Scrutiny

The Commission does not dispute that the CPNI rule restricts protected speech and, accordingly, implicates the First Amendment. *See Order* ¶¶ 44-49 (applying *Central Hudson* to CPNI opt-in notice requirement); 2002 Order ¶¶ 31-68 (applying *Central Hudson* to all

CPNI notice requirements).[3] The *Order* infringes on protected speech in several respects.

First, the *Order* directly restricts speech by regulating *what* a carrier can say to its joint venture partners and independent contractors—severely limiting a carrier's right to disclose truthful and lawfully obtained customer information to its business partners, *see supra* at 6-7. A "prohibition against disclosures is fairly characterized as a regulation of pure speech." *Bartinicki v. Vopper*, 532 U.S. 514, 515 (2001). *Second*, it dictates *how* a carrier can communicate with its customer—effectively forcing carriers either to communicate through in-house marketers or to abandon targeted marketing altogether. The First Amendment does more than protect speakers' right "to advocate their cause"; it equally protects their right "to select what they believe to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). *Third*, the CPNI regulation burdens customers' ability to receive targeted marketing information about services they would

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[3] *See also US West*, 182 F.3d at 1232 (FCC regulation prohibiting disclosure and use of CPNI for targeted marketing purposes absent the prior express consent of the customer burdens protected speech); *Showalter*, 282 F. Supp. 2d at 1190-91 (state regulation prohibiting disclosure and use of CPNI for marketing purposes without express consent burdens protected speech).

like to receive. *See, e.g., Bolger v. Young Drugs Corp.*, 463 U.S. 60 (1983) (imposition of affirmative obligation on addressee to receive mail implicates First Amendment); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it.").

The *US West* and *Showalter* courts concluded that this speech was commercial in nature. As explained by the Tenth Circuit, "[b]ecause petitioner's speech to its customers is for the purpose of soliciting those customers to purchase more or different telecommunications services, and 'does no more than propose a commercial transaction,' " it should be characterized as "commercial speech." *US West*, 182 F.3d at 1232-33; *Showalter*, 282 F. Supp. 2d at 1191 n.6 (same).[4] These courts may have understated the constitutional protection of the speech at issue. The opt-in requirement restricts more than speech merely "propos[ing] a commercial transaction"; it is a content-based prohibition against

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[4] *See also US West*, 182 F.3d at 1233 & n.4 (noting that speech also fits within broader definition of commercial speech—"'expression related solely to the economic interest of the speaker and its audience'"—and concluding that "when the sole purpose of the 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").

carriers' sharing of truthful, lawfully obtained information with their business partners and thus arguably should be subject to strict scrutiny.

This Court need not resolve that issue, however, because the *Order* fails the test for purely "commercial" speech. Under the traditional test announced in *Central Hudson*, a restriction on truthful, nonmisleading commercial speech is valid only if the government establishes that: (1) there is 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 that interest. 447 U.S. at 566.

Although less stringent than the strictest form of scrutiny, the *Central Hudson* test is far more exacting than rational basis review. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). The Government bears the burden of proving each prong—a burden that cannot be "satisfied by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In nearly every commercial speech case decided by the Supreme Court over the last two decades,

the Court has invalidated the challenged regulation under this standard. *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n. Inc. v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality op.); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136 (1994); *Edenfield*, 507 U.S. 761; *Discovery Network,* 507 U.S. 410; *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

Indeed, a majority of Justices presently on the Court has now suggested, at one time or another, that truthful and non-misleading commercial speech may be entitled to greater protection than afforded under intermediate scrutiny. *See Thompson*, 535 U.S. at 367-68 (citing *Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 179 (Thomas, J., concurring in judgment); *44 Liquormart*, 517 U.S. at 501 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas J., concurring in part and concurring in judgment)). Again, however, because the CPNI regulation fails under even the intermediate

standard of scrutiny historically applied to "commercial speech" cases, this Court need not decide the issue.

B. The CPNI Opt-In Rule Restricts Protected Speech Without Directly and Materially Advancing the Identified State Interest

Because the CPNI opt-in rule infringes on protected speech, this Court must begin its inquiry by "identify[ing] with care the interests the [Commission] itself asserts." *Edenfield*, 507 U.S. at 768. "[T]he *Central Hudson* standard does not permit [the court] to supplant the precise interest put forward by the State with other suppositions." *Id.* In contrast to rational basis review, "hypothesized justifications" cannot suffice to sustain a regulation under *Central Hudson*. *Thompson*, 535 U.S. at 373.

The only governmental interest identified by the Commission that is even purportedly furthered by requiring opt-in consent for sharing CPNI with joint venture partners and independent contractors is the protection of consumer privacy. *Order* ¶ 37.[5] Although there is good reason to question whether the Government has a "substantial interest"

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[5] Specifically, the Commission was concerned with a customer's privacy interest in the CPNI data itself; it was not seeking to protect consumers from intrusion into the privacy of their homes (*e.g.*, from telemarketing calls).

in keeping voluntarily disclosed information confidential in the name of customer privacy,[6] the Tenth Circuit assumed it was a substantial interest in *US West*, 182 F.3d at 1234-36, and Petitioner does not argue otherwise.

"That the [Commission's] asserted interest[] [is] substantial in the abstract does not mean, however, that its [regulation] serves" that interest. *Edenfield*, 507 U.S. at 770-71. To satisfy this burden, the Commission must demonstrate both that (1) "the harms it recites are real," and (2) its opt-in requirement will in fact address them in a "direct and material" way. *Id.* at 771, 776; *see also Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 188; *Lorillard Tobacco Co.*, 533 U.S. at 555. On this record, it cannot do so.

1. The Only "Real" Threat To Customer Privacy Supported by the Record Is Unauthorized Disclosure Through Pretexting

Of the threats to customer privacy identified by the Commission, only the possibility of disclosure through "pretexting" is genuinely supported by the record. *See, e.g., Order* ¶¶ 1-2. Indeed, the *Order* is a

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6 *See, e.g.,* Solveig Singleton, Privacy as Censorship: A Skeptical View of Proposals To Regulate Privacy in the Private Sector, Cato Institute No. 295 (Jan. 22, 1998).

"direct[] respon[se] to the practice of 'pretexting,' " *id.* ¶ 2, defined by the Commission as "pretending to be a particular customer or other authorized person in order to obtain access to that customer's call detail or other private communications records," *id.* ¶1 n.1; *see also id.* ¶ 2 (claiming that "[t]he additional privacy safeguards we adopt today will sharply limit pretexters' ability to obtain unauthorized access"). Petitioner does not dispute that the Commission has now documented some instances of unauthorized disclosure of CPNI obtained *through pretexting* and that this identified harm to customer privacy from such illegal behavior is "real." *Edenfield*, 507 U.S. at 771.

The Commission has not, however, pointed to any evidence suggesting that pretexting is a problem for third-party marketing partners. *See, e.g.,* JA __ (Verizon Jan. 29, 2007 Letter at 21-22). Apparently recognizing as much, the Commission conjures up two other, hypothetical threats to the security of CPNI: "computer intrusion and disclosure by insiders." *Order* ¶ 46. But the Commission points to nothing in the record substantiating these purported threats.

The Commission does allude to "evidence in the record suggest[ing] that 50-70% of cases of identity theft arise from wrongful

conduct by insiders." *Id.*[7] But even assuming that statistic is accurate, it is a *non sequitur* and completely irrelevant to the rule under review. The Commission failed to draw any connection whatsoever between *identity theft* and unauthorized disclosure of CPNI. Identity thieves are interested in billing information—names, addresses, credit card numbers, and so forth—not the service features a consumer buys or her usage details. The Commission also failed entirely to provide evidence that CPNI has ever been obtained through computer intrusion,[8] and it certainly did not link these hypothetical threats to the possession of CPNI by *third-party* marketing partners.[9]

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7 The "evidence" to which the Commission refers is a single sentence in a single comment, which itself cites a single news report. *See* JA __ (EPIC Apr. 28, 2006 Comments at 6).

8 The Commission cites to three commenters for the proposition that CPNI is being disclosed through computer intrusion. *Order* ¶ 46 n.152. None provides any evidence for that assertion—in fact, the commenters cite each other for the proposition. *See, e.g.,* JA __ (NASUCA Apr. 28, 2006 Comments at 11 (citing EPIC Apr. 28, 2006 Comments at 5)).

9 The Commission also refers generally to "security breaches." *See Order* ¶41 & n.131 (citing NAAG Apr. 28, 2006 Comments at 7-9). But of the 152 documented breaches cited by the NAAG, *none* involved CPNI (indeed, only *one* breach—theft of a laptop computer—involved a telecommunications carrier). *See* JA ___ (BellSouth June 2, 2006 Reply Comments at 5 n.7).

Because the Commission has not demonstrated that the "harms it recites are real," rather than "speculati[ve] or conjectur[al]," *Edenfield,* 507 U.S. at 770-71, they cannot provide support for the opt-in rule's restriction on protected speech.

2. The Opt-In Rule Does Not Directly Address, and Will Not Alleviate, the Identified Harm

Under *Central Hudson*, the government must demonstrate that the challenged restriction "advances the Government's interest 'in a direct and material way.' " *Rubin*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 767); *see Central Hudson*, 447 U.S. at 565. The Commission bears the burden of demonstrating that the rule "directly" and "effective[ly]" advances the identified government interest. *44 Liquormart,* 517 U.S. at 505 (plurality op.); *Edenfield*, 507 U.S. at 773. As the Supreme Court has observed, "this requirement is critical; otherwise, [the government] could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 188. The Commission falls far short of carrying that burden where, as here, the rule "provides only ineffective or remote support for" the identified government interest. *Id.* at 188 (quoting

Central Hudson, 447 U.S. at 564); *see also Novartis Corp. v. FTC*, 223 F.3d 783, 789 (D.C. Cir. 2000).

Although the Commission has now documented instances of harm resulting from the unauthorized disclosure of CPNI via pretexting, the Commission's decision to require a cable company to obtain "opt-in" consent before sharing CPNI with its third-party marketing partners, as opposed to less onerous "opt-out" procedures, plainly does not address the hypothetical risk of such disclosures in any "direct and material" way. *Rubin*, 514 U.S. at 487 (internal quotations omitted).

a. The Opt-In Rule Does Not Advance Consumer Privacy in a "Direct" Way

This rulemaking was prompted by a legitimate threat to consumer privacy: unauthorized disclosure of CPNI through pretexting. The Commission accordingly adopted a number of measures directly responsive to that concern—*e.g.,* password protection, notification of account changes, and annual certification requirements. *See supra* at 16-17. Congress also directly responded, making pretexting a federal crime punishable by imprisonment. *See* 18 U.S.C. § 1039.

In contrast to these measures, the opt-in rule is remarkably oblique. The opt-in restriction is not designed to increase the *security* of

CPNI or deter would-be pretexters; rather, the point of the restriction is to make it more onerous to obtain customer approval, and thereby decrease the incidence of *authorized* sharing with joint venture partners and independent contractors. *See, e.g., Order* ¶ 39. Of course, the manner in which a customer's approval is obtained *prior* to sharing has no effect on the handling of CPNI once it has been shared. *See, e.g.*, JA ___ (Verizon Aug. 7, 2007 Reply Comments at 13-14).

The FCC's argument resembles the contention rejected by the Supreme Court in *Edenfield*. There the rule at issue sought to prevent fraud and overreaching by professional accountants by restricting the manner in which they may solicit clients. The Court explained that such a prohibition does not serve the Government's interest "in a direct and material manner." *Edenfield*, 507 U.S. at 773. Likewise, requiring opt-in approval before a carrier may share CPNI with its contractors and joint venture partners is not a sufficiently direct way to pursue the Commission's objective of protecting consumers from unauthorized disclosure.

The Commission makes much of the supposed reluctance of consumers to share information outside the "carrier-customer

relationship," *Order* ¶ 40 & n.129, but that is both immaterial and unsubstantiated.[10] CPNI in the hands of marketing partners was never the concern; the fear was that bad actors would procure customer information *from* those parties. Whether CPNI is shared with independent contractors or joint venture partners, on the one hand, or agents or affiliates of the carrier, on the other, seems quite unlikely to affect consumer preferences. Indeed, an ownership stake of 10.1 percent is sufficient to confer affiliate status under the FCC's rules, *see* 47 U.S.C. § 153(1); 47 C.F.R. § 64.2003(c)—and thus authorize sharing based on opt-*out* approval. It is difficult to see how a consumer would even know if the service provider's economic interest in another company was sufficient to establish "affiliation," much less understand what to make of that information. As the *Showalter* court recognized:

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[10] The Commission previously recognized that "telecommunications consumers expect to receive targeted notices from their carriers about innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits." 2002 Order ¶ 36. In this *Order*, the Commission cites only three commenters for its contrary proposition regarding consumer preference. None provides any evidence in support. Only one cites empirical studies concerning privacy. *See* JA __ (EPIC Apr. 28, 2006 Comments at 9-10). And those studies have nothing to do with CPNI.

"If consumers [cannot] understand the complicated regulatory framework sufficiently to effectively implement their preference"—as is the case here with multifaceted notice requirements resting on subtle distinctions of corporate structure and agency law—such rules certainly could not directly advance the Government's interest. *Showalter*, 282 F. Supp. 2d at 1193; *see also* JA __ (AT&T Apr. 28, 2006 Comments at 19; Verizon Jan. 29, 2007 Letter at 16).

b. There Is No Record Evidence Suggesting that the Opt-In Rule Will in Fact Alleviate the Problem To a Material Degree

Even if the opt-in mechanism were sufficiently "direct," the *Order* conspicuously fails to provide *any evidence* that this circuitous approach will have any effect on the incidence of unauthorized disclosure. The Commission's justifications for the rule collapse into speculative assumptions that (1) a decrease in the number of separate legal entities that have access to CPNI will inevitably result in fewer unauthorized disclosures; and (2) sharing with joint venture partners and independent contractors is somehow particularly risky. *See, e.g., Order* ¶ 45. Both assumptions are sheer conjecture.

The *Order* conspicuously fails to demonstrate *any* link between unauthorized disclosures of CPNI and the dissemination of CPNI to third-party marketing partners. In response to comments pointing out that "there is no evidence that data brokers have obtained CPNI from carriers' joint venture partners and independent contractors," *Order* ¶ 46, the Commission conceded that "the record does not include specific examples" of such disclosures. *Id.* (Indeed, the record does not include *any* such evidence.) But, the Commission speculated: "that does not mean that unauthorized disclosure has not occurred or will not occur in the future," because there is "no reason why joint venture partners and independent contractors would be immune from this widespread problem." *Id.*

Of course, the Commission's observation that there is no evidence that these parties are immune from the problem cannot substitute for evidence that they *do* materially contribute to the problem. *Cf. Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993) ("The absence of evidence is not evidence."). It is the Commission's burden to justify the restriction on protected speech by demonstrating that *unauthorized disclosures do occur*—it is not Petitioner's burden to prove

the negative. And the Commission certainly cannot carry its burden by offering only speculation about what might happen in the future. *See Order* ¶ 41 (asserting that "*[i]t stands to reason* that placing customers' personal data in the hands of companies outside the carrier-customer relationship places customers at increased risk" of a breach of privacy) (emphasis added). As this Court has recognized, deference to an agency's "common sense" or "predictive judgments" has no place "where First Amendment rights are even incidentally at stake." *Century Commc'ns Corp. v. FCC*, 835 F.2d 292, 299 (D.C. Cir. 1987) (citations omitted); *see also US West*, 182 F.3d at 1239.[11]

Even if the Commission could point to *some* instances in which pretexters had successfully obtained CPNI from joint venture partners or independent contractors, the potential impact of the opt-in measure would still be "highly speculative." *Central Hudson*, 447 U.S. at 569. Indeed, the rule freely permits sharing with agents and affiliates that provide communications-related services (with an opt-*out* mechanism).

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[11] Safeguarding information—whether from pretexters, hackers, or insiders—is not within the Commission's area of expertise, so deference would be inappropriate even absent a constitutional question. *See Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1478 (D.C. Cir. 1998).

Since the difference between an opt-out and opt-in requirement ultimately turns on whether the service provider owns more than 10 percent of any entity with which it shares CPNI, 47 C.F.R. § 64.2003(c), the rule is more likely to prompt carriers to simply abandon their preferred and more efficient contractor/joint venture relationships and restructure their operations with affiliates than it is to decrease the number of individuals with access to consumers' CPNI.[12] This is itself a direct and impermissible infringement of carriers' right "to select what they believe to be the most effective means" of communicating with their customers. *See, e.g., Meyer*, 486 U.S. at 424.

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12 Petitioner does not suggest that the opt-*out* rule that applies to sharing CPNI with agents and affiliates is problematic; rather, a comparison of the opt-out and opt-in rules simply highlights that the opt-*in* rule cannot survive First Amendment scrutiny. Of course, the constitutional problems with the opt-in rule cannot be cured by restricting *more* speech (*i.e.,* requiring opt-in for all sharing). Such a rule would fail First Amendment scrutiny for many of the reasons identified by the Tenth Circuit in *US West*, at least on this record. For example, the Commission has utterly failed to demonstrate that the rule (or *any* opt-in rule) is narrowly tailored to advance the government interest. *See* Part II.C, *infra*. Requiring opt in for all sharing obviously would not remedy this problem; it would just make the restriction on speech that much broader and unjustifiable.

The regulation struck down by the Supreme Court in *Edenfield* suffered from similar flaws. The State justified the restriction on soliciting accounting clients based on its goal of preventing fraud and overreaching. The Court held that the restriction did not address the state's purpose in a material way, as there was "no reason to suspect that CPA's who engage in personal solicitation are more desperate for work, or would be any more inclined to compromise their professional standards, than CPA's who do not solicit, or who solicit only by mail or advertisement." 507 U.S. at 773. Likewise, the Commission in this case has not identified a shred of evidence to support the proposition that a carrier that markets in conjunction with a contractor or joint venture partner is more likely to compromise CPNI than one whose marketing only involves entities that meet the FCC's affiliation standard.

Indeed, the Commission itself came to precisely the contrary conclusion in 2002, on a record not meaningfully different from the one in the rulemaking proceeding at issue. *See* 2002 Order ¶¶ 32, 45-59. As the FCC explained, the regulatory safeguards imposed by the Commission put independent contractors and joint venture partners "on

a similar footing as the carriers themselves in terms of incentives, thus obviating the need for more stringent approval requirements such as opt-in." *Id.* ¶ 48; *see also id.* ¶ 45 ("[B]ecause . . . consumers are protected by the same or equivalent safeguards as those that exist when carriers use CPNI themselves," consumers are not harmed when carriers share CPNI with "independent contractors"); *see also* JA __ (NAAG Apr. 28, 2006 Comments at 8) (acknowledging that joint venture partners and independent contractors are only "equally" vulnerable).

Even apart from the absence of record evidence, there is no logic to the Commission's speculative assertions. As the Commission acknowledges, it has established safeguards "for sharing CPNI with joint venture partners and independent contractors." *Order* ¶ 39.[13] Many carriers impose additional contractual requirements to ensure the safety and security of customer information, including a right to

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[13] 47 C.F.R. § 64.2007(b)(2) (2002) (requiring carriers to enter into confidentiality agreements with joint venture partners and independent contractors that (1) limit CPNI use to marketing the communications-related service for which the CPNI had been provided; (2) disallow disclosure to other parties except as permitted by law; and (3) require the independent contractor or joint venture partner to adopt protections sufficient to protect the ongoing confidentiality of the consumers' CPNI).

terminate the business relationship in the event of a breach. *See, e.g.,* JA __ (AT&T Apr. 28, 2006 Comments at 18; Verizon Jan. 29, 2007 Letter at 8-9). And, whether a carrier does business through an agent or a third party, it cannot avoid the non-delegable obligations associated with its statutorily imposed duties.[14] *See* JA __ (Qwest Jan. 18, 2007 Letter at 3 & n.12).

The Commission's rejoinder is that existing safeguards "do not adequately protect a customer's CPNI" because "once the CPNI is shared with a joint venture partner or independent contractor, the carrier no longer has control over it and thus the potential for loss of this data is heightened." *Id.* That ignores the myriad statutory, regulatory, and contractual incentives carriers and third-party business partners have to actively protect customer information. There is simply

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[14] For example, a carrier has the independent and non-delegable duty under Section 222 to "protect the confidentiality of proprietary information of, and relating to . . . customers." 47 U.S.C. § 222(a); *see also Order* ¶ 39 (finding that "a carrier's section 222 duty to protect CPNI extends to situations where a carrier shares CPNI with its joint venture partners and independent contractors"). Section 217 also holds carriers responsible for agents "or other person[s] acting for" a carrier, which the Commission has interpreted to extend to independent contractors. 15 FCC Rcd 3297, 3300-01 ¶ 9 (2000); JA __ (Qwest Jan. 18, 2007 Letter at 3 n.12).

no reason to think that contractual agreements between a carrier and its joint venture partner, or between a carrier and its independent contractor, will be any less effective in protecting CPNI data than similar (or in some cases even less formal) arrangements between the carrier and its own affiliates or employees. Indeed, the absence of even a single documented incident of unauthorized disclosure by third parties suggests quite strongly the contrary.[15]

In sum, because there is no record evidence of an increased risk of unauthorized disclosure when carriers share CPNI with their third-party marketing partners—or that any disclosure has in fact occurred as a result of such sharing—the Commission cannot possibly demonstrate that the rule will "significantly reduce" unauthorized

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[15] In fact, there are good reasons to suppose that joint venture partners and independent contractors are *less* vulnerable to pretexters than carriers and their affiliates. In the past, data brokers were able to obtain CPNI from some carriers by pretending to be their customer. *See, e.g., Order* ¶ 1 n.1. But such pretexting succeeded only because the carriers made CPNI available to consumers (over the telephone or otherwise). By contrast, cable operators' marketing partners do not release CPNI to any consumer for any reason. *See, e.g.,* 47 C.F.R. § 64.2007(b)(2)(ii). Thus, even assuming pretexters could identify and target unaffiliated third parties who are in possession of CPNI, posing as a customer of the cable VoIP service would not enable them to access such CPNI.

disclosures, *44 Liquormart*, 517 U.S. at 505 (plurality op.), thereby "alleviat[ing]" the problem "to a material degree," *Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 189 (quoting *Edenfield*, 507 U.S. at 770-71). The opt-in rule therefore restricts protected speech in violation of the First Amendment.

C. The CPNI Rule Is Not Narrowly Tailored To Further the Government's Stated Interest

The Commission's decision to adopt an opt-in requirement for disclosure of CPNI to independent contractors and joint venture partners also fails the final part of the *Central Hudson* test. To survive First Amendment scrutiny, a regulation of commercial speech must also be "no[] more extensive than is necessary to serve th[e] [stated] interest." *Central Hudson*, 447 U.S. at 566. There must be a fit between the government's means and the desired objective "that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks omitted). Although the government need not employ the least restrictive means imaginable, it must utilize a means narrowly tailored to achieve its

stated objective—a means resulting from a "careful[] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *Discovery Network,* 507 U.S. at 417 (internal quotation marks omitted); *see also Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 188; *Rubin*, 514 U.S. at 491. As with all other elements of the *Central Hudson* test, the government "bears the burden of . . . affirmatively establish[ing] the reasonable fit" required. *Fox*, 492 U.S. at 480.

There can be no reasonable dispute that an opt-out regime is significantly less restrictive and burdensome than an opt-in regime. *See US West*, 182 F.3d at 1238-39 (describing opt-out rule for CPNI disclosure as an "obvious and substantially less restrictive alternative"); 2002 Order ¶ 31 (describing "opt-out rule" as "less restrictive" and "less burdensome on commercial speech"); *cf. United States v. Playboy Entertainment Group*, 529 U.S. 803, 816 (2000) (noting that "no one disputes" that the opt-out provision was "less restrictive" than the opt-in provision). The only question then is whether an opt-out approach could serve the Commission's interest "as well." *Central Hudson*, 447 U.S. at 564; *Rubin*, 514 U.S. at 490-91 (holding that the availability of

options "which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights, indicates that [the requirement] is more extensive than necessary"). In 2002, the Commission itself answered this question in the affirmative.

Nothing has changed. Although the Commission attempts to articulate "new circumstances" to justify its decision to revert to the opt-in approach it previously rejected as "unnecessarily" restrictive and burdensome, the *Order* simply asserts a "belie[f]" that an opt-in regime would "more effectively" limit the circulation of consumer CPNI and more effectively represent "informed" consumer choice. *Order* ¶ 37. As the basis for this "belie[f]," the Commission rehashes previously rejected claims that (1) customers either do not read or do not understand opt-out disclosure forms and, accordingly, cannot confer truly informed consent, *id.* ¶¶ 40, 44, and (2) the carrier loses control over information once disclosed to third party marketing partners and the resulting "increased risk" necessitates prior express consent, *id.* ¶¶ 39, 49. There is nothing "new" about these arguments, the Commission points to no record *evidence* in support of either, and both can be alleviated by less burdensome alternatives.

1. The Commission Ignores the Substantial Burden on Protected Speech

At the outset, the Commission appears to recognize that it must engage in a "careful calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition," *Discovery Network,* 507 U.S. at 417. *Order* ¶ 43. Yet, its "careful" calculation consists of a conclusory assertion that "an opt-in regime's costs [do not] outweigh the benefits to customers." *Id.* The Commission "appreciate[d] commenter concern that carriers may need to engage in broader marketing campaigns for their services as a result of an opt-in regime," but "believe[d]" that "this cost is outweighed by the carriers' duty to protect their customers' private information, and more importantly, customers' interest in maintaining control over their private information." *Id.* It cites nothing in support of this "belie[f]."

The Commission touts this regulation as a consumer privacy safeguard but ignores equally compelling privacy interests on the other side, as well as the substantial cost borne by consumers as a consequence of the agency's paternalism. Targeted marketing benefits consumers by providing cost-effective information about products and services responsive to individual needs in a less intrusive manner. As

the Commission previously recognized: "[e]nabling carriers to communicate with consumers 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." 2002 Order ¶ 35. It places "customers in a position to reap significant benefits in the form of more personalized service offerings (and possible cost savings) . . . based on the CPNI that the carriers collect." *Id.* In short, "consumers may profit from having more and better information provided to them, or by being introduced to products or services that interest them." *Id.*

By setting the default rule to "no targeted speech," the Commission relegates customers to speech that is more costly and intrusive, yet less effective. The Commission has presumed that any sharing of CPNI with joint venture partners and contractors enhances the risk of unauthorized disclosures to such an extent that it presumptively outweighs the countervailing home privacy interests protected by, and informational benefits conferred through, targeted marketing. *Cf. City of Struthers*, 319 U.S. at 148 (government cannot presume for all of its residents that door-to-door solicitation is

unwelcome). It made that decision without any record support for the purported benefits, *see* Part II.B.2, and without "careful" consideration of its costs. *See Lorillard Tobacco Co.*, 533 U.S. at 561, 565 (holding that a "speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction" and that the "broad sweep" of the challenged regulations "indicates that [the government] did not 'carefully calculate the costs and benefits associated with the burden on speech imposed' by the regulations").

2. The Commission's Concern that Customers Will Not Read or Understand Opt-Out Notices Is Unsubstantiated and in any Event Can Be Alleviated in a Less Restrictive Manner

The Commission asserts that an opt-out regime cannot effectively advance the Commission's interest in preventing unauthorized disclosure because "most customers either do not read or do not understand carriers' opt-out notices" and, accordingly, cannot confer informed consent in this manner. *Order* ¶ 44. The agency claims that, whereas the record in *US West* "d[id] not adequately show that an opt-out strategy would not sufficiently protect customer privacy," "[i]n this proceeding . . . substantial evidence shows that the current opt-out rules do not adequately protect customer privacy because most customers

either do not read or do not understand carriers' opt-out notices." *Id.* The only "evidence" the Commission cites consists of unsubstantiated assertions by interested parties, secondhand references to a handful of older sources rejected by the Commission in 2002, and sources having nothing to do with CPNI. And there is at least as much evidence in the record to suggest that most customers who do not spend time reading privacy notices simply are not interested.[16] Even if the Commission's concern could somehow be validated despite the dearth of actual evidence, it could easily be remedied by "obvious" and far less restrictive alternatives.

a. The Commission Failed To Establish that Current Opt-Out Notices Are Insufficient To Ensure Informed Consent

Assuming its concerns about informed consent are valid, the Commission largely ignores the existing notification requirements

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16 The Commission itself relied on a study in which a majority of individuals surveyed (54%) indicated they simply lacked interest in privacy notices or did not care about privacy issues generally. *See Order* ¶ 40 & nn. 127-128 (citing NAAG Apr. 28, 2006 Comments at 6 n. 19 (citing Harris Interactive study at 2)); *see also US West*, 182 F.3d at 1239 (noting that "a substantial number of individuals are ambivalent or [un]interested in the privacy of their CPNI").

imposed to alleviate these very concerns. In 2002, the agency adopted "more stringent notice requirements to ensure that customers are in a position to comprehend their choices and express their preferences regarding the use of CPNI." 2002 Order ¶ 89. For example, the notifications must advise consumers of their right (and the carriers' duty) to protect information, describe what constitutes CPNI and for what purposes it will be used, and explain precisely how a customer can opt-out. 47 C.F.R. § 64.2008(c), (d). These requirements directly "address[ed] the known shortcomings of opt-out in a targeted manner in lieu of adopting a more restrictive approach such as opt-in." 2002 Order ¶ 43.

Despite the five-year duration of the opt-out regime, the Commission does not cite (much less include in the record) a single study concluding that the notification requirements adopted in 2002 have proven insufficient to remedy "shortcomings" that were "known" to the Commission from the beginning. Instead, the Commission summarily asserts that an opt-in requirement is necessary because "*current* opt-out notices" are "often vague and not comprehensible to the average customer." *Order* ¶ 40 (emphasis added).

For this, it points only to *comments* submitted by interested parties. *Id.* ¶ 40 n.126. The EPIC comment claims "notices are vague, incoherent, and often concealed in a pile of less important notices mailed in the same envelope from the same source," and cites a *1996* book discussing notices unrelated to CPNI and not specific to telecommunications. JA __ (EPIC Apr. 28, 2006 Comments at 7 & n.5) (citing Paul M. Schwartz & Joel R. Reidenberg, Data Privacy Law: A Study of United States Data Protection 329-30 (1996)). Of course, this says nothing of the clarity or presentation of "current" *2007* CPNI opt-out notices provided by a customer's existing carrier under mandatory form and content restrictions. Moreover, this very book and, indeed, the very same quote, was already cited to (and implicitly rejected by) the Commission in 2002 when it reached the *opposite* conclusion. JA __ (EPIC Apr. 28, 2006 Comments at 7 & n.5), *with* JA __ (EPIC Nov. 1, 2001 Comments at 5 & n.23).[17]

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[17] The Commission also cites anecdotal examples provided by the MoPSC of difficulties some Missouri consumers allegedly experienced with opt-out notifications. *Order* ¶ 40 & n.126. But the Commission makes no attempt to quantify the extent of the purported problems or inquire whether consumers experienced similar difficulties outside of Missouri. Moreover, and as discussed in detail below, these concerns counsel in favor of, "at a

The Commission additionally asserts that "*many* consumer studies on opt-out regimes also reflect this consumer confusion." *Order* ¶ 40 (emphasis added). Yet, these "many" studies are found nowhere in the record. Instead, the Commission again cites party comments. Those comments, in turn, refer to two studies examining "opt-out" consent under the Gramm-Leach-Bliley Act ("GLB Act")—an entirely different statute applicable to the financial services sector and one containing distinct notice requirements.[18] JA __ (NAAG Apr. 28, 2006 Comments at 6 & nn.18-19).

The first is a 2001 survey the Commission already addressed and expressly rejected in its 2002 Order. *See* 2002 Order ¶ 39 & n.113; *compare also* JA __ (NAAG Apr. 28, 2006 Comments at 6 & n.19) *with* JA __ (NAAG Dec. 26, 2001 Comments at 9 & n.14). The Commission discussed the NAAG comment in particular, as well as the Harris Interactive survey, explaining that it was "mindful of the deficiencies widely reported for the [GLB] notifications in the financial services

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minimum," "enhance[d] guidelines outlining [notice] requirements," as MoPSC itself recognized. JA __ (MoPSC Apr. 25, 2006 Comments at 5).

[18] The only other set of comments cited do not refer to a single study. *Order* ¶ 40 & n.127.

sector" and as a result "fashioned our CPNI notification requirements in this Order with an eye toward learning from that experience." 2002 Order ¶ 39 & n.113. Accordingly, in 2002, the Commission had already recognized that "opt-out has been criticized in other contexts, *e.g.,* the financial services sector, because of the possibility that customers may not actually see, read, or understand opt-out notices, and therefore the customers may not be able to respond to a carrier's request for approval in a timely and appropriate matter." *Id.* ¶ 42. And, more importantly, it already "respond[ed] to these specific problems with requirements that are designed to increase the effectiveness of opt-out without burdening more carrier speech than necessary." *Id.* Certainly, the 2001 study that prompted such notification requirements cannot suffice to prove that those very requirements failed to accomplish their purpose.

The comments further cite a 2006 study by the Kleimann Communication Group (also absent from the record) which is also about opt-out notices under the GLB Act. JA __ (NAAG Apr. 28, 2006 Comments at 6 & n.18). Although that study does suggest consumers have some difficulty understanding *certain* opt-out notices, it ultimately concludes that whatever consumer confusion may exist when presented

with poorly crafted notices, truly informed consent *is* possible with a properly devised opt-out notice. *See* Report prepared by Kleimann Communication Group: *Evolution of a Prototype Financial Privacy Notice, A Report on the Form Development Project* (Feb. 28, 2006). Through extensive testing, the study "success[fully]" devised a prototype notice that would "ensure[] that the information about financial privacy laws and sharing practices is available to the public in a clear and understandable notice" so that "consumers are informed and can, therefore, make informed choices." *Id.* at 274. This study proves only that a less restrictive alternative *does* exist. *See* Part II.C.2.b, *infra*.

In the end, there is no *evidence* in this record substantiating the Commission's concern that customers are unable or unwilling to read or understand *current* opt-out notices provided by carriers in full compliance with the host of regulations devised by the Commission five years earlier. Old studies and books found nowhere in the record based on experiences with dissimilar statutes cannot satisfy the Government's burden. *See Rubin*, 514 U.S. at 490 ("These various tidbits . . . cannot overcome . . . the weight of the record.").

b. There Are Obvious Less Restrictive Alternatives To Address the Commission's Concern

Even if the Commission could demonstrate that the current notice requirements have proven insufficient to inform customers of their ability to opt-out, the "obvious" way to address this concern without restricting more speech would be to modify existing opt-out requirements. As the *Showalter* court explained, anecdotal examples of failed or flawed opt-out notices or studies suggesting the same do "not invalidate opt-out approaches"; they simply suggest that "the *presentation and form* of opt-out notices is what determines whether an opt-out campaign enables consumers to express their privacy preferences." 282 F. Supp. 2d at 1194. There is no reason why the Commission could not adopt additional, more effective notification requirements based on expertise and extensive research, such as the Kleimann Communication Group study cited by the NAAG, *see supra* at 54-55.

The Commission, however, rejected this less restrictive alternative out of hand based on a "belie[f]" that sharing of CPNI could occur even though a "customer may or may not have read" the notice. *Order* ¶ 40. Again, the agency does not include a single study in support. Instead, it

relies on "argu[ments]" made by the NAAG and an unsubstantiated assertion by the NASUCA. *Id.* ¶ 40 & n.128. Taken at face value, the Commission's argument would seemingly invalidate every notification regime—*i.e.,* no notification could ever be effective because people will not read the notices. But a "court should not assume a plausible, less restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 824. The Commission's "assum[ptions]" lack any record support, and are contradicted by the record evidence (including a study establishing an *effective* opt-out notice form), *see supra* at 54-55, and by the Commission itself, *see Order* ¶ 41 (asserting that in an opt-in system carriers would be forced to provide—and thus *capable* of providing—"clear and comprehensible notices to their customers in order to gain their express authorization"). Moreover, additional notice "regulations [could be combined] with educational campaigns to inform consumers of their rights." *See Showalter*, 282 F. Supp. 2d at 1194; *see also 44 Liquormart,* 517 U.S. at 507 (plurality op.) (education campaigns may be more effective at advancing state interest than speech-restricting regulation). (Of course, there will likely be a subset of consumers who

will not read these notices and will ignore educational campaigns, simply because they do not care. *See supra* at 50 n.16.)

Indeed, the Supreme Court has repeatedly rejected the argument that an opt-in regime is the only, or even the most effective method of ensuring true consent. Most notably, in *United States v. Playboy Entertainment Group, Inc.*, the Court held that a statutory provision requiring cable operators to fully scramble, block, or time channel stations with sexually oriented programming was not narrowly tailored to meet the compelling state interest of protecting minors *because* an opt-out regime provided in another statutory provision (dealing with "non-adult" channels) would have provided "*as much* protection against unwanted programming." 529 U.S. at 810 (citing district court opinion) (emphases added). The Court was faced with the very same arguments put forth by the Commission here (*i.e.,* an opt-out approach would not be effective, the burden would be on the customer to act, and customers would not respond to an opt-out notice). *Id.* at 824. But, it was "no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." *Id.* Even

with these potential shortcomings, the Court concluded that opt-out could be effective with adequate publicity. *Id.*

The Court held likewise in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). There the Court struck down a statute requiring cable operators to segregate and block "patently offensive" material on leased channels unless the viewer requested that the channel be "unblocked." *Id.* at 733. Citing *Central Hudson*, among other commercial speech cases, the Court concluded that this opt-in regime failed the First Amendment's "'strictest,' *as well as its somewhat less strict* requirements." *Id.* at 755 (emphasis added); *see also Bolger*, 463 U.S. 60 (striking down commercial speech regulation prohibiting the mailing of *unsolicited* contraceptive advertisements and recognizing that allowing individual homeowners to opt-out of receiving unwanted contraceptive advertising would be a "[n]arrower restriction" that nevertheless "*fully serve[d]* the Government's interest") (emphasis added). The Court explained that when dealing with restrictions on speech—commercial or otherwise—the practical difficulties of an opt-out regime do not call for an opt-in

mandate, but "rather, for informational requirements" and other less restrictive modifications. *Denver Area*, 518 U.S. at 759.

That "perfectly obvious" and less restrictive forms of regulation exist demonstrates that the regulations at issue are not narrowly tailored. *See 44 Liquormart*, 517 U.S. at 507-08 (plurality op.); *Showalter*, 282 F. Supp. 2d at 1195. Just like the city of Cincinnati's failure to regulate the "size, shape, appearance, or number" of newsracks to address the state's concern regarding safety and aesthetics, the Commission's failure to regulate the presentation, form, and content of opt-out CPNI notices "indicate[s] that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Discovery Network,* 507 U.S. at 417. Because the Commission "could achieve its interests in a manner that . . . restricts less speech," it "*must* do so." *Thompson*, 535 U.S. at 371 (emphasis added).[19]

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19 This Court's decision in *Trans Union Corp. v. FTC*, does not suggest otherwise. 245 F.3d 809 (D.C. Cir. 2001), *cert. denied with dissenting op.* 536 U.S. 915 (2002). In *Trans Union*, this Court rejected an argument that Congress should have adopted an opt-out alternative when enacting the Fair Credit Reporting Act (an entirely different statute and record in support thereof) because "Congress had no obligation to choose the least restrictive

3. Carriers Maintain Effective Control over CPNI Disclosed to Joint Venture Partners and Independent Contractors and any Heightened Concerns Can Be Addressed in a Less Restrictive Manner

The Commission also argues that "express prior customer authorization" is necessary to authorize sharing of CPNI with joint venture partners or independent contractors because "a carrier is no longer in position to personally protect the CPNI once it is shared." *Order* ¶ 39. Because the carrier purportedly loses "control over [the CPNI]," "the potential for loss of this data is heightened," in the Commission's view. *Id.* Even if there were any evidence to support the factual premise (which there is not, *see* Part II.B.2.b, *supra*), there are obvious means available to alleviate this concern that restrict far less speech.

As discussed in detail above, the Commission already mandated significant contractual safeguards for sharing with marketing partners in the 2002 Order. Even if these measures had been shown to confer

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means of accomplishing its goal." *Id.* at 818-19. In so holding, the panel did not apply *Central Hudson* or the commercial speech doctrine, did not have the benefit of *Thompson*, 535 U.S. at 371, and of course did not examine the thin record marshaled in support of the particular opt-in regime at issue here which, unlike *Trans Union*, involves existing customer relationships.

insufficient protection—which they have not, *see supra* at 41-43—the obvious solution would be to impose additional contractual and regulatory safeguards to alleviate this supposed risk. *Greater New Orleans Brodcasting Ass'n.* aptly illustrates the problem with the FCC's approach. There, the Supreme Court struck down a restriction on casino advertising that afforded disparate treatment to private and tribal casinos. 527 U.S. at 192. The government argued that this distinction was sound because, *inter alia*, tribal casino gambling is "'heavily regulated.'" *Id.* The Court rejected this "ironic[]" rationale, explaining that "[i]f such direct regulation provides a basis for believing the social costs of gambling in tribal casinos are sufficiently mitigated to make their advertising tolerable, one would have thought that Congress might have at least experimented with comparable regulation before abridging the speech rights of federally *un*regulated casinos." *Id.*

Likewise, if the Commission thought the restrictions applicable to carriers and their affiliates/agents were sufficient to permit sharing under an opt-out regime, "one would have thought" the agency would adopt comparable regulations for joint venture partners and independent contractors—as in the 2002 Order—before "abridging . . .

speech rights." For example, building on its existing requirements for contractors and joint venture partners, the Commission could promulgate regulations requiring carriers to contract for the same safeguards it imposes internally, mandate additional contractual safeguards, and/or amend the regulations to make it clear carriers will be held "liable for the mishandling of CPNI by their chosen marketing vendors." JA __ (Verizon Jan. 29, 2007 Letter at 22); *see also e.g.,* JA __ (Sprint Nextel Jan. 22, 2007 Letter at 1; Sprint Nextel Jan. 26, 2007 Letter at 2).

The Commission rejected these less restrictive alternatives based on its supposition that "the risk of unauthorized CPNI disclosures increases when such information is provided by a carrier to a joint venture partner or independent contractor." *Order* ¶ 49. Once again, however, the Commission ignored the complete absence of any evidence that joint venture partners or contractors, unlike carriers themselves, have been responsible for any unauthorized disclosures in the past five years while opt-out (with safeguards) was the norm. *Order* ¶ 46. Moreover, the Commission deemed the safeguards employed by carriers themselves (as supplemented by the new restrictions adopted in the

Commission's order, *supra* at 16-17) to be sufficiently effective at furthering the governmental interest to support an *opt-out* regime for carrier affiliates and agents. Absent evidence to suggest that joint venture partners or contractors would not follow those same safeguards if the Commission so ordered, such an opt-out approach is likewise a less restrictive and *equally effective* alternative.[20]

The existence of these "perfectly obvious" and less restrictive forms of regulation demonstrates that the opt-in requirement is not narrowly tailored. *See 44 Liquormart*, 517 U.S. at 507-08 (plurality op.); *Showalter*, 282 F. Supp. 2d at 1195. The CPNI opt-in regulation accordingly violates the First Amendment.

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At the very least, all of these shortcomings raise a grave constitutional question. If this Court declines to reach the question whether the opt-in rule violates the First Amendment, it should

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[20] Yet another example of the opt-in regulation's overbreadth is its application to all forms of CPNI, encompassing many forms of customer information far outside the interest of would-be pretexters and data brokers (*e.g.,* subscriber services, average usage, price detail). *See, e.g.,* JA__ (Verizon Jan. 29, 2007 Letter at 7-8, 24-26) (noting that pretexters have no interest in most CPNI and proposing narrowly tailored alternative that would limit opt-in approval to call detail information).

nevertheless construe Section 222 as precluding the Commission's interpretation and, accordingly, invalidate the opt-in rule. *See Chamber of Commerce*, 69 F.3d at 604-05 (declining to defer to FEC's interpretation of statute where regulation defining the term "members" for purposes of political communications and solicitations by membership organizations raised grave First Amendment concerns); *see also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

III. THE CPNI OPT-IN RULE IS ARBITRARY AND CAPRICIOUS UNDER THE ADMINISTRATIVE PROCEDURE ACT

For many of the same reasons that it violates the First Amendment, the CPNI opt-in rule is also arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2). *First*, although the Commission purports to justify its sudden about-face from the previous opt-out rule, its justifications are not supported by evidence in the record. *See Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 313 (D.C. Cir. 1992). *Second*, there is no "rational connection between the facts found and [the Commission's] choice" to revert to an opt-in requirement for sharing CPNI with joint

venture partners and independent contractors. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *Third,* the Commission "entirely failed to consider an important aspect of the problem"—the potential for competitive harm to new entrants and smaller carriers. *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005) (quoting *State Farm*, 463 U.S. at 43). Accordingly, the Commission's reversion to an opt-in rule is unlawful agency action and the rule should be vacated.

A. The Commission Has Not Provided a Satisfactory Explanation, Supported by Record Evidence, for Its Abandonment of the Opt-Out Rule

"An agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so." *Wis. Valley Improvement v. Fed. Energy Regulatory Comm'n*, 236 F.3d 738, 748 (D.C. Cir. 2001); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 849 (D.C. Cir. 1970) (where agency provides reason for change in policy, court reviews basis of the change under arbitrary and capricious standard). Although the Commission acknowledged and attempted to explain its departure

from its own prior opt-out rule, its purported justifications do not find any support in the record. *See Ctr. for Auto Safety*, 956 F.2d at 314 ("An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence."). Accordingly, the FCC has not provided "a principled explanation for its change of direction." *Nat'l Black Media Coal. v. FCC*, 775 F.2d 342, 355-56 (D.C. Cir. 1985). The Commission's decision to revert to the opt-in regime that it rejected on effectively the same record is therefore unlawful.

The Commission's abandonment of opt-out in favor of a selective opt-in regime is based on various assumptions that the Commission treats as facts: (1) the supposed "increased risk" of unauthorized disclosure when CPNI is in the hands of third-party partners, *Order* ¶ 41; (2) the notion that customers ignore and/or do not understand opt-out notices, *id.* ¶ 44; and (3) the belief that "there is less customer willingness for their information to be shared without their express authorization with others outside the carrier-customer relationship," *id.* ¶ 40. As explained in detail above, none of these "facts" finds any support in the rulemaking record. *See* Part II.B.2.b, *supra* (no evidence of "increased risk"); Part II.C.2.a, *supra* (no evidence that consumers

ignore or do not understand CPNI opt-out notices in full compliance with Commission regulations); *see supra* at 34-36 (no evidence that customers are less willing to share with marketing partners).

B. There Is No Rational Connection Between the Facts Found and the Decision To Require Opt-In

The only factual predicate even arguably based on substantial evidence is that pretexters are obtaining unauthorized access to CPNI. *See supra* at 29-30. But the Commission has not demonstrated any rational nexus between that threat and the opt-in rule. *See U.S. Telecomm'cn Ass'n v. FCC*, 227 F.3d 450, 461-62 (D.C. Cir. 2000) (Commission's action arbitrary and capricious because it failed to provide "a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made' ") (quoting *State Farm,* 463 U.S. at 43).

The new CPNI restrictions, including the opt-in rule, purport to be a "respon[se] to the practice of 'pretexting.'" *Order* ¶ 1. Accordingly, such measures were intended "to protect customers' CPNI from *unauthorized* access and disclosure." *Id.* There is no rational connection between the need to prevent unauthorized access to CPNI and the opt-in requirement. In short, for all the same reasons the rule

fails to "directly" and "materially" advance the Commission's stated interest, *see* Part II.B.2 *supra*, it also is not rationally connected to furthering that interest. The rule simply does not address the problem identified by the Commission and is therefore arbitrary and capricious.

C. The Commission Failed to Consider Competitive Harm

"An agency's rule will be found arbitrary and capricious 'if the agency has . . . entirely failed to consider an important aspect of the problem.' " *Advocates for Highway and Auto Safety*, 429 F.3d at 1144-45 (quoting *State Farm*, 463 U.S. at 43); *see PSC of Ky. v. Fed. Energy Regulatory Comm'n*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) ("The Commission must . . . respond meaningfully to the arguments raised before it.").

The Commission did not address in its *Order* commenters' arguments that the opt-in requirement puts smaller carriers and new entrants at a competitive disadvantage. Those commenters pointed out that new entrants and smaller carriers are generally without the in-house resources of their larger, or more established, counterparts and therefore rely more heavily on outside marketing consultants. *See, e.g.,* JA ___ (Charter Comm., Inc. Apr. 28, 2006 Comments at 2; Alltel Apr.

28, 2006 Comments at 4; Sprint Nextel Feb. 12, 2007 Letter at 13-14; Comcast Mar. 13, 2007 Letter at 1-2). By requiring opt-in approval prior to sharing with third-party partners, therefore, the opt-in rule puts a disproportionate burden on these carriers. But the Commission ignored these small carrier and new entrant concerns in adopting its opt-in rule.

The Commission should have been particularly sensitive to these concerns, given that *promoting competition* in the telecommunications industry was the driving force behind passage of the statute it is charged with administering. *See* S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (purpose of the Telecommunications Act is "to provide for a procompetitive, de-regulatory national policy framework" by "opening all telecommunications markets to competition"). As the Commission itself recognized, "[t]he 1996 Act was meant to ensure, to the maximum extent possible, that, as markets were opened to competition, carriers would win or retain customers on the basis of their service quality and prices, not on the basis of competitive advantage . . . due to their incumbent status." 1998 Order ¶ 66. The Commission thus recognized that it should reject a regulatory approach that "would

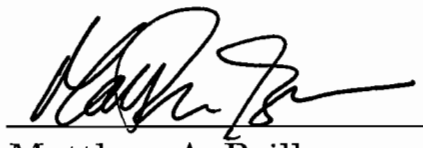
give incumbent carriers an unwarranted competitive advantage in marketing new categories of services" and "might discourage new entrants." *Id.* But that is precisely the effect of the selective opt-in rule.

In light of the Commission's statutory obligations, there can be no doubt that the opt-in rule's anticompetitive implications constitute "an important aspect of the problem" warranting the Commission's careful consideration. *Advocates for Highway and Auto Safety*, 429 F.3d at 1145. Its failure to consider and respond meaningfully to this issue renders its action arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should vacate the Commission's Order and remand for further proceedings.

Respectfully submitted,



Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
Steven F. Morris
NATIONAL CABLE &
TELECOMMUNICATIONS
ASSOCIATION
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431
Tel: (202) 222-2445
Fax: (202) 222-2446

Matthew A. Brill
J. Scott Ballenger
Melissa B. Arbus
Lori Alvino McGill
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

Counsel for Petitioner

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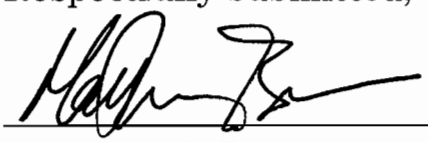
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,793 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Century font.

Respectfully submitted,



Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
Steven F. Morris
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431
Tel: (202) 222-2445
Fax: (202) 222-2446

Matthew A. Brill
J. Scott Ballenger
Melissa B. Arbus
Lori Alvino McGill
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

Counsel for Petitioner

March 14, 2008

CERTIFICATE OF SERVICE

I, Jennifer Pugh-Nolan, certify that on March 14, 2008, I caused two (2) copies of the foregoing Brief of Petitioner National Cable & Telecommunications Association, in the matter of *National Cable & Telecommunications Association v. FCC*, to be delivered by first class mail to each of the following recipients:

FEDERAL COMMUNICATIONS COMMISSION
Joel Marcus
Samuel Louis Feder
Richard Kiser Welch
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

UNITED STATES OF AMERICA
Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Room B-103
Washington, DC 20530-0001

U.S. DEPARTMENT OF JUSTICE
Joseph Springsteen
Mick Stawasz
1301 New York Avenue NW
Suite 600
Washington, DC 20530

QWEST COMMUNICATIONS INTERNATIONAL INC.
Kathryn Marie Krause
Melissa Newman

607 14th Street NW, Suite 950
Washington, DC 20005

VERIZON COMMUNICATIONS, INC.

John T. Scott III
Donna Epps
Richard T. Ellis
1300 I Street NW
Suite 400 West
Washington, DC 20005

Mark J. Montano
1515 North Courthouse Road
Suite 500
Arlington, VA 22201

Scott Delacourt
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

SPRINT NEXTEL CORP.

Anthony Alessi
Kent Y. Nakamura
Legal Department
2001 Edmund Halley Dr.
Reston, VA 20191

Dow Lohnes
To-Quyen Truong
1200 New Hampshire Ave. NW, Suite 800
Washington, DC 20036-6802

Douglas G. Bonner
Kathleen G. Ramsey
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, DC 20005

Jennifer Pugh-Nolan

STATUTORY ADDENDUM

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*** CURRENT THROUGH P.L. 110-195, APPROVED 3/12/2008 ***

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

Go to the United States Code Service Archive Directory

47 USCS § 222

§ 222. Privacy of customer information

(a) In general. Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) Confidentiality of carrier information. A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) Confidentiality of customer proprietary network information.

(1) Privacy requirements for telecommunications carriers. Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers. A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(3) Aggregate customer information. A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) Exceptions. Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents--

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services;

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service; and

(4) to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) [*47 USCS § 332(d)*])--

(A) to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

(B) to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(C) to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

(e) Subscriber list information. Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) Authority to use wireless location information. For purposes of subsection (c)(1), without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to--

(1) call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) [*47 USCS § 332(d)*]), other than in accordance with subsection (d)(4); or

(2) automatic crash notification information to any person other than for use in the operation of an automatic crash notification system.

(g) Subscriber listed and unlisted information for emergency services. Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide information described in subsection (i)(3)(A) [(h)(3)(A)] (including information pertaining to subscribers whose information is unlisted or unpublished) that is in its possession or control (including information pertaining to subscribers of other carriers) on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions to providers of emergency services, and providers of emergency support services, solely for purposes of delivering or assisting in the delivery of emergency services.

(h) Definitions. As used in this section:

(1) Customer proprietary network information. The term "customer proprietary network information" means--

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

(2) Aggregate information. The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) Subscriber list information. The term "subscriber list information" means any information--

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

(4) Public safety answering point. The term "public safety answering point" means a facility that has been designated to receive emergency calls and route them to emergency service personnel.

(5) Emergency services. The term "emergency services" means 9-1-1 emergency services and emergency notification services.

(6) Emergency notification services. The term "emergency notification services" means services that notify the public of an emergency.

(7) Emergency support services. The term "emergency support services" means information or data base management services used in support of emergency services.

TITLE 47 -- TELECOMMUNICATION
REVISED AS OF OCTOBER 1, 2002
CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B -- COMMON CARRIER SERVICES
PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART U -- CUSTOMER PROPRIETARY NETWORK INFORMATION

47 CFR 64.2007

THERE ARE MULTIPLE VERSIONS OF THIS DOCUMENT.

§ 64.2007 Approval required for use of customer proprietary network information. [See Publisher's note.]

[PUBLISHER'S NOTE: 67 FR 59205, 59212, Sept. 20, 2002, which revised this section, provides: "Effective October 21, 2002, except §§ 64.2007, 64.2008, and 64.2009, which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the Federal Register announcing the effective date of these rules." For the convenience of the user, this section has been set out twice. The version incorporating the amendment at 67 FR 59205, 59212, Sept. 20, 2002, immediately follows this note. For the version prior to the amendment at 67 FR 59205, 59212, Sept. 20, 2002, see the other version, also numbered §/ 64.2007.]

(a) A telecommunications carrier may obtain approval through written, oral or electronic methods.

(1) A telecommunications carrier relying on oral approval shall bear the burden of demonstrating that such approval has been given in compliance with the Commission's rules in this part.

(2) Approval or disapproval to use, disclose, or permit access to a customer's CPNI obtained by a telecommunications carrier must remain in effect until the customer revokes or limits such approval or disapproval.

(3) A telecommunications carrier must maintain records of approval, whether oral, written or electronic, for at least one year.

(b) Use of Opt-Out and Opt-In Approval Processes. (1) A telecommunications carrier may, subject to opt-out approval or opt-in approval, use its customer's individually identifiable CPNI for the purpose of marketing communications-related services to that customer. A telecommunications carrier may, subject to opt-out approval or opt-in approval, disclose its customer's individually identifiable CPNI, for the purpose of marketing communications-related services to that customer, to its agents; its affiliates that provide communications-related services; and its joint venture partners and independent contractors. A telecommunications carrier may also permit such persons or entities to obtain access to such CPNI for such purposes. Any such disclosure to or access provided to joint venture partners and independent contractors shall be subject to the safeguards set forth in paragraph (b)(2) of this section.

(2) Joint Venture/Contractor Safeguards. A telecommunications carrier that discloses or provides access to CPNI to its joint venture partners or independent contractors shall enter into confidentiality agreements with independent contractors or joint venture partners that comply with the following requirements. The confidentiality agreement shall:

(i) Require that the independent contractor or joint venture partner use the CPNI only for the purpose of marketing or providing the communications-related services for which that CPNI has been provided;

(ii) Disallow the independent contractor or joint venture partner from using, allowing access to, or disclosing the CPNI to any other party, unless required to make such disclosure under force of law; and

(iii) Require that the independent contractor or joint venture partner have appropriate protections in place to ensure the ongoing confidentiality of consumers' CPNI.

(3) Except for use and disclosure of CPNI that is permitted without customer approval under section § 64.2005, or that is described in paragraph (b)(1) of this section, or as otherwise provided in section 222 of the Communications Act of 1934, as amended, a telecommunications carrier may only use, disclose, or permit access to its customer's individually identifiable CPNI subject to opt-in approval.

TITLE 47 -- TELECOMMUNICATION
REVISED AS OF OCTOBER 1, 2002
CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B -- COMMON CARRIER SERVICES
PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART U -- CUSTOMER PROPRIETARY NETWORK INFORMATION

47 CFR 64.2008

§ 64.2008 Notice required for use of customer proprietary network information.

[PUBLISHER'S NOTE: 67 FR 59205, 59212, Sept. 20, 2002, which added this section, provides: "Effective October 21, 2002, except §§ 64.2007, 64.2008, and 64.2009, which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the Federal Register announcing the effective date of these rules.]

(a) Notification, Generally. (1) Prior to any solicitation for customer approval, a telecommunications carrier must provide notification to the customer of the customer's right to restrict use of, disclosure of, and access to that customer's CPNI.

(2) A telecommunications carrier must maintain records of notification, whether oral, written or electronic, for at least one year.

(b) Individual notice to customers must be provided when soliciting approval to use, disclose, or permit access to customers' CPNI.

(c) Content of Notice. Customer notification must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose, or permit access to, the customer's CPNI.

(1) The notification must state that the customer has a right, and the carrier has a duty, under federal law, to protect the confidentiality of CPNI.

(2) The notification must specify the types of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time.

(3) The notification must advise the customer of the precise steps the customer must take in order to grant or deny access to CPNI, and must clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes. However, carriers may provide a brief statement, in clear and neutral language, describing consequences directly resulting from the lack of access to CPNI.

(4) The notification must be comprehensible and must not be misleading.

(5) If written notification is provided, the notice must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to a customer.

(6) If any portion of a notification is translated into another language, then all portions of the notification must be translated into that language.

(7) A carrier may state in the notification that the customer's approval to use CPNI may enhance the carrier's ability to offer products and services tailored to the customer's needs. A carrier also may state in the notification that it may be compelled to disclose CPNI to any person upon affirmative written request by the customer.

(8) A carrier may not include in the notification any statement attempting to encourage a customer to freeze third-party access to CPNI.

(9) The notification must state that any approval, or denial of approval for the use of CPNI outside of the service to which the customer already subscribes from that carrier is valid until the customer affirmatively revokes or limits such approval or denial.

(10) A telecommunications carrier's solicitation for approval must be proximate to the notification of a customer's CPNI rights.

(d) Notice Requirements Specific to Opt-Out. A telecommunications carrier must provide notification to obtain opt-out approval through electronic or written methods, but not by oral communication (except as provided in paragraph (f) of this section). The contents of any such notification must comply with the requirements of paragraph (c) of this section.

(1) Carriers must wait a 30-day minimum period of time after giving customers notice and an opportunity to opt-out before assuming customer approval to use, disclose, or permit access to CPNI. A carrier may, in its discretion, provide for a longer period. Carriers must notify customers as to the applicable waiting period for a response before approval is assumed.

(i) In the case of an electronic form of notification, the waiting period shall begin to run from the date on which the notification was sent; and

(ii) In the case of notification by mail, the waiting period shall begin to run on the third day following the date that the notification was mailed.

(2) Carriers using the opt-out mechanism must provide notices to their customers every two years.

(3) Telecommunications carriers that use e-mail to provide opt-out notices must comply with the following requirements in addition to the requirements generally applicable to notification:

(i) Carriers must obtain express, verifiable, prior approval from consumers to send notices via e-mail regarding their service in general, or CPNI in particular;

(ii) Carriers must allow customers to reply directly to e-mails containing CPNI notices in order to opt-out;

(iii) Opt-out e-mail notices that are returned to the carrier as undeliverable must be sent to the customer in another form before carriers may consider the customer to have received notice;

(iv) Carriers that use e-mail to send CPNI notices must ensure that the subject line of the message clearly and accurately identifies the subject matter of the e-mail; and

(v) Telecommunications carriers must make available to every customer a method to opt-out that is of no additional cost to the customer and that is available 24 hours a day, seven days a week. Carriers may satisfy this requirement through a combination of methods, so long as all customers have the ability to opt-out at no cost and are able to effectuate that choice whenever they choose.

(e) Notice Requirements Specific to Opt-In. A telecommunications carrier may provide notification to obtain opt-in approval through oral, written, or electronic methods. The contents of any such notification must comply with the requirements of paragraph (c) of this section.

(f) Notice Requirements Specific to One-Time Use of CPNI. (1) Carriers may use oral notice to obtain limited, one-time use of CPNI for inbound and outbound customer telephone contacts for the duration of the call, regardless of whether carriers use opt-out or opt-in approval based on the nature of the contact.

(2) The contents of any such notification must comply with the requirements of paragraph (c) of this section, except that telecommunications carriers may omit any of the following notice provisions if not relevant to the limited use for which the carrier seeks CPNI:

(i) Carriers need not advise customers that if they have opted-out previously, no action is needed to maintain the opt-out election;

(ii) Carriers need not advise customers that they may share CPNI with their affiliates or third parties and need not name those entities, if the limited CPNI usage will not result in use by, or disclosure to, an affiliate or third party;

(iii) Carriers need not disclose the means by which a customer can deny or withdraw future access to CPNI, so long as carriers explain to customers that the scope of the approval the carrier seeks is limited to one-time use; and

(iv) Carriers may omit disclosure of the precise steps a customer must take in order to grant or deny access to CPNI, as long as the carrier clearly communicates that the customer can deny access to his CPNI for the call.