SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 et al.

In this *Order*, the Commission implements the Tenth Circuit's directive that we must, as a constitutional matter, carefully weigh the costs and benefits associated with satisfying consumers' statutory entitlement to give knowing consent to the use and disclosure of their customer proprietary network information (CPNI). We do this, as the court insisted, while still respecting companies' valid speech interests pursuant to the First Amendment.

This item is a timely response to the Tenth Circuit's decision remanding our prior order implementing section 222 by embracing a "mixed approach" to customer approval. Companies must obtain affirmative consent from consumers for third party and non-communications uses (*i.e.,* allow consumers to "opt-in" to such use). But we conclude, albeit somewhat reluctantly, that under the court's constitutional analysis, companies may satisfy the somewhat less stringent requirement of giving consumers the chance to "opt-out" of *intra*company communications-related use of CPNI.[1] Indeed, the court concluded that the First Amendment concerns implicated here are so grave that the Commission is not entitled to the usual *Chevron* deference.[2] This mixed approach we adopt here tracks evidence on the record that consumers have a reduced expectation of privacy regarding CPNI where this information is used by their existing carriers to market services customarily offered by telephone companies, such as voicemail and Internet access. This approach also comports with decisions by other appeals courts, at least one of which has required opt-in consent for some purposes and opt-out consent for others.[3]

Regrettably, the reach of the Tenth Circuit's opinion does not allow us to adopt an across-the-board opt-in regime at this time. Specifically, the Commission is severely constrained by the court's overt skepticism that the record supporting our prior order lacked the empirical support necessary to justify in this instance the intrusion on carriers' commercial speech interests. The court demanded, if requiring opt-in consent were to withstand a second appeal, that the record provide more persuasive empirical evidence that the privacy interest for intracarrier CPNI disclosure is substantial given companies' intended uses of this information. Yet, despite the laudable efforts of the parties to

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1 The court instructed the Commission to consider an opt-out strategy, which the court concluded was "an obvious and substantially less restrictive alternative" to opt-in. *U.S. West v. FCC,* 182 F.3d 1224, 1238 (10th Cir. 1999), *cert. denied* 530 U.S. 1213 (2000).

2 *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

3 *See Trans Union Corp. v. FTC,* 267 F.3d 1138 (D.C. Cir. 2001) (declining to rehear decision approving opt-out consent regime with respect to disclosure of personal information in return for offers of credit, while requiring opt-in consent regime for target marketing generally), *cert. denied Trans Union LLC v. FTC,* 122 S. Ct. 2386 (June 10, 2002).

generate such an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court. Indeed, the most persuasive empirical evidence of this sort regards third party dissemination of CPNI, where this *Order* confidently requires opt-in consent.

In closing, I would underscore that I remain committed to continued vigilance in this area and urge parties to ask us to revisit these requirements in the event they uncover new support that meets the courts' demanding standard. I hasten to add, moreover, that states continue to be uniquely positioned to assess the proper scope of CPNI use and may adopt more stringent notification requirements where those can be squared with the First Amendment based on state-specific facts on which we lack the opportunity to rely here. I take comfort that these avenues will enable the Commission or our state colleagues to protect consumers from unwarranted invasions of privacy where the evidence supports more stringent consent requirements in the manner the Constitution requires.