Before the
Federal Communications Commission
Washington, D.C. 20554

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

CLARIFICATION ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 28, 2001 **Released:** September 7, 2001

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By the Commission: Commissioners Tristani and Copps issuing a statement.

I. INTRODUCTION

1. On August 18, 1999, the United States Court of Appeals for the Tenth Circuit issued an opinion[1] vacating a portion of the Commission's 1998 order addressing customer proprietary network information (CPNI).[2] In the *CPNI Order*, the Commission

[1] *U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (Jun. 5, 2000) (No. 99-1427) (*U S WEST v. FCC*).

[2] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*). The Commission also released a *Further Notice of Proposed Rulemaking* on February 26, 1998 seeking comment on three general issues that principally involve carrier duties and obligations established under Sections 222(a) and (b) of the Act. *CPNI Order*, 13 FCC Rcd at 8200-04, paras. 203-10. This Further Notice remains pending.

adopted rules implementing Section 222 of the Communications Act, which governs carrier use and disclosure of CPNI. CPNI includes where, when, and to whom a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent to which the service is used.[3] In this Order, we clarify the status of our CPNI rules after the Tenth Circuit's opinion and explain how parties may obtain customer consent for use of their CPNI. In this Second Further Notice of Proposed Rulemaking, we seek comment on what methods of customer consent would serve the governmental interests at issue and afford informed consent in accordance with the First Amendment. We also seek comment on the interplay between Section 222 and Section 272 of the Act in response to a voluntary remand granted by the United States Circuit Court of Appeals for the District of Columbia.[4]

II. BACKGROUND

2. On May 17, 1996, the Commission initiated a rulemaking, in response to various informal requests for guidance from the telecommunications industry, regarding the obligation of telecommunications carriers under Section 222 of the Act and related issues.[5] The Commission subsequently released the *CPNI Order* on February 26, 1998, which addressed the scope and meaning of Section 222, and promulgated regulations to implement that section. In the *CPNI Order*, the Commission determined that "[w]ith Section 222, Congress expressly directs a balance of 'both competitive and consumer privacy interests with respect to CPNI.'"[6] It found this conclusion to be supported by the comprehensive statutory design, which expressly recognizes the duty of all telecommunications carriers to protect customer information, and embodies the principle that customers must be able to control information they view as sensitive and personal from unauthorized use, disclosure, and access by carriers. Where information is not sensitive, it found that Section 222 permits the free flow of information beyond the customer-carrier relationship, because in this situation, the customer's interest rests more in choosing service with respect to a variety of competitors, thus necessitating competitive access to the information.[7]

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[3] *CPNI Order*, 13 FCC Rcd at 8064, para. 2.

[4] *AT&T v. FCC*, No. 99-1413 (D.C. Cir. July 25, 2000).

[5] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*NPRM*).

[6] *CPNI Order*, 13 FCC Rcd 8065, para. 3 (citing the Joint statement of Mangers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996).

[7] *CPNI Order*, 13 FCC Rcd at 8066, para. 3 ("Indeed, in provisions governing use of aggregate customer and subscriber list information, Sections 222(c)(3) and 222(e) respectively, where privacy of sensitive information is by definition *not* at stake, Congress expressly *required* carriers to provide such information to third parties on nondiscriminatory terms and conditions.").

3. In the *CPNI Order*, the Commission stated that Section 222(c)(1) of the Act allows a carrier to use, without the customer's prior approval, the customer's CPNI derived from the complete service that the customer subscribes to from that carrier and its affiliates, for marketing purposes within the existing service relationship.[8] This is known as the "total service approach." The Commission also concluded that carriers must notify the customer of the customer's rights under Section 222 and then obtain express written, oral or electronic customer approval -- a "notice and opt-in" approach -- before a carrier may use CPNI to market services outside the customer's existing service relationship with that carrier.[9] U S West appealed this order to the Tenth Circuit. On August 16, 1999, the Commission adopted the *CPNI Reconsideration Order*[10] in response to a number of petitions for reconsideration, forbearance, and clarification of the *CPNI Order*. The *CPNI Reconsideration Order*, among other things, further clarified the total service approach.[11] It also retained the opt-in approach.[12]

4. After the Commission adopted the *CPNI Reconsideration Order*, the Tenth Circuit issued its decision in *U S WEST v. FCC*, vacating a portion of the *CPNI Order* "and the regulations adopted therein."[13] In *U S WEST v. FCC*, U S WEST contended that the opt-in approach for customer approval in the *CPNI Order* violated the First and Fifth Amendments of the Constitution.[14] The court declined to review the Commission's opt-in approach under the traditional administrative law standards of *Chevron*,[15] in light of what

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[8] *CPNI Order*, 13 FCC Rcd at 8080, 8083-84, 8087-88, paras. 23-24, 30, 35.

[9] *Id.* at 8127-45, paras. 86–107; *see also U S WEST v. FCC*, 182 F.3d at 1230. This approach is distinguished from an "opt-out" or negative option approach "in which approval would be inferred from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted." *U S WEST v. FCC*, 182 F.3d at 1230.

[10] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999) (*CPNI Reconsideration Order.*). On November 1, 1999, MCI Communications Corp. filed a Petition for Further Reconsideration. We will address MCI's Petition in a separate order.

[11] *CPNI Reconsideration Order*, 14 FCC Rcd at 14464, paras. *109-110*. In particular, the Order expanded Section 64.2005 of the Commission's rules, 47 C.F.R. § 64.2005, which codifies the total service approach, to include customer premises equipment and some information services.

[12] Only one carrier, Omnipoint Communications, Inc., requested that we reconsider that the Commission "opt-in" approach, and limited its request to CMRS carriers only. *CPNI Reconsideration Order*, 14 FCC Rcd at 14463-64, paras. 107-08. The Commission denied Omnipoint's request and declined to reconsider its original finding that "the requirement of affirmative consent is consistent with Congressional intent, as well as principles of customer control and convenience." *Id.*

[13] *U S WEST v. FCC*, 182 F.3d at 1240.

[14] *Id.* at 1231.

[15] *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*).

it perceived as the "serious constitutional questions" raised by the approach, and determined that it must be reviewed under the constitutional standards applicable to regulations of commercial speech in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*.[16]

5. The *Central Hudson* analysis tests "the validity of regulations under the constitutional standards applicable to regulation of commercial speech."[17] Applying these tests, the Tenth Circuit first questioned whether the government had demonstrated that the interests it put forward in regulating CPNI -- protecting customer privacy and fostering competition -- are substantial. The court agreed that the government had asserted a substantial interest in protecting customers' privacy, but declined to find that promoting competition was a significant consideration in Congress' enactment of Section 222 because the section contains no explicit mention of competition. The court did acknowledge, however, that Congress "may not have completely ignored competition in drafting 222" and so allowed that the Act's objective of competition was in "concert with the government's interest in protecting the consumer's privacy."[18]

6. The court nonetheless concluded that the government did not demonstrate that the CPNI regulations requiring opt-in customer approval "directly and materially advanc[ed] its interests in protecting privacy and promoting competition."[19] The court concluded that the Commission's determination that an opt-in requirement would best protect a consumer's privacy interests was not narrowly tailored because the Commission had failed to adequately consider an opt-out option. The court stated that an opt-out option should have been more fully investigated as it is inherently less restrictive of speech. Further, the court ruled the Commission did not adequately show that an opt-out strategy would not offer sufficient protection of consumer privacy.[20] In vacating portions of the *CPNI Order*, the court did not require the Commission to find specifically that the opt-out option was the correct approach. Instead, it found fault with the Commission's "inadequate consideration of the approval mechanism alternatives in light of the First Amendment."[21]

III. EFFECT OF THE U S WEST DECISION ON THE CPNI RULES

A. Status of Rules Not Concerning Opt-in Customer Approval

16 447 U.S. 557 (1980) (*Central Hudson*).

17 *See U S WEST v. FCC*, 182 F.3d at 1233-34 (citing *Central Hudson*, 447 U.S. at 564-66).

18 *U S West v.* FCC, 182 F.3d at 1235-37.

19 *Id.*

20 *Id.* at 1238-39.

21 *Id.* at 1240, n. 15 ("The dissent accuses us of 'advocating' an opt-out approach. We do not 'advocate' any specific approach.").

7. The court's opinion in *U S WEST v. FCC* analyzed only the constitutionality of the Commission's interpretation of the customer approval requirement of Section 222(c)(1) of the Act by enacting the opt-in regime discussed above. As we have found previously, the court's vacatur order related only to the discrete portions of the *CPNI Order* and rules requiring opt-in customer approval.[22] Had the court intended to take the unusual step of vacating portions of the order and rules not before it, we believe it would have said so explicitly. Accordingly, we conclude that the court sought to eliminate only the specific section of our rules that was before it, and that its vacatur order applied only to Section 64.2007(c), the only provision inextricably tied to the opt-in mechanism.[23] The remainder of the Commission's CPNI rules remain in effect. In reaching this determination, we note that Section 64.2007 contains customer notification requirements, which are needed regardless of whether an opt-in or opt-out regime is in effect. These requirements, set forth in paragraph (f) of this rule, ensure that a carrier provides a customer with "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."[24] Among other things, this rule requires the carrier to advise the customer about the customer's right to limit access to CPNI and the precise steps the customer would need to take to limit such access. Because these notification requirements are general in nature, and necessary without regard to the particular method of customer approval ultimately adopted, we consider it appropriate that they remain in effect notwithstanding the court's vacatur of the specific method of customer approval previously adopted.

8. In the Further Notice of Proposed Rulemaking discussed below, we seek comment on the responsibilities of carriers in obtaining consent from customers for the use of CPNI and, specifically, on whether we should adopt opt-in or opt-out consent under Section 222(c)(1). Pending the resolution by the Commission of the particular method of consent, we offer in this Order guidance to parties on how to obtain consent during this interim period. Specifically, pending resolution of this docket, carriers may proceed to obtain consent consistent with the notification requirements in Section 64.2007(f), using an opt-out mechanism or, should they choose to do so, an opt-in mechanism. However,

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[22] *See AT&T Corp., v. New York Telephone Company, d/b/a Bell Atlantic – New York*, File No. EB-00-MD-011, Memorandum Opinion and Order, FCC 00-362, para. 17 (rel. Oct. 6, 2000) (*AT&T v. Bell Atlantic Order*) (concluding, in the context of a formal complaint regarding certain CPNI issues, that "when read in context, the [Tenth Circuit's] vacatur order related only to the discrete portions of the order and rules that were before the court in light of the parties' petitions for review and addressed by the court.").

[23] 47 C.F.R. § 64.2007(c). This provision, pertaining to "oral approval," would be superfluous under an opt-out regime. In contrast, the remaining provisions of Section 64.2007 address primarily consumer notification requirements that are applicable under any approval regime.

[24] 47 C.F.R. § 64.2007(f). Subsequent references to "Section 64.2007" shall mean that section of our rules.

we underscore that consistent with the court's vacatur, we no longer mandate an opt-in mechanism.

9. If carriers should choose to obtain customer approval by means of an opt-out approach, such carriers will need to provide customers with notification consistent with Section 64.2007(f). Such notification, either written or oral, advises customers that without any further authorization, the carrier may use the customer's CPNI not only to market to the customer services to which the customer currently subscribes, along with customer premises equipment and information services, and to share the customer's CPNI with any of its telecommunications carrier affiliates that have an existing relationship with the customer, but also to market services to which the customer does not already subscribe.[25] An opt-out notification must also provide a reasonable and convenient means of opting out, such as a detachable reply card, toll-free telephone number or electronic mail address.

10. To the extent that a carrier has already provided any customer with an opt-out request to market services to which the customer does not already subscribe, and such opt-out mechanism satisfies the requirements set forth in paragraphs 9 and 11, the carrier need not provide any additional notification to such customer.[26] Moreover, if a carrier has already provided a customer with notification premised upon an opt-in mechanism, the carrier, should it so choose, may continue to rely upon such notice. However, in that event, the carrier and its affiliates may not market services in reliance upon the notification unless the customer has chosen to opt-in, consistent with the notification. For that reason, we expect that carriers may choose to send out new notices describing an opt-out mechanism in light of the vacatur order.

11. Finally, we note that our current rules do not provide for any time period after which a customer's implicit approval of the use or sharing of CPNI may be reasonably assumed to have been given to the carrier. We will consider that question in the FNPRM below. In the interim, however, we expect that carriers shall not use the CPNI based on "implicit approval" (through opt-out) until customers have been afforded some reasonable period to respond to the notification. Pending resolution of the FNPRM, we will use a 30-day period from customer receipt of notice as a "safe harbor," but may permit some shorter period if supported by an adequate explanation from the carrier.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

12. In this Further Notice, we seek to obtain a more complete record on ways in which customers can consent to a carrier's use of their CPNI. Taking into account the Tenth Circuit's opinion, we seek comment on what methods of approval would serve the

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[25] *CPNI Order*, 13 FCC Rcd at 8161-63, paras. 135-38; *CPNI Reconsideration Order*, 14 FCC Rcd at 14464, para. 109

[26] *CPNI Order*, 13 FCC Rcd at 8151, para. 116.

governmental interests at issue, and afford informed consent, while also satisfying the constitutional requirement that any restrictions on speech be narrowly tailored. Specifically, we seek comment on the interests and policies underlying Section 222 that are relevant to formulating an approval requirement, including an analysis of the privacy interests that are at issue, and on the extent to which we should take competitive concerns into account. To the extent that competition, in addition to privacy, is a legitimate government interest under Section 222, we seek comment on the likely difference in competitive harms under opt-in and opt-out approvals. We seek comment on whether it is possible for the Commission to implement a flexible opt-in approach that does not run afoul of the First Amendment, or whether opt-out approval is the only means of addressing the constitutional concerns expressed by the 10th Circuit.

13. At the outset, we also ask parties to comment on the scope of the Tenth Circuit's opinion. As we stated above, we conclude that the Tenth Circuit vacated only the specific portion of our CPNI rules relating to the opt-in mechanism. We seek comment on this interpretation, and on whether it is reasonable to interpret the opinion as vacating other CPNI rules that are not inextricably tied to opt-in. If we were to conclude that the court vacated additional requirements, which we do not believe that it did, we ask parties to comment on whether it would affect our overall findings regarding "approval of the customer" in Section 222(c)(1). Would we need to re-examine our interpretation of "approval" as it relates to the uses for which a carrier may use CPNI without customer approval, including to market customer premises equipment and information services, and to use CPNI to market to customers who have switched to another carrier?[27] As the Commission concluded in the *CPNI Order*, we have authority to adopt rules to implement approval requirements in Section 222(c)(1) as well as for other obligations imposed on carriers by Section 222.[28] Exercising this authority is consistent with what Congress envisioned to ensure a uniform national CPNI policy, and is necessary to reduce confusion and controversy for customers and carriers regarding carrier use of CPNI.[29] We ask parties to comment on whether anything in the Tenth Circuit's opinion affects our exercise of this authority, or otherwise changes how we should implement and enforce the privacy requirements contained in Section 222.

A. Form of Approval Under Section 222(c)(1)

14. In the *CPNI Order*, the Commission addressed specifically the requirement that a carrier obtain "approval of the customer" for use of CPNI outside the telecommunications service from which it was derived.[30] It concluded that the term

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27 *See CPNI Reconsideration Order*, 14 FCC Rcd at 14420-48, paras. 16-74.

28 *CPNI Order*, 13 FCC Rcd at 8073, para. 14.

29 *Id.*

30 Section 222(c)(1) states,

(continued….)

"approval" should be interpreted "in a manner that will best further consumer privacy interests and competition, as well as the principle of customer control" underlying Section 222.[31] In light of those statutory objectives, it further concluded that carriers must obtain express written, oral, or electronic approval by a customer to use a customer's CPNI beyond the existing service relationship. It concluded that an opt-in approach would best ensure that customers confer knowing approval of the use of their information.[32] It further concluded that CPNI could be shared with other affiliates that have a relationship with the customer because such sharing would not implicate privacy concerns.[33]

15. The Commission rejected an opt-out regime, under which a carrier could use CPNI beyond the existing service relationship as long as it has made a request to a customer for permission to use CPNI in that manner and the customer had not expressly objected to such use. It reasoned that an opt-out regime would not ensure informed consent because customers might not read carriers' disclosures and might not comprehend the extent of their rights under the Act or the steps they must take to protect those rights. Moreover, with respect to promoting competition, the Commission found that an opt-in requirement limits the advantage that incumbent carriers have over new competitive entrants.[34]

16. Because the Tenth Circuit found that the opt-in requirements were not narrowly tailored to promote the government's asserted interests in protecting privacy and promoting competition,[35] we initiate this proceeding to obtain a more complete record on consent mechanisms, and we urge commenters to focus upon the concerns articulated by the court. In addition, we ask parties to comment on whether there are any other laws or regulatory schemes governing matters similar to CPNI that the Commission might use as an analog. For example, both the financial services and healthcare industries have regulatory models in place for guarding consumers' privacy.[36] Is the information that

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> 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 telecommunication 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.

31 *CPNI Order*, 13 FCC Rcd at 8128, para. 87.

32 *Id.* at 8130-45, paras. 91-107.

33 *Id.* at 8100, para. 51.

34 *Id.* at 8134, para. 95.

35 *U S West v. FCC*, 182 F.3d at 1238-39.

36 *See* Gramm-Leach-Bliley Act, Title V, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (requires certain federal agencies to adopt rules implementing notice requirements and restrictions on the ability of financial institutions to disclose nonpublic personal information about consumers to nonaffiliated third parties. The rules promulgated pursuant to the Act also describe conditions under which a financial (continued….)

these models are designed to protect different or more sensitive than CPNI such that it deserves heightened protection, or are there similarities that we should take into account in developing a consent scheme that is responsive to the court's opinion? Parties should also comment on whether there are any other consent requirements that apply in a non-telecommunications context that we should consider?

17. We seek comment on the interests and policies underlying Section 222 that are relevant to formulating an approval requirement to implement Section 222(c)(1). In the *CPNI Order*, the Commission articulated two governmental interests: protection of customer privacy and promotion of competition.[37] The court indicated that "[w]hile, in the abstract, these may constitute legitimate and substantial interests, we have concerns about the proffered justifications *in the context of this case*."[38] We ask the parties to comment upon the extent to which these interests bear upon our interpretation of the approval requirement at issue. Commenters should also discuss, with as much specificity as possible, how a carrier's use of CPNI could erode privacy. The Tenth Circuit recognized that "disclosure of CPNI information could prove embarrassing to some," but beyond that was uncertain about the government's privacy interest.[39] We seek comment on that aspect of the court's analysis and ask what other privacy concerns may be implicated by access to CPNI. For example, the court noted that privacy interests may include protection against unwanted solicitations, but questioned whether such concerns were embraced by Section 222. We seek comment on this question. The court also said that it "would prefer to see a more empirical explanation and justification for the government's asserted interest [in privacy]."[40] We seek comments responsive to the court's concern.

18. The court was not persuaded that competition was a legitimate or substantial state interest underlying Section 222.[41] We seek comments that address those reservations, and on the extent to which competitive concerns should be taken into

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institution may disclose nonpublic information about a consumer and provide a method for a consumer to opt-out of the disclosure of that information. *See, e.g.* 17 CFR Part 160; 66 FR 21236 (Apr. 27, 2001) (final implementing rules adopted by the Commodity Futures Trading Commission)), and 65 FR 82462 (Dec. 28, 2000) (announcing final rule, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, that establishes standards to protect the privacy of individually identifiable health information. The rule requires, in most instances, that health care providers who have a direct treatment relationship with their patients obtain affirmative opt-in consent of their patients in order to use and disclose protected health information for treatment, payment and health care operations).

37 *CPNI Order*, 13 FCC Rcd at 8065-66, para. 3.

38 *U S WEST v. FCC*, 182 F.3d at 1234 (emphasis added).

39 *Id.* at 1235.

40 *Id.*

41 *Id.* at 1236-37.

account in our interpretation of the approval requirements under Section 222(c)(1). We further seek comment about the potential competitive ramifications of construing Section 222 without regard to competitive issues, and how such a construction might affect the competitive goals of the 1996 Act. We seek comment on the likely difference in competitive effects under opt-in and opt-out approvals. We request empirical or other evidence to illustrate the competitive advantages, if any, that opt-out approval affords a carrier.[42] We ask whether, and to what extent, any such competitive advantages may undermine the goals of Section 222 or, more generally, the goals of the 1996 Act. The court indicated that the competitive concerns we previously articulated were speculative.[43] We seek comments responsive to the court's opinion and ask how these competitive questions should shape our interpretation and enforcement of the Section 222(c)(1) approval requirement.

19. We seek comment on any potential harms that may arise from adopting either an opt-out or opt-in approach. The court, for example, stated that the "government presents no evidence regarding how and to whom carriers would disclose CPNI."[44] As a result, the court had difficulty evaluating the potential for harms from CPNI dissemination.[45] We inquire to whom a carrier might make CPNI available, and seek comments about the extent to which such dissemination would affect customer privacy interests.

20. We ask parties to address the relative costs and convenience of CPNI use under both opt-in and opt-out approaches. Finally, we seek comment on the court's statement that opt-out is a "substantially less restrictive alternative."[46] We seek comment more broadly on what methods of approval would serve the governmental interests at issue, and afford informed consent, while also satisfying the constitutional requirement that any restrictions on speech be narrowly tailored.

21. We seek comment on whether adoption of an opt-out mechanism is consistent with the rationale for the total service approach set forth in the *CPNI Order*.[47] In other words, under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service, while the customer must grant the carrier affirmative approval in order for the carrier to use the customer's CPNI to market other services to the customer. If we adopt an opt-out approach such that a carrier need not obtain the customer's affirmative approval to market services not already

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42 *Id.* at 1235.

43 *Id.* at 1236-37.

44 *Id.* at 1237.

45 *Id.*.

46 *Id.* at 1238-39.

47 *CPNI Order*, 13 FCC Rcd at 8084-8113, paras. 32-67.

subscribed to by the customer, is it necessary or appropriate for us to adopt an alternative to the total service approach? In particular, would there be an impact on the competitive goals of the Act if adoption of an opt-out mechanism increased the likelihood of customer approval for the use of CPNI to market services not already subscribed to by the customer? Alternatively, would adoption of an opt-out mechanism achieve the appropriate balance among the interests of privacy, competition, equity, and efficiency? Moreover, in the *CPNI Reconsideration Order*, the Commission determined that carriers may use CPNI derived from its provision of a telecommunications service to market CPE necessary to, or used in, the provision of that telecommunications service in accordance with Section 222(c)(1).[48] In a separate proceeding, the Commission modified and clarified its bundling rules promulgated under *Computer II*[49] to allow carriers to bundle CPE and enhanced services with telecommunications services.[50] We seek comment on whether the issues raised in that proceeding should affect our interpretation of Section 222(c)(1) and the total service approach.

22. Finally, we note that in the Wireless Communications and Public Safety Act of 1999 (911 Act),[51] Congress amended Section 222 of the Communications Act by adding provisions regarding CPNI. The amendments were enacted as incentives for greater deployment of wireless E911 services. Congress found that the ultimate key to improving the value of the wireless phone as a life-saving safety device was ensuring that the proper emergency personnel receive the information necessary to perform their duties.[52] The new CPNI provisions are intended to encourage that objective by providing separate provisions to protect certain wireless location information, and by expressly authorizing carriers to release this information to specified third parties for specified emergency purposes.[53] Specifically, Congress added "location" to the definition of CPNI,[54] and amended Section 222(f) to read that "[f]or the purposes of [Section 222](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" certain types of

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48 *CPNI Reconsideration Order*, 14 FCC Rcd at 14430-35, paras. 40 – 47; 47 C.F.R. § 64.2005(b)(1).

49 *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980).

50 *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-16; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Market*, CC Docket No. 98-183, Report and Order, FCC 01-98 (rel. March 30, 2001).

51 Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286, amending the Communications Act of 1934, 47 U.S.C. §§ 222, 251.

52 H.R. Rep. No. 106-25, at 9 (1999) (House Report).

53 House Report at 5, S. Rep. No. 106-138, 2 (1999) (Senate Report).

54 Revised 47 U.S.C. § 222(h)(1)(A); new 47 U.S.C. § 222(f).

location information except in specified emergency circumstances.[55] We seek comment on what affect, if any, the provisions of Section 222(f) have on our interpretation of the provisions of Section 222(c)(1) and the customer approval requirements that are under consideration here.

B. Specific Notification Requirements

23. We seek comment on whether modifications should be made to the current notification requirements in our rules so that they are most effective in ensuring that customers are clearly informed of their rights. For example, one approach would be to adopt an opt-in method of approval under which a request for oral consent from the customer would provide sufficient notification. We seek comment on this approach, and on whether the carrier should submit written materials to the customer prior to seeking oral consent, or whether the carrier may secure consent simultaneously with verbal notification of a customer's rights. If oral notification is adequate, how can we ensure that the actual subscriber is the person with whom the carrier communicates about consent? In other words, how would the carrier ensure and document that any oral communication is made directly with its subscriber, rather than some other party who might answer the phone? Another approach would be to adopt an opt-out method of approval under which a carrier would be required to provide written notification to the customer of his or her CPNI rights, and then afford the customer at least 30 days from receipt of the written notice to opt-out before it may use the CPNI in the manner requested under the notification. Alternatively, if we adopt an opt-out approach without any written notification requirements, it may be prudent to find that approval shall not be deemed to occur until 30 days after the date of the oral communication with the customer. We seek comment on both of these methods. We also seek comment on how carriers should manage later requests for privacy from the customer. For example, if a customer chooses to opt-out after the date on which approval has already been inferred, or, in the case of an opt-in mechanism, after the customer revokes an express consent previously granted, what

[55] New 47 U.S.C. § 222(f). Without express prior authorization, a carrier may only provide "call location information concerning the user of a commercial mobile service," as such term is defined in Section 332(d) of the Communications Act, 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; to inform the user's legal guardian or member's 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 to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency." 47 U.S.C. § 222(d)(4). The carrier also may use or disclose, without express prior authorization, "automatic crash notification information" for use in "the operation of an automatic crash notification system." 47 U.S.C. § 222(f)(2). The Commission has sought comment on a petition filed by the Cellular Telecommunications and Internet Association (CTIA) requesting that we initiate a rulemaking proceeding to implement Section 222(f) by adopting CTIA's proposed location privacy principles. *Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices*, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. Mar. 16, 2001).

would be a reasonable time period within which the carrier and its affiliates should be required to implement that opt-out request or revocation? In sum, we seek comment on all of these approval and notification approaches as well as any other options for ensuring that customers receive adequate notification of their rights under Section 222 of the Act.

C. Interplay of Sections 222 and 272

24. On October 8, 1999, AT&T filed a petition for review of the *CPNI Order* with the U.S. Circuit Court of Appeals for the District of Columbia, challenging the Commission's CPNI decisions as they relate to the interplay between Section 222 and Section 272 of the Communications Act.[56] On July 25, 2000, the D.C. Circuit granted the Commission's motion for remand of the AT&T appeal.[57] As we explain below, the consent mechanism that we eventually adopt in response to the Tenth Circuit's Order could impact our previous findings regarding the interplay between these two sections, and we therefore find it necessary to raise the relevant issues here.

25. As stated above, we conclude that the Tenth Circuit only vacated the portion of the *CPNI Order* and rules requiring opt-in customer approval.[58] Therefore, our finding in the *CPNI Order*, which we affirmed in the *CPNI Reconsideration Order*, that the term "information" in Section 272(c)(1) does not include CPNI remains intact.[59] Specifically, Section 272(c)(1) states that a Bell Operating Company (BOC), in its dealing with its Section 272 separate affiliate, "may not discriminate between the company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards..." We found that in the context of the entire 1996 Act, it is not readily apparent that the meaning of "information" in Section 272 necessarily includes CPNI, and that the most reasonable interpretation of the interplay between Sections 222 and 272 is that Section 272 "does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their Section 272 affiliates when they share information with their Section 272 affiliates according to the requirements of Section 222."[60] We found this to be reasonable because if we deemed "information" to include CPNI under Section 272(c)(1), then the BOCs would be unable to share CPNI with their affiliates to the extent contemplated by Section 222, but would instead be subject to the more affirmative nondiscrimination requirements in Section 272. Adhering to these requirements would mean that BOCs could share CPNI among their 272 affiliates only

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56 *AT&T v. FCC*, No. 99-1413 (D.C. Cir., filed Oct. 8, 1999).

57 *AT&T v. FCC*, No. 94-1413 (D.C. Cir., July 25, 2000).

58 *See also AT&T v. Bell Atlantic Order* at para. 17.

59 *CPNI Order*, 13 FCC Rcd at 8172, para. 154; *CPNI Reconsideration Order*, 14 FCC Rcd at 14481, para. 137.

60 *CPNI Order*, 13 FCC Rcd at 8174, 8179, paras. 160, 169; *CPNI Reconsideration Order*, 14 FCC Rcd at 14480-81, para. 136.

pursuant to express approval, and CPNI sharing under Section 222(c)(1)(A) (based on implied approval under the total service approach) would be precluded.[61]

26. More specifically, under the terms of Section 272, we found that the nondiscrimination requirements contained in that section would, in the context of an opt-in approach, "pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown"[62] Although this was only one of several reasons supporting our interpretation of the interplay between Sections 222 and 272, we would likely have to revisit this conclusion if we adopt an opt-out approach as a final rule. For example, under an opt-in approach, the CPNI requirements operate to make a carrier's anti-competitive use of CPNI more difficult by prohibiting carriers from using CPNI unless and until they have obtained affirmative customer approval. The only approval that is inferred is the approval gained through the total service approach, in which case the customer is already receiving service from both the BOC and its affiliate.[63] Under an opt-out approach, however, a BOC may be free to share its local customer's CPNI with its long distance affiliate regardless of whether the local customer has chosen the affiliate as his or her long distance service provider. We are concerned about the possible competitive and customer privacy ramifications of such an interpretation, and we seek comment on whether we should revisit our interpretation of the interplay between Sections 222 and 272 if we adopt an opt-out approach. In particular, would we have to alter our fundamental conclusion that BOCs may share CPNI with their 272 affiliates pursuant to Section 222 without regard to the nondiscrimination requirements in Section 272? If we retain this conclusion, would customers then receive sufficient protection if we adopt procedures to ensure effective notice and opportunity for customers to approve or disapprove the BOCs' sharing of CPNI with its Section 272 affiliates? Would customers be fully informed of their rights if we required BOCs to explain in an opt-out notification that it may share CPNI with its Section 272 affiliates even if the customer does not currently subscribe to service from those affiliates? We seek comment on these and any other relevant issues.

V. PROCEDURAL MATTERS

1. Ex Parte Presentations

27. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[64] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects

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61 *CPNI Order*, 13 FCC Rcd at 8174, paras. 158-59.

62 *CPNI Reconsideration Order*, 14 FCC Rcd at 14485, para. 142.

63 *CPNI Order*, 13 FCC Rcd at 8175, para. 164.

64 47 C.F.R. §§ 1.1200 *et seq*.

discussed. More than a one or two sentence description of the views and arguments presented is generally required.[65] Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well.

2. Initial Regulatory Flexibility Act Analysis

28. Appendix A sets forth the Commission's Initial Regulatory Flexibility Analysis (IFRA) regarding the policies and rules proposed in the *Second Notice of Proposed Rulemaking* in CC Docket No. 98-147. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Notice*. The Commission will send a copy of the *Second Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[66] In addition, the *Second Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[67]

3. Initial Paperwork Reduction Act Analysis

29. The rule changes proposed in the *Second Further Notice of Proposed Rulemaking* may cause modifications to the collections of information approved by OMB in connection with the *Local Competition Second Report and Order*. As part of our continuing effort to reduce paperwork burdens, we invite the general public and OMB to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from the date of publication of notice of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed information collections are necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

4. Comment Filing Procedures

30. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules,[68] interested parties may file comments on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register. All filings should refer to CC Docket No. 96-115.

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65 *See* 47 C.F.R. § 1.1206(b)(2), *as revised*.

66 *See* 5 U.S.C. § 603(a).

67 *See id.*

68 47 C.F.R. §§ 1.415, 1.419.

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[69] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, which in this instance is CC Docket No. 96-115. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

31. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th St. S.W., Washington, D.C. 20554.

32. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Common Carrier Bureau, Policy & Program Planning Division, 445 12th Street, S.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 99-273), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554.

33. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554.Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

34. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's rules.[70] We also direct all interested parties to include the name of the filing party and the

[69] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

[70] *See* 47 C.F.R. § 1.49.

date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in this *Notice* in order to facilitate our internal review process.

35. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register. Written comments must be submitted by the OMB on the proposed and/or modified information collections on or before 60 days after date of publication of notice of this *Notice of Proposed Rulemaking* in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 1-C804, 445 12th Street, S.W., Washington, D.C. 20554 or via the Internet to jboley@fcc.gov and to Virginia Huth, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to vhuth@omb.eop.gov.

XI. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4(i), 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 222 and 303(r), the CLARIFICATION ORDER and SECOND FURTHER NOTICE OF PROPOSED RULEMAKING ARE ADOPTED. The requirements of this Order shall become effective 30 days after publication of a summary thereof in the Federal Register.

37. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this CLARIFICATION ORDER AND SECOND FURTHER Notice OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A – INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA), as amended,[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice*. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and Objectives of, the Proposed Rules

2. The Commission is issuing the *Second Further Notice* to seek comment on an appropriate method by which carriers must secure their customers' consent to use the customer's CPNI. This is necessary to respond to the Tenth Circuit's decision vacating the opt-in consent method. Under the opt-in method, a carrier was required to notify the customer of his or her rights with regard to CPNI and then obtain express written, oral or electronic customer approval before the carrier may use CPNI to market services to the customer that are outside the existing service relationship that the customer has with the carrier. The opt-in method is distinguished from the opt-out method under which approval to use the customer's CPNI is inferred from the customer-carrier relationship unless the customer requests specifically that his or her CPNI be restricted.

3. The Tenth Circuit concluded that although the Commission had asserted that the opt-in method would protect consumer privacy and promote competition for telecommunications services in accordance with the goals of Section 222 of the Act,[2] it did not demonstrate that opt-in directly and materially advanced these interests. The court concluded that the Commission's determination that an opt-in requirement would best protect a consumer's privacy interests was not narrowly tailored because the Commission had failed to adequately consider an opt-out option. The court stated that an opt-out option should have been more fully investigated as it is inherently less restrictive of speech. Further, the court ruled the Commission did not adequately show that an opt-out strategy would not offer sufficient protection of consumer privacy.[3] In vacating portions

[1] 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq*., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] 47 U.S.C. § 222

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

of the *CPNI Order*, the court did not require the Commission to find specifically that the opt-out option was the correct approach. Instead, it found fault with the Commission's "inadequate consideration of the approval mechanism alternatives in light of the First Amendment."[4]

4. Taking into account the Tenth Circuit's concerns, we seek comment in the *Second Further Notice* on several significant issues concerning what methods of approval would serve the governmental interests at issue under Section 222 of the Act, and afford informed consent, while also satisfying the constitutional requirement that any restrictions on speech be narrowly tailored. We seek comment specifically on the extent to which an opt-in or opt-out method of customer approval would be consistent with both the court's concerns and Section 222, and on whether we should make modification to our customer notification requirements in Section 64.7002 of our rules, 47 C.F.R. § 64.7002, based on the form of approval that we adopt.[5]

5. We also ask for information on any potential harms to business entities, especially smaller business entities within the class of companies directly affected by the proposed rule, that may arise from adopting either an opt-in or opt-out approach, including the extent to which dissemination of CPNI would affect a customer's privacy.[6] We also ask for comment on how we can ensure that the consent approach we adopt balances the interests of privacy, competition, equity and efficiency.[7]

6. In addition, we ask parties to indicate whether or not adoption of an opt-out mechanism undermines the total service approach. The total service approach is not a consent mechanism like the opt-in or opt-out approach, but instead describes the scope of services for which a customer grants his or her consent for the carrier to use CPNI. Specifically, under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service, while the customer must grant the carrier affirmative approval in order for the carrier to use the customer's CPNI to market other services to the customer. If a carrier need not obtain the customer's affirmative approval to market services not already subscribed to by the customer, is it necessary or appropriate for us to adopt an alternative to the total service approach.[8]

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[4] *Id.* at 1240, n. 15 ("The dissent accuses us of 'advocating' an opt-out approach. We do not 'advocate' any specific approach.").

[5] *See infra* paras. 14-23.

[6] *See infra* para. 9.

[7] *See infra* para. 21.

[8] *See infra* para. 21.

B. Legal Basis

7. The *Second Further Notice* is adopted pursuant to Sections 1, 4(i), 222, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 222, and 303(r).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply

8. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.[9] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[10] For the purposes of this order, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. s 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[11] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[12] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[13] We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

9. .Although affected incumbent local exchange carriers (ILECs) may have no more than 1,500 employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they either are dominant in their field of operations or are not independently owned and operated, and are therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of

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[9] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[10] 5 U.S.C. § 601(6).

[11] 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 5 U.S.C. § 632).

[12] 15 U.S.C. § 632.

[13] 13 C.F.R. § 121.201. The North American Industry Classification System (NAICS) has replaced the SIC system for describing types of industries. SIC 4812 corresponds to NAICS 513321, 513322, 51333 (Radiotelephone Communications). SIC 4813 corresponds to NAICS 51331, 51333, 51334 (Telephone Communications, Except Radiotelephone).

an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by SBA as "small business concerns."[14]

10. *Total Number of Telephone Companies Affected*. The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[15] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."[16] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are either small entities or small incumbent LECs that may be affected by this order.

11. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[17] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[18] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small entity telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by this order.

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14 13 C.F.R. § 121.210 (SIC 4813).

15 United States Department of Commerce, Bureau of the Census, *1992 Census of transportation Communications and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

16 15 U.S.C. § 632(a)(1).

17 *1992 Census*, at Firm Size 1-123.

18 13 C.F.R. § 121.201 (SIC 4813/NAICS 51331).

12. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[19] According to our most recent data, there are 1,335 incumbent LECs, 349 competitive LECs, and 87 resellers.[20] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,335 small entity incumbent LECs, 349 competitive LECs, and 87 resellers that may be affected by the proposals in the *Second Further Notice*.

13. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 204 companies reported that they were engaged in the provision of interexchange services.[21] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 204 small entity IXCs that may be affected by this order.

14. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 349 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange service.[22] Although it seems certain that some of these carriers are not independently

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[19] 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator: Interstate Service Providers*, FCC Common Carrier Bureau, Industry Analysis Division (rel. Oct. 2000) (*Carrier Locator*).

[20] *Carrier Locator* at Figure 1. The total for competitive LECs includes competitive access providers and competitive LECs.

[21] *Carrier Locator* at Figure 1.

[22] *Carrier Locator* at Figure 1.

owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 349 small entity CAPs that may be affected by this order.

15. *Operator Service Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 21 companies reported that they were engaged in the provision of operator services.[23] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 21 small entity operator service providers that may be affected by this order.

16. *Pay Telephone Operators*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 758 companies reported that they were engaged in the provision of pay telephone services.[24] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 758 small entity pay telephone operators that may be affected by this order.

17. *Wireless Carriers*. The SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[25] According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[26] The Census Bureau also reported that 1,164 of those

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23 *Carrier Locator* at Figure 1.

24 *Carrier Locator* at Figure 1.

25 *1992 Census* at Firm Size 1-123.

26 13 C.F.R. § 121.201 (SIC 4812/NAICS 513322).

radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by this order.

18. *Cellular Service and Mobile Service Carriers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 806 companies reported that they were engaged in the provision of cellular services.[27] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service and mobile service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by this order.

19. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[28] For Block F, an additional classification for "very small business" was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[29] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.[30] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the

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[27] *Carrier Locator* at Figure 1. The total for cellular carriers includes cellular, Personal Communications Service (PCS) and Specialized Mobile Radio (SMR) carriers.

[28] *See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, FCC 96-278, WT Docket No. 96-59, paras. 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

[29] *Id.* at para. 60.

[30] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. Based on this information, we estimate that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by SBA and the Commissioner's auction rules.

20. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for *geographic* area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. The definition of a "small entity" in the context of 800 and 900 MHz SMR has been approved by the SBA. The proposed rules may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. Consequently, we estimate, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, some of which may be affected by the rules proposed in the Notice.

21. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we estimate that the number of geographic area SMR licensees that may be affected by the decisions and rules proposed in the Notice includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we estimate, for purposes of this IRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the decisions and rules proposed in the Notice.

22. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this IRFA, that all of the licenses will be awarded to

small entities, as that term is defined by the SBA.

23. *Toll Resellers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under the SBA's rules is for all telephone communications companies. The most reliable source of information regarding the number of toll resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 454 companies reported that they were engaged in the resale of telephone toll services.[31] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of toll resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 454 small entity resellers that may be affected by this order.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

24. Because we have not made any tentative conclusions or suggested proposed rules, we are unable at this time to describe any projected reporting, recordkeeping, or other compliance requirements.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

25. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[32]

26. As noted above, we do not propose a specific method for how carriers should obtain customer consent to use CPNI for marketing purposes, rather we seek comment on ways in which carriers can obtain their customers' consent and the extent to which an opt-in or opt-out approach would satisfy both Section 222 and the Tenth Circuit's concerns that any restrictions on speech be no more than necessary to serve the asserted state interests. Section 222 applies to all telecommunications carriers, and therefore, any rules that we adopt regarding customer consent will be applicable to all

[31] *Carrier Locator* at Figure 1.

[32] 5 U.S.C. § 603(c).

carriers.[33] Accordingly, we cannot exempt small entities from complying with any consent rules that we adopt.

27. We have, however, taken the limited resources of small entities into account in promulgating certain existing CPNI rules,[34] and intend to do so again in addressing the customer consent requirements. Specifically, we recognize that an opt-in approach would require small entities to have a process in place to obtain express approval from their customers to use CPNI. While such a process could place a burden on small entities in terms of developing, tracking and maintaining customer consent, it would confer a countervailing benefit by permitting them to gain approval to use a customer's CPNI for a broad range of service offerings with a single request through written, oral or electronic means that remains in effect unless or until the customer revokes it.[35] Therefore, we ask parties to comment on whether the burden outweighs the benefit under an opt-in scheme.

28. We also note that the Commission, in response to concerns from all carriers about the cost of compliance, has already streamlined the "flagging" and "audit trail" requirements that are required to protect against unauthorized access to a customer's CPNI.[36] Small entities may continue to take advantage of these streamlined rules even if the Commission adopts an opt-in requirement.

29. Under an opt-out approach, a small entity need not obtain express approval, but would only be required to notify its customers of their CPNI rights and then process any requests for privacy after such notification. This could be less administratively onerous than obtaining opt-in approval. However, we seek comment indicating small entities' perception of the probable impact of this burden.

30. We ask small entities to particularly keep in mind these types of requirements when they comment in the *Second Further Notice* on any potential harms that may arise from adopting either form of consent,[37] and overall, we ask for comment in response to this IRFA on what competitive or economic impact either an opt-in or opt-out approach would have on small entities and on whether there is any alternative form of consent that we should consider to minimize the economic impact on them.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

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[33] *CPNI Order*, 13 FCC Rcd at 8098-8100, paras. 49-50.

[34] *See CPNI Reconsideration Order*, 14 FCC Rcd at 14472-75, paras. 125-27 (adjusting certain CPNI safeguards to ease the costs of compliance for small carriers).

[35] *See CPNI Reconsideration Order*, 14 FCC Rcd at 8142-43, 8146, 8151, paras. 104, 109, 116.

[36] *CPNI Reconsideration Order*, 13 FCC Rcd at 14472-75, paras. 124-27.

[37] *See supra* para. 19.

31. None.

SEPARATE STATEMENT OF COMMISSIONERS GLORIA TRISTANI AND MICHAEL J. COPPS

Re: *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*

Today the Commission issues a Further Notice to develop a record that allows us to implement Section 222 of the Communications Act, the customer proprietary network information (CPNI) provision, consistent with the direction provided by the 10th Circuit Court of Appeals in *U.S. West, Inc. v. Federal Communications Commission*.[1] This proceeding should result in CPNI rules that provide industry with certainty regarding the legal use of customer information for marketing and other purposes. At issue here is whether the rules will also provide customers with the ability to make an express decision regarding whether and how their personal information will be used.

Our overriding responsibility in this remanded proceeding is to follow the specific substantive instructions of Congress supported by a record that has the scope and depth required by the 10th Circuit. Congress expressly stated that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to . . . customers."[2] Congress added that a telecommunications carrier that receives or obtains CPNI by virtue of its provision of a telecommunication service shall only use, disclose, or permit access to individually identifiable CPNI "with the approval of the customer."[3] Congress has already made the public policy decision that telephone consumers deserve special privacy protection for CPNI, and that no such information should be used without approval.

We write separately because we believe that in order to comply with Section 222, the Commission should have expressed continued support for its current CPNI policy, seeking comment on the nature of the government interest in privacy, the potential harm to privacy to which consumers are exposed, and whether our approach is no more extensive than necessary to serve the interest of protecting personal privacy. In the 1998 *CPNI Order*,[4]

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1 182 F.3d 1224 (10th Cir. 1999) (*U.S. West*).

2 47 U.S.C § 222.

3 Telecommunications carriers may also use, disclose, or permit access to CPNI "as required by law," and for other purposes that are not at the center of this FNPRM. *See* 47 U.S.C. § 222.

4 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, paras. 88-107 (1998) (*CPNI Order).*

the Commission considered the concerns that Congress addressed with the adoption of Section 222, namely, the strong interest of consumers in keeping sensitive information private. The Commission determined that a common sense interpretation of the word "approval" as used in the statute suggested that it required "a knowing acceptance" by a customer that its carrier would be using the customer's CPNI for marketing services outside those services currently being subscribed to by the customer.[5] Simply put, the Commission determined that an affirmative approval requirement, the opt-in method, rather than a passive approval requirement, the opt-out method, provided the level of protection of privacy interests that Congress chose.[6] We continue to believe this is the correct interpretation of Section 222. We hope the neutral approach taken here does not reflect this Commission's reconsideration of this fundamental policy choice.

The 10th Circuit found that our proceeding relied on a record that did not allow it to make several findings needed to uphold our CPNI Order in the face of a First Amendment challenge. At the same time, the 10th Circuit made a special point of explaining that it did not "advocate" that the Commission change its decision to require the opt-in approach. Nor did it advocate that the Commission take another approach, by, for example, deciding to change course and allow the opt-out approach.[7]

Instead, the 10th Circuit found that the record in this proceeding was inadequate. To respond to the court's decision, first we must provide "more empirical explanation and justification for the government's asserted interest" in protecting consumer privacy and in promoting competition.[8] Without this information the Court could not determine whether those interests were "substantial" in its First Amendment analysis.[9] Second, we must seek a more complete record on the question of whether harms to consumer privacy and competition "are real" and whether an opt-in approach "will in fact alleviate them to a material degree."[10] Third, we must provide additional consideration of whether opt-in is " 'no more extensive than necessary to serve [the stated] interest[s].' "[11] The court's decision, as demonstrated above, was based on an incomplete record, not on a flawed outcome.

We emphasize the importance of expeditiously collecting and analyzing the relevant data and then proceeding to carry Congress's will. Our charge from Congress is to ensure that

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5 *Id.* at para. 93.

6 *Id.* at para. 94.

7 *U.S. West* at 1240 fn 15.

8 *Id*. at 1235.

9 *Id*. at 1234-37.

10 *Id*. at 1237.

11 *Id*. at 1238, quoting *Rubin v. Coors Brewing*, 514 U.S. 476, 486 (1995).

carriers only use, disclose, or permit access to individually identifiable CPNI "with the approval of the customer."[12] Congress chose to enact a tough requirement for carriers and it is our duty to implement it.

[12] Telecommunications carriers may also use, disclose, or permit access to CPNI "as required by law," and for other purposes that are not at the center of this FNPRM. *See* 47 U.S.C. § 222.