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FINAL BRIEF

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 10, 2008

No. 07-1312

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

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENORS VERIZON AND QWEST

Michael E. Glover
Karen Zacharia
Mark J. Montano
VERIZON
1515 North Courthouse Road, Suite 500
Arlington, VA 22201
TEL: 703-351-3175
FAX: 703-351-3658

Counsel for Verizon

Andrew G. McBride
Helgi C. Walker*
William S. Consovoy
Brett A. Shumate
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

Counsel for Verizon and Qwest

* *Counsel of Record*

Dated: May 30, 2008

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Richard B. McKenna, Jr.
Kathryn Marie Krause
Qwest Communications International Inc.
607 14th Street, N.W.
Suite 950
Washington, DC 20005
TEL: 303-383-6651
FAX: 303-896-1107

Counsel for Qwest

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

(A) Parties and Amici

All parties, intervenors, and amici appearing before the Federal Communications Commission and in this Court are listed in the Opening Brief for Petitioner at i.

(B) Rulings Under Review

Reference to the ruling at issue appears in the Opening Brief for Petitioner at i-ii.

(C) Related Cases

A reference to a comparable case appears in the Opening Brief for Petitioner at ii.

Andrew G. McBride
Helgi C. Walker*
William S. Consovoy
Brett A. Shumate
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

Counsel for Verizon and Qwest

* *Counsel of Record*

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors Verizon and Qwest Communications International Inc. ("Qwest") respectfully submit the following corporate disclosure statements:

The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company. No publicly held company owns 10% or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide telecommunications services.

Qwest is a publicly held corporation that has no parent company. Qwest, through its operating subsidiaries, provides a variety of broadband Internet-based data, voice, and imaging communications for businesses and consumers. Legg Mason Capital Management, Inc. (a/k/a Investment Adviser Subsidiaries of Legg Mason, Inc.), a wholly owned subsidiary of Legg Mason, Inc., a publicly traded company, owns more than 10% of the stock of Qwest. No other publicly held company owns more than 10% of the stock of Qwest.

Qwest owns Qwest Corporation (or "QC"), a local exchange carrier that provides local exchange telecommunications, exchange access, information access, data and intraLATA long distance services pursuant to tariff and contract within QC's 14-state incumbent local exchange region. U S WEST, Inc. was formerly the

parent and sole shareholder of U S WEST Communications, Inc. U S WEST, Inc. merged with and into Qwest on June 30, 2000. On July 6, 2000, U S WEST Communications, Inc. was renamed Qwest Corporation.

In addition, Qwest owns Qwest Communications Corporation, a provider of interstate interLATA services, both domestically and internationally, as well as Voice over Internet Protocol services. Qwest also owns other subsidiaries that provide telecommunications services, including Qwest Wireless, LLC (via resale).

STATEMENT REGARDING THE DEFERRED APPENDIX

Pursuant to Circuit Rule 30(c), the parties have conferred and agreed to utilize the deferred-appendix option set forth in Rule 30(c) of the Federal Rules of Appellate Procedure.

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GLOSSARY

APA	Administrative Procedure Act
CPNI	Customer Proprietary Network Information
EPIC	Electronic Privacy Information Center
NPRM	Notice of Proposed Rulemaking
J.A.	Joint Appendix
VoIP	Voice over Internet Protocol

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Opening Brief for Petitioner.

STATEMENT OF FACTS

The Telecommunications Act of 1996 ("Act") imposes a duty on telecommunications carriers "to protect the confidentiality of proprietary information of, and relating to . . . customers." 47 U.S.C. § 222(a). Customer proprietary network information ("CPNI") includes two categories of information: (1) information about the nature and amount of telecommunications services to which an individual customer subscribes; and (2) more detailed information about the calls that customers make and receive (referred to generically as "call detail"), including the frequency, number, destination, and duration. *Id.* § 222(h)(1).

The statute is not absolute, however, and carriers are expressly permitted to use, disclose, or provide access to CPNI in several circumstances. The statute broadly permits carriers to use, disclose, or permit access to CPNI, either directly or through agents, in order to provide—and obtain compensation for—the telecommunications services from which the information is derived. *Id.* § 222(c)(1). Carriers also may disclose or permit access to CPNI "as required by law." *Id.* In addition, the statute expressly requires carriers to disclose CPNI in response to an affirmative written request from the customer. *Id.* § 222(c)(2).

Finally, the statute expressly allows carriers to use, disclose, or permit access to CPNI for any other purpose with the "approval" of the customer. *Id.*

The Act does not specify the method by which a customer's "approval" must be obtained, and the Federal Communications Commission ("FCC" or "Commission") has consistently found that two forms of customer approval would be sufficient. *See, e.g., In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further NPRM, 17 FCC Rcd 14860, ¶ 30 (2002) (J.A. 302) ("2002 Order"). For example, one form of approval, known as "opt-out", requires carriers to give notice to customers of any plan to use or share CPNI and provide an opportunity to choose not to have their CPNI used or shared. *Id.* ¶ 2 (J.A. 290). Another form of approval, known as "opt-in", requires carriers to obtain a customer's express consent before using or sharing CPNI. *Id.* ¶ 11 (J.A. 294).

The choice between these two forms of approval is critical to the ability of carriers to communicate with their customers. As in any industry, carriers regularly develop new products and services, or packages of products and services, and wish to offer them to their existing customers. These offerings can provide significant value to customers, whether by providing new services that are of use to customers, or providing added convenience or favorable pricing for various

packaged offerings or for promotional or discount offerings. *Id.* ¶¶ 35, 41 (J.A. 304-05, 307-08).

Carriers are able to communicate information about their offerings more effectively when they are able to engage in targeted marketing. Targeted marketing occurs when a carrier communicates information to customers about the particular offering that may be of interest to them based on information about the current array of services that the customer purchases. This practice significantly reduces the cost to carriers of communicating with their customers as compared to broadcast advertising to all customers. Moreover, it is both more effective and of greater benefit to customers because they receive less information and what they do receive is far more likely to be of interest to them. Verizon *Ex Parte* 2-3, 14-15 (Jan. 29, 2007) (J.A. 677-78, 689-90).

Carriers must work with certain third parties in order to communicate more effectively with their customers in this manner. For example, carriers cannot afford to maintain large permanent staffs with the necessary expertise to handle all of the activities that are required for periodic marketing campaigns, such as compiling customer lists for targeted offerings, preparing marketing communications, and managing the distribution of those communications to the target audience. 2002 Order ¶ 45 & n.121 (J.A. 309). Rather, carriers must rely to various degrees on specialized vendors who already have the necessary staffing

and expertise. Carriers also must work with their various affiliates or joint venture partners who may provide one or more of the services that make up their packaged offerings and who participate in the marketing efforts. Verizon *Ex Parte* 2 (J.A. 677). As part of this process, carriers sometimes must share customer information that qualifies as CPNI with their contractors, affiliates, or partners. This sharing may be for the purpose of compiling the target market list or for use in determining whether a customer's current slate of services are compatible (or incompatible) with any new offerings or packages.

Carriers' frequent use of these vendors thus makes the choice between the various forms of customer "approval" critical to a carrier's ability to effectively communicate with its customers. Experience has shown that customers routinely fail to return opt-in forms even where they are willing or affirmatively want to receive targeted offerings. *Id.* at 12 (J.A. 687). Accordingly, an opt-in regime imposes significantly greater constraints on a carrier's ability to communicate with its customers than does an opt-out regime.

The FCC first addressed the issue of the form that customer approval should take shortly after the passage of the Act, imposing a broad requirement that carriers obtain opt-in approval before sharing CPNI with any affiliates, contractors, or joint venture partners. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information*

and Other Customer Information, Second Report and Order and Further NPRM, 13 FCC Rcd 8061, ¶ 4 (1998) (J.A. 104) ("1998 Order"). The 1998 Order did not distinguish between disclosures to affiliates or unrelated third parties. Instead, the Commission imposed a sweeping opt-in regime for all CPNI. *Id.* The FCC claimed to have considered, but rejected, an "opt-out" requirement as inadequate to protect consumer privacy. *Id.* ¶¶ 91-114 (J.A. 138-49).

On review, the Tenth Circuit struck down the FCC's broad opt-in requirement because the FCC had failed to adduce any evidence—aside from mere speculation—that the posited harm to privacy was real. *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). The court thus held that the opt-in requirement neither advanced the government's interest in protecting privacy nor was narrowly tailored to achieve that objective. *Id.* at 1237. The court also faulted the FCC for not adequately considering "an obvious and substantially less restrictive alternative, an opt-out strategy." *Id.* at 1238.

In response to that decision, the FCC conducted an extensive re-examination of its CPNI rules based on a voluminous record and concluded that an opt-out requirement would address any legitimate privacy concerns associated with sharing CPNI. 2002 Order ¶¶ 2, 31-32 (J.A. 290, 302-03). The FCC further concluded that a broad opt-in requirement, such as the one embodied in its 1998 Order, would run afoul of the First amendment, and, therefore, settled on an opt-out regime for

the disclosure of CPNI. *Id.* ¶ 31 (J.A. 302). The Commission conceded that an opt-out rule was a "less restrictive alternative," *id.*, and recognized that an opt-in rule would place significant burdens on industry because it "could immediately impact the way carriers conduct business." *Id.* ¶ 45 (J.A. 309). It also noted that "[m]any carriers employ independent contractors such as telemarketers rather than their own employees . . . [and that it was] taking this factor into account in order to avoid undue burdens to the carriers based on having to change current commercial practices." *Id.* ¶ 45 n.121 (J.A. 309).

The FCC was comfortable with its decision, in part, because it "put[ ] sufficient safeguards in place to avoid any abuses." *Id.*; *id.* ¶¶ 46-49 (J.A. 309-11). In particular, the Commission required carriers to enter into stringent confidentiality agreements with joint venture partners and independent contractors that: (1) restrict the use of CPNI only for marketing purposes; (2) prohibit the sharing of CPNI to any other party; and (3) require the third party to implement appropriate protections to ensure the confidentiality of CPNI. *Id.* ¶ 47 (J.A. 309-10). As the FCC explained, "[t]hese [contractual safeguards] place independent contractors and joint venture partners on a similar footing as the carriers themselves in terms of incentives, thus obviating the need for more stringent approval requirements such as opt-in." *Id.* ¶ 48 (J.A. 310).

In addition, the FCC established detailed rules regarding the form and content of opt-out notices "to ensure that customers are in a position to comprehend their choices and express their preferences regarding the use of their CPNI." *Id.* ¶ 89 (J.A. 328); *id.* ¶¶ 89-97 (J.A. 327-31). Specifically, the FCC adopted a number of requirements with respect to opt-out notices sent via e-mail. *Id.* ¶ 93 (J.A. 329). The Commission also required carriers to resend opt-out notices every two years, *id.* ¶ 110 (J.A. 337), advise customers how to reverse a previous opt-out decision, *id.* ¶ 97 (J.A. 330-31), and wait at least 30 days after sending an opt-out notice before inferring customer consent, *id.* ¶ 112 (J.A. 337-38). These safeguards were intended to "address the known shortcomings of opt-out in a targeted manner in lieu of adopting a more restrictive approach such as opt-in." *Id.* ¶ 43 (J.A. 308).

In the wake of the FCC's orders, carriers conformed their practices to the FCC's requirements and were able to structure their marketing efforts in a manner that allowed them to communicate most efficiently and effectively with their customers. Since then, there have been no indications of any problems as a result of sharing CPNI with affiliates, joint venture partners, and independent contractors. Verizon Comments 22 (Apr. 28, 2006) (J.A. 589). By all indications, the existing opt-out regime benefited carriers and their customers and furthered the Commission's interest in protecting customer privacy.

A different and unrelated privacy issue arose after the FCC's 2002 Order, however. Authorities learned that so-called "data brokers" were increasingly engaging in a practice known as "pretexting" in which they would falsely pose as customers or carrier employees in an effort to dupe carrier representatives into providing access to a customer's CPNI. In particular, these pretexters sought to obtain access to the category of CPNI known as "call detail" information. As noted above, this information reveals who the customer called or was called by, when those calls occurred, and the duration of the calls. *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further NPRM, 22 FCC Rcd 6927, ¶ 13 n.45 (2007) (J.A. 10) ("Order"). The practice appeared to be employed in a variety of contexts, ranging from marital or custody disputes, to various types of commercial disputes, and became front-page news nationwide when it was linked to a corporate scandal at Hewlett-Packard in which pretexting was reportedly used in connection with an effort to identify a board-room leak. *Id.* ¶ 61 & n.193 (J.A. 33).

The publicity surrounding pretexting prompted legislatures at the federal and state levels to reexamine the adequacy of their existing laws. It also prompted the FCC to revisit its CPNI rules to determine whether any changes were needed to protect CPNI from this newly-emerged practice. The FCC issued a Notice of

Proposed Rulemaking in February 2006, seeking comment on whether changes to its CPNI rules were needed to address the pretexting problem. *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, NPRM, 21 FCC Rcd 1782, ¶ 1 (2006) (J.A. 370) ("NPRM").

While the FCC's rulemaking was pending, both Congress and a number of states took action to directly address the pretexting issue that gave rise to the FCC NPRM. Order ¶ 12 (J.A. 8-10). In particular, Congress criminalized all forms of pretexting. Telephone Records and Privacy Protection Act of 2006, Pub. L. No. 109-476, 120 Stat. 3568 (codified at 18 U.S.C. § 1039). The statute makes it unlawful to obtain confidential phone records information through fraudulent means, to access a customer's account without prior authorization, and to sell or purchase such information without customer authorization.

The FCC, in turn, took a number of steps designed to further protect against the practice of pretexting and prevent the unauthorized disclosure of CPNI when it released the *Order* under review on April 2, 2007. Order ¶ 3 (J.A. 3-4). For example, the FCC prohibited carriers from disclosing to customers over the phone the call detail information that is targeted by pretexters unless the customer provides a pre-established password to verify his or her identity. *Id.* ¶ 13 (J.A. 10-11). The Commission also required carriers to password protect online

accounts to ensure that pretexters could not obtain access to any information that may be available through online access. *Id.* ¶ 20 (J.A. 15). In response to evidence that pretexters sometimes established or modified customers' existing online accounts to obtain access to CPNI, the FCC also required carriers to immediately notify customers when an online account is set up in their name or when an existing account is changed, *id.* ¶ 24 (J.A. 17), and when CPNI is released to a third party without authorization, *id.* ¶¶ 26, 29 (J.A. 18, 29). The Commission also required carriers to annually file a CPNI compliance certificate, *id.* ¶ 51 (J.A. 28), and extended the protections of its CPNI rules to VoIP providers to ensure that the same protections apply to all customers of voice service. *Id.* ¶ 54 (J.A. 29-30). Many of these new safeguards were supported by telecommunications carriers, because they were directly aimed at the problem of pretexting and had little or no effect on carriers' ability to engage in marketing speech to their customers. None of these measures are challenged in this appeal.

In addition to these targeted safeguards, the FCC decided that carriers must obtain opt-in approval before sharing CPNI in certain limited circumstances. This new requirement applied only in the context of sharing CPNI with independent contractors and joint venture partners for marketing purposes. *Id.* ¶ 37 (J.A. 22). Significantly, the FCC did not modify its prior conclusion that opt-out approval is adequate in all other circumstances, including sharing CPNI with carriers' affiliates

or other entities with a formal agency relationship, and indeed expressly noted that these opt-out rules remained in place. *Id.* ¶ 43 n.137 (J.A. 24). On the contrary, the FCC asserted that the sharing of CPNI with independent contractors and joint venture partners might give rise to unique problems that increased the risk of disclosure and that justified more intrusive requirements in these limited circumstances. *Id.* ¶ 39 (J.A. 22-23). Thus, in the case of joint venture partners and independent contractors, the FCC decided that an opt-in regime "will more effectively limit the circulation of a customer's CPNI by maintaining it in a carrier's possession unless a customer provides informed consent for its release." *Id.* ¶ 37 (J.A. 22).

The FCC claimed to have adopted this limited opt-in rule after compiling a record "replete with specific examples of unauthorized disclosure of CPNI" by carriers. *Id.* ¶¶ 12, 44 (J.A. 8-10, 25). Yet, the agency conceded that the record did not contain a single instance of unauthorized disclosure by a joint venture partner or independent contractor. *Id.* ¶ 46 (J.A. 26). Instead, the record showed that carriers such as Verizon do not even provide joint venture partners and independent contractors, who may engage in marketing, with the type of call detail information that pretexters seek. *Id.* ¶ 46 (J.A. 27). Citing to no record evidence, the Commission nonetheless presumed that there is a greater risk of disclosure when CPNI is shared with joint venture partners and independent contractors,

id. ¶ 46 (J.A. 26), and on that basis imposed an opt-in requirement limited to those situations. It is this opt-in requirement that is challenged by Petitioner and Intervenors in this case.

SUMMARY OF ARGUMENT

This case involves the Commission's latest attempt to adopt an "opt-in" regime for the sharing of CPNI. While the *Order* purportedly responds to the growing, and now criminal, practice of pretexting, in which data brokers fraudulently obtain CPNI from telecommunications carriers, that portion of the rule that requires an opt-in regime for a carrier to share CPNI with independent contractors and joint venture partners is burdensome, legally flawed, and should be vacated.

Under both the Administrative Procedure Act ("APA") and the heightened First Amendment standard that applies to measures that restrict commercial speech such as the one at issue here, the government must demonstrate based on substantial record evidence that the proposed restriction addresses a concrete problem *and* is appropriately tailored to address that issue after considering less burdensome alternatives. Here, the CPNI opt-in rule adopted in the *Order* fails on both scores.

As the agency essentially concedes in its *Order*, no evidence of an actual problem exists with respect to the unauthorized disclosure of CPNI by joint

venture partners and independent contractors. As an initial matter, there is essentially no evidence that joint venture partners and independent contractors have been targeted by pretexters. In fact, the record contains evidence that carriers do not even provide joint venture partners and independent contractors with the kind of CPNI in which pretexters are interested. Moreover, unlike carriers, independent contractors cannot be associated with any particular customer or customer record. It is thus not surprising that the FCC admitted that there is no evidence of unauthorized CPNI disclosures by joint venture partners or independent contractors.

Confronted with this complete lack of record evidence, the Commission was reduced to sheer speculation, claiming only that the lack of evidence "does not mean unauthorized disclosure has not occurred or will not occur in the future." Order ¶ 46 (J.A. 26). But the FCC simply cannot restrict free speech without evidentiary support establishing that the regulation at issue responds to an actual problem. The opt-in rule should be vacated for this reason alone.

Further, the FCC failed to show that other less restrictive alternatives would not address any legitimate concerns. The FCC conceded that opt-out with certain other safeguards is adequate in all other circumstances. There is no evidence that opt-out, or other measures far less restrictive than the opt-in approach chosen by the Commission, would not be sufficient to remedy concerns with respect to the

sharing of CPNI by carriers with joint venture partners and independent contractors. The opt-in rule should also be vacated for this reason.

ARGUMENT

The FCC's CPNI opt-in rule is invalid under either the APA or First Amendment. 5 U.S.C. § 706(2)(A) (requiring the invalidation of agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (restriction on truthful commercial speech must "directly advance[] the governmental interest asserted" and be "no[] more extensive than is necessary to serve that interest"). As explained below, the Commission's decision to resurrect the "opt-in" rule for disclosures of CPNI to joint venture partners and independent contractors cannot be sustained under either standard.[1]

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[1] The First Amendment standard is "more demanding than the arbitrary and capricious standard of the APA." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002). Even under the APA, however, the agency "assumes a heavy burden of justification" when its regulations "impinge on rights protected by the First Amendment." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1462 (D.C. Cir. 1985). In any event, the unreasonable nature of the opt-in rule adopted in the *Order* allows this Court to refrain from addressing the First Amendment issues that must be squarely confronted to sustain this agency action. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

I. BOTH THE FIRST AMENDMENT AND THE APA REQUIRE THE GOVERNMENT TO DEMONSTRATE, BASED ON SUBSTANTIAL RECORD EVIDENCE, THAT THE CPNI OPT-IN RULE REDRESSES A CONCRETE PROBLEM AND IS APPROPRIATELY TAILORED TO MEET THAT PROBLEM.

The First Amendment imposes fundamental threshold restrictions on the government's ability to impose restrictions on non-misleading commercial speech.[2] *Pearson v. Shalala*, 164 F.3d 650, 655-56 (D.C. Cir. 1999). When regulating commercial speech, the government cannot rely on "mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real *and* its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasis added). Accordingly, in addition to first demonstrating the presence of a problem that is real, the restriction adopted must also "contribute in a material way to solving that problem." *Id.* at 776. The "regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Cent. Hudson*, 447 U.S. at 564; *Edenfield*, 507 U.S. at 767 (rule must advance the Government's interest "in a direct and material way").

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[2] As Petitioner notes, Brief for Petitioner 25-26 (filed Mar. 14, 2008) ("Petr.'s Br."), it is not clear that all of the speech at issue is merely "commercial" under governing Supreme Court precedent.

The APA imposes a similar obligation on federal agencies and "establishes a scheme of 'reasoned decisionmaking.'" *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (internal quotation marks and citation omitted)); *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, for a regulation to be valid, the administrative record must demonstrate the existence of an actual problem in need of regulatory solution. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Indeed, "a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (internal quotation marks and citation omitted). Failure to put forward record evidence of an actual problem is fatal under APA review. *Quincy Cable TV*, 768 F.2d at 1463 ("[T]he Commission has failed entirely to determine whether the evil the rules seek to correct is a real or merely a fanciful threat." (internal quotation marks and citation omitted)).

Thus, *both* the First Amendment and the APA require an agency to demonstrate the existence of an actual problem under its statutory jurisdiction to support agency action, *and* that its regulation in some way addresses the problem that is shown to exist. *Nat'l Fuel*, 468 F.3d at 841 (invalidating order where agency "provided no evidence of a real problem"). In the context of restrictions of constitutionally protected speech, as here, this requirement takes on added

importance. *Quincy Cable TV*, 768 F.2d at 1462. As the Supreme Court has explained, establishing a record of a real problem is "critical" because, otherwise, government "could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal quotation marks omitted).

Moreover, under the First Amendment, restrictions on commercial speech must be "narrowly tailored to advance a legitimate governmental interest." *Lowe v. SEC*, 472 U.S. 181, 234 (1985). Accordingly, there must be a "reasonable fit between" the FCC's "legitimate interests" and "the means chosen to serve those interests." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (internal quotation marks omitted); *Rubin*, 514 U.S. at 486 (explaining that a restriction on commercial speech must be "no more extensive than is necessary to serve [the stated] interest"); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (government must have "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition" (internal quotation marks omitted)). Similarly, at the heart of the APA's scheme of "reasoned decisionmaking" is the requirement that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

State Farm, 463 U.S. at 43 (internal quotation marks and citation omitted); *id.* (decision is arbitrary and capricious if agency "offered an explanation for its decision that runs counter to the evidence before the agency").

On this basis, both the First Amendment and the APA require the agency to explain why less restrictive alternatives were rejected or abandoned. *City of Cincinnati*, 407 U.S. at 418 n.13 (the existence of "less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable"); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984) (under the APA "an agency has a duty to consider responsible alternatives to its chosen policy, and to give a reasoned explanation for its rejection of such alternatives" (footnote omitted)). "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring).

Indeed, as courts have repeatedly explained, opt-in rules constitute a severe impairment on First Amendment rights and, therefore, are highly problematic. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("The right to receive information and ideas . . . is an inherent corollary of

the rights of free speech and press that are explicitly guaranteed by the Constitution."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *cf. Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) (upholding opt-out scheme involving unsolicited advertisements). Opt-in regimes not only burden the rights of the speaker, but also interfere with the rights of the willing listener to receive speech. *See U.S. West*, 182 F.3d at 1232; *cf. Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991).

Accordingly, whether the Commission's decision is judged under either the statutory or constitutional standard, the agency bears a heavy burden to defend the lawfulness of the opt-in rule. As explained below, the FCC has failed to carry that burden, and the rule must be invalidated.

II. THERE IS NO RECORD EVIDENCE ESTABLISHING ANY LINK BETWEEN PRETEXTING AND THE SHARING OF CPNI WITH JOINT VENTURE PARTNERS AND INDEPENDENT CONTRACTORS AND THUS NO EVIDENCE OF AN ACTUAL PROBLEM.

The FCC has not met its basic duties to provide record evidence establishing the existence of an actual problem involving joint venture partners and independent contractors, or to demonstrate that the restriction adopted here will contribute in a material way to addressing any such problem. As an initial matter, while the

Commission cast its decision to revert to the opt-in rule as a general response to "new privacy concerns," Order ¶ 37 (J.A. 22), the clear focus of the proceeding was to protect privacy by stopping pretexters from gaining unauthorized access to customer CPNI, *id.* ¶ 2 (J.A. 2) ("directly respon[ding] to the actions of data brokers, or pretexters, to obtain unauthorized access to CPNI"); NPRM ¶ 1 (J.A. 370-71). Indeed, the FCC may not simply rely on "a broad interest in privacy. It must specify the particular notion of privacy and interest served." *U.S. West*, 182 F.3d at 1235; *id.* at 1234 ("The breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest."). Here, the FCC's asserted purpose was to protect consumers' privacy interests in the CPNI data itself, not to restrict or limit targeted marketing practices. Order ¶¶ 1-2 (J.A. 2-3); NPRM ¶ 12 (J.A. 376). The agency's action, therefore, must be judged against the problems it identified. *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 886 n.16 (D.C. Cir. 1999). In this case, the FCC failed to demonstrate either that a problem exists with respect to CPNI that is shared with joint venture partners and independent contractors, or that its decision to revive an opt-in rule for sharing CPNI with joint venture partners and independent contractors materially advances its legitimate effort to thwart pretexters.

First, the FCC was unable to point to any concrete evidence suggesting that joint venture partners and independent contractors have been targeted by pretexters. Indeed, the FCC was only able to cite to a single sentence in a lone *ex parte* to establish any link between pretexting and joint venture partners and independent contractors. Order ¶ 46 & n.155 (J.A. 27). A single unsupported assertion does not establish as a factual matter that pretexters target joint venture partners and independent contractors. *HCA Health Servs. of Okla. Inc. v. Shalala*, 27 F.3d 614, 616 (D.C. Cir. 1994) (explaining that agency decision must be supported "by *substantial* record evidence" (emphasis added)). In fact, as Petitioner explains, Petr.'s Br. 43 n.15, there is no logical basis for the position that joint venture partners and independent contractors are susceptible to pretexting. On the contrary, as the FCC itself recognized, pretexters have obtained CPNI from carriers because it is carriers themselves who make this information available to their customers when they call or go online to request information about services they use. By contrast, joint venture partners and independent contractors are prohibited from disclosing CPNI, 47 C.F.R. § 64.2007(b)(2)(ii) (2006); therefore, pretexters, who obtain CPNI from carriers by posing as customers, will be unable to obtain CPNI from joint venture partners and independent contractors.

Indeed, joint venture partners and independent contractors engaged in marketing activities for carriers are, in fact, an unlikely source of unauthorized

CPNI disclosure. Pretexters would have no way of knowing which joint venture partner or independent contractor a particular carrier uses for marketing assistance or which customer's CPNI was entrusted to those contractors or joint venture partners. Verizon *Ex Parte* 26 n.65 (J.A. 701). Cold calling marketers to seek the CPNI of a particular telephone customer is an obviously fruitless practice for pretexters or anyone else. Thus, the agency's failure to establish this most basic link between the pretexting problem and its decision to restrict protected speech between carriers and joint venture partners and independent contractors renders the opt-in rule unsustainable. *State Farm*, 463 U.S. at 43.

Second, there was no record evidence that carriers provide their independent marketing partners with the call detail information that pretexters seek. On the contrary, the evidence showed that carriers do *not* share call detail with independent contractors or joint venture partners engaged in marketing. Verizon Wireless Comments 10 (Apr. 28, 2006) (J.A. 608); Verizon *Ex Parte* 4 & n.1, 22, 24-25 (J.A. 679, 697, 699-700). Indeed, the FCC itself acknowledged that "certain carriers claim that they do not provide the type of CPNI to joint venture partners and independent contractors that are attractive to pretexters." Order ¶ 46 (J.A. 27); *id.* ¶ 37 n.117 (J.A. 22). Despite the absence of record evidence to the contrary, the FCC summarily claimed that "this does not appear to be the case across the entire industry" without citing any evidence supporting such a claim. *Id.* ¶ 46 (J.A.

27). A factual assertion without any evidentiary basis, such as this, does not satisfy the FCC's obligation to respond meaningfully to the evidence and arguments before it. *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).

This is the essence of arbitrary and capricious decisionmaking. *Nat'l Fuel*, 468 F.3d at 841 (rejecting agency's reliance upon "comments from the rulemaking that merely reiterated a *theoretical* potential for abuse" and "do not constitute record evidence"). If joint venture partners and independent contractors do not have call detail information and are not targeted by pretexters, there is no risk of unauthorized disclosure of that information and, *a fortiori*, there is no reason to restrict the lawful sharing of CPNI through an opt-in requirement. *HBO*, 567 F.2d at 36.

Third, there was no evidence of unauthorized disclosures of CPNI by joint venture partners or independent contractors. Because of the lack of evidence suggesting a problem with respect to joint venture partners and independent contractors, the FCC was forced to rely on evidence showing that pretexters fraudulently obtain CPNI directly from carriers to support its change in policy.[3]

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[3] Although the FCC recognized two other forms of unauthorized disclosure of CPNI—computer intrusion and disclosure by carrier insiders with access to CPNI—there is no evidence to support these findings, as Petitioner shows. Petr.'s Br. 30-31. Moreover, nothing connects these hypothetical threats to the sharing of CPNI with joint venture partners and independent contractors.

Order ¶ 12 & n.31 (J.A. 8) (noting that "carriers' record on protecting CPNI demonstrate[d]" the need for a change in policy). Indeed, after inquiring as to whether "there is a greater possibility of dissemination of" CPNI by marketing partners, NPRM ¶ 12 (J.A. 376), the Commission flatly conceded that "the record does not include specific examples of unauthorized disclosure of CPNI by a joint venture partner or independent contractor," Order ¶ 46 (J.A. 26). A rulemaking is arbitrary and capricious where the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. That is precisely the case here.

Thus, the Commission did not establish any link whatsoever between its assertion that "unauthorized disclosure of CPNI is a serious and growing problem" based on a record "replete with specific examples of unauthorized disclosure of CPNI," Order ¶¶ 44-45 (J.A. 25), and the sharing of CPNI with joint venture partners and independent contractors. This failure to establish a rational connection between the problem identified and the proposed solution renders the rule invalid. *See, e.g.*, *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1498 (D.C. Cir. 1988) (explaining that courts must "guard against an agency's drawing inferences that are 'arbitrary' in relation to the facts found, no matter how substantial may be the support for those facts"); *Fox Television Stations*, 280 F.3d at 1042 (explaining that FCC had "no valid reason to think the NTSO Rule is

necessary to safeguard competition" because there was no record evidence that broadcasters had undue market power).

This Court's decision in *National Fuel* illustrates the point. There, the Court invalidated a FERC order as arbitrary and capricious where the agency "provided no evidence of a real problem" because there was not "a single example of abuse by non-marketing affiliates." 468 F.3d at 841. FERC attempted to justify the order based on evidence of abuse by *marketing* affiliates; however, the court rejected this evidence as having "no bearing on whether the Standards should be extended to relationships with *non-marketing* affiliates." *Id.* at 842. Here too, the record reveals some instances of unauthorized disclosure by carriers, but there is no evidence of similar disclosures by joint venture partners and independent contractors. As the *National Fuel* Court explained, "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." *Id.* at 843. The basic, and necessary, connection between the facts found and the action taken is plainly absent here.

Finally, given the absence of record evidence linking the pretexting problem to joint venture partners and independent contractors, the FCC was compelled to rely on the unsupported assumption that "the more companies that have access to CPNI, the greater the risk of unauthorized disclosure" to justify the opt-in rule.

Order ¶ 46 (J.A. 26); *id.* ¶ 39 (J.A. 23) (identifying a "potential" for unauthorized disclosure when carriers share CPNI with joint venture partners and independent contractors). By simply sharing CPNI with another company, the FCC decided, "it is clear that carriers increase the odds of wrongful disclosure of this sensitive information." *Id.* ¶ 46 (J.A. 26); *id.* ¶ 41 (J.A. 24) ("It stands to reason that placing customers' personal data in the hands of companies outside the carrier-customer relationship places customers at increased risk . . . ."). The FCC saw "no reason why joint venture partners and independent contractors would be immune from this widespread problem." *Id.* ¶ 46 (J.A. 26).

These unsupported assumptions, upon which the opt-in rule rests entirely, are nothing more than speculation that unlawful disclosures, as a matter of theory, become more likely simply due to increased sharing. *See supra.* In the APA context, this Court has consistently rebuked agencies for using "speculative factual assertions" as a substitute for record evidence of a problem. *Edison Elec. Inst. v. EPA*, 2 F.3d 438, 446 (D.C. Cir. 1993); *Nat'l Fuel*, 468 F.3d at 842 (rejecting evidence that abuse was "possible" or could "potentially" occur); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 188-89 (D.C. Cir. 1986) (requiring "hard evidence in the record" instead of "observations, [that] while hardly implausible, [were] nonetheless completely conjectural"). Although the FCC can speculate that unauthorized disclosure of CPNI may occur by joint venture partners and

independent contractors, it "has not produced a shred of evidence indicating that has happened or is likely to happen." *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1064 (D.C. Cir. 2000).

Even if the APA did not forbid this type of conjectural rulemaking, the First Amendment strictly prohibits the use of rank speculation as a proxy for evidence of a real problem. *44 Liquormart*, 517 U.S. at 505-07 (rejecting use of "common sense" judgments lacking evidentiary support); *Pearson*, 164 F.3d at 656 (rejecting the government's reliance on "common sense judgment"). Instead, the First Amendment requires agencies to support restrictions on protected speech with record evidence and to demonstrate that the rule directly and materially advances the government's interest. *Compare Edenfield*, 507 U.S. at 770-71 (government's burden "is not satisfied by mere speculation or conjecture") *with Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557-61 (2001) (finding "ample documentation of the problem" such that restriction on tobacco advertising did not rest upon "mere speculation [and] conjecture" (internal quotation marks and citation omitted)). The complete lack of evidence that carriers even share call detail information with joint venture partners and independent contractors, or that any sharing of CPNI has resulted in unauthorized disclosures of customer information by those parties, is fatal to any effort to provide the strong justification necessary to impose restrictions on truthful commercial speech.

In fact, considering the absence of evidence in this case, the FCC committed the same error identified by the court in the *U.S. West* decision. The Tenth Circuit vacated the 1998 Order because the government had presented "no evidence showing the harm to either privacy or competition is real" or that "disclosure might actually occur." 182 F.3d at 1237. Instead, the FCC "relie[d] on speculation that harm to privacy and competition for new services will result if carriers use CPNI." *Id.*; *id.* at 1239 (rejecting FCC's contention that it could rely "upon its common sense judgment based on experience"). Here too, the record does not support an opt-in rule because there is no evidence that marketing partners have disclosed CPNI in contravention of their contractual obligations with carriers to protect it. Instead, the FCC speculated that the sharing of CPNI would increase the possibility of disclosure. This will not do when constitutionally protected speech is at stake. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000).

At bottom, the CPNI opt-in rule fails under either the APA or First Amendment because there is no record evidence of a problem with respect to the unauthorized disclosure of CPNI by joint venture partners and independent contractors. Nor is the rule supported by the Commission's more general appeals to "privacy." *U.S. West*, 182 F.3d at 1235 ("[P]rivacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it."). In fact, outside of pretexting, the Commission was acting on the

same record which caused it to *reject* opt-in as unnecessary and constitutionally unsound in its 2002 Order. It is thus no surprise that the Commission failed to adduce any evidence of unauthorized disclosures of CPNI by joint venture partners and independent contractors.

In short, instead of supporting its decision with record evidence, as required by the APA and First Amendment, the Commission relied upon speculation and conjecture. For this fundamental threshold reason, the opt-in rule is unlawful and should be vacated. [4]

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[4] While Intervenors fully support Petitioner's request for invalidation of the opt-in rule, Intervenors respectfully cannot join in one of Petitioner's alternative arguments that the FCC failed to consider the competitive disadvantage allegedly placed on certain carriers by the opt-in rule. Petr.'s Br. 69-71. The opt-in rule does not impose a disproportionate burden on any group of carriers because the rule applies equally to all providers, regardless of size or marketing strategy. *Cf. Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005). In any event, the rule is invalid with respect to all carriers for the several reasons explained above and other reasons given by Petitioner. Finally, Petitioner agrees that extending the opt-in rule to affiliates and agents, and thereby unjustifiably infringing more protected speech, is neither an option before the Court nor a means of salvaging this already unconstitutionally overbroad rule. Petr.'s Br. 39 n.12. Accordingly, this Court need not and should not rely on the "competitive disadvantage" ground advanced by Petitioner.

III. THE FCC FAILED TO SHOW THAT OTHER LESS RESTRICTIVE MEANS WOULD NOT HAVE BEEN SUFFICIENT TO ADDRESS THE SUPPOSED PROBLEM OF CPNI DISCLOSURE BY JOINT VENTURE PARTNERS AND INDEPENDENT CONTRACTORS.

Even assuming the existence of an actual problem with respect to CPNI disclosure by joint venture partners and independent contractors, the APA and the First Amendment still require the government to show that other, less restrictive means than the opt-in rule would not have been adequate to address that supposed problem. *See supra.* The FCC wholly failed to make that showing too.

Foremost, the FCC failed to avail itself of the most obvious, less burdensome approach in this context: the retention of the basic opt-out scheme that the FCC itself previously (and correctly) concluded is adequate to address any legitimate concerns. As the Tenth Circuit explained in striking down the FCC's 1998 Order, which adopted a broad opt-in rule for the sharing of CPNI, the FCC failed to choose the "obvious and substantially less restrictive alternative, an opt-out strategy." *U.S. West*, 182 F.3d at 1238. Although the Commission argued that it had thoroughly considered, but ultimately rejected an opt-out regime in the 1998 Order, *id.* at 1239; 1998 Order ¶¶ 88-107 (J.A. 137-47), the court found that "the FCC record" did "not adequately show that an opt-out strategy would not sufficiently protect customer privacy," *U.S. West*, 182 F.3d at 1239. "The [FCC] merely speculated that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the

opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires." *Id.*

In response to the *U.S. West* decision, the FCC itself concluded that opt-out, in conjunction with the other safeguards it put in place, is adequate to address any legitimate concerns, 2002 Order ¶ 2 (J.A. 290); *id.* ¶¶ 44-45 (J.A. 308-09), and recognized that an opt-in requirement would therefore contravene the First Amendment, *id.* ¶ 31 (J.A. 302). The only change in circumstance which the Commission identified since that time was the emergence of pretexters who obtained access to call detail from carriers in some instances by misrepresenting their identities. But, as explained above, that issue has nothing to do with joint venture partners and independent contractors.

Similarly, in *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003), the district court invalidated Washington's opt-in requirement for failing to choose an opt-out regime. Like the FCC's 1998 Order, Washington's CPNI regulations banned the use of call detail information for the marketing of communications-related services without the customer's opt-in consent. *Id.* at 1189. Although the state had "considered and rejected an opt-out approach," the court held the opt-in regime was not narrowly tailored because it was "subject to the same criticism as that expressed by the *U.S. West* court." *Id.* at 1194. In particular, the court found that stringent restrictions on the form and content of opt-

out notices, combined with an educational campaign, would be a less restrictive and equally effective alternative. *Id.*

Together, *U.S. West*, *Showalter*, and the Commission's own prior conclusion demonstrate that an opt-out requirement—in conjunction with stringent regulations on, say, the form and content of opt-out notices—offer the agency a far "less burdensome" alternative. This alternative is less restrictive than the unconstitutional opt-in regimes struck down in these cases and the narrower, but equally problematic, opt-in regime resurrected by the Commission here for joint venture partners and independent contractors. Indeed, the FCC reaffirmed in the *Order* that, in all other circumstances, an opt-out approach with appropriate safeguards is more appropriate and equally effective. Order ¶ 43 n.137 (J.A. 24). But here the agency simply rejected the opt-out approach in this context, without making a serious effort to show why this fundamental framework, coupled with additional safeguards if necessary, would not be sufficient to address the supposed problem.

First, with respect to the confidentiality agreements, the FCC claimed that they no longer "adequately protect a customer's CPNI in today's environment" because the potential for loss is heightened once CPNI leaves the carrier's possession and "is no longer in a position to personally protect the CPNI." *Id.* ¶ 39 (J.A. 23). *Second*, the Commission suggested that "current opt-out rules do not

adequately protect customer privacy because most customers either do not read or do not understand carriers' opt-out notices." *Id.* ¶ 44 (J.A. 25). Relying on studies that pre-dated its 2002 Order, the FCC found that "current" opt-out notices are "often vague and not comprehensible to an average customer." *Id.* ¶ 40 & n.126 (J.A. 23) (citing EPIC Comments 7 & nn.5-6 (Apr. 14, 2006) (J.A. 414)). Neither argument hits the mark.

The Commission's effort to discredit opt-out notices is illogical considering it has conceded that opt-out is permissible in all other contexts and that notices either are or can be made sufficiently clear in those other contexts. *Id.* ¶ 43 n.137 (J.A. 24); *see also* Petr.'s Br. 51-55. The FCC did not identify any good reason why the same is not true here. Indeed, the federal courts have already rejected the Commission's theory that consumers are hopelessly confused by, and will not read, opt-out notices, regardless of efforts to make those notices more prominent and clear.[5] In *Showalter*, Washington argued that opt-in was required because studies

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[5] The Commission rejected an opt-out regime in its 1998 Order based on the same concern that "customers may not actually consider CPNI notices under a notice and opt-out approach." 1998 Order ¶ 91 (J.A. 138). Despite this concern and the FCC's extensive consideration of opt-out in 1998, *id.* ¶¶ 88-107 (J.A. 137-47), the *U.S. West* court faulted the FCC for not choosing an opt-out regime. 182 F.3d at 1239. Thus, contrary to the Commission's assertion, nothing distinguishes the record in this case from the record in *U.S. West*. As in *U.S. West*, the Commission's concern about the readability of opt-out notices does not prove a basis for rejecting the opt-out alternative, even with respect to a more narrow category of speech.

showed "that consumers either never see and read such complicated opt-out notices, or they don't understand them." 282 F. Supp. 2d at 1194 (internal quotation marks and citation omitted). As the court explained, such evidence did not invalidate an opt-out approach. "Rather, it is evident that the *presentation* and *form* of opt-out notices is what determines whether an opt-out campaign enables consumers to express their privacy preferences." *Id.* The Commission acknowledged "this very fact when it devoted a substantial portion of its 2002 Order to dictating the form, content, and frequency of opt-out notices." *Id.* For this reason, the court concluded that "regulations that address the form, content, and timing of opt-out notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences." *Id.* at 1195. Like the State of Washington, the FCC's attempt to retreat to the inability of customers to read or understand opt-out notices defies all available evidence and, indeed, basic logic.

Moreover, confidentiality agreements, which joint venture partners and independent contractors by FCC rule must enter into before carriers can provide them with access to CPNI, create legally enforceable rights and responsibilities and can be adapted to meet changing circumstances. As the Commission previously recognized, these agreements place carriers and joint venture partners/independent contractors on equal footing in terms of incentives because carriers have ultimate

responsibility for the acts of their agents. 2002 Order ¶¶ 46-48 (J.A. 309-10); 47 C.F.R. § 64.2007(b)(2)(iii) (2006).

Indeed, by operation of federal statute, carriers are responsible for the acts and omissions of their agents, including joint venture partners and independent contractors. 47 U.S.C. § 217 (making carriers responsible for agents "or other person[s] acting for" a carrier); *see also* Qwest *Ex Parte* 2 (Jan. 18, 2007) (J.A. 665); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 525-26 (E.D. Cal.) (identical language in criminal statute imposes liability for acts of independent contractors), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978). The FCC has noted that this language "is extremely broad and clearly extends to" independent contractors "acting for" a carrier. *In re Long Distance Direct, Inc.*, 15 FCC Rcd 3297, ¶ 9 (2000). In particular, the Commission "has ruled on numerous occasions that carriers are responsible for the conduct of third parties acting on the carrier's behalf, including third party marketers. . . . To hold that the section does not include independent contractors would create a gaping loophole in the requirements of the Act and frustrate legislative intent." *Id.* Thus, regardless of whether a carrier uses an agent or independent contractor, the carrier cannot avoid responsibility for those parties "acting for" it. Given this federal legal obligation, and the incentives that naturally flow from it, the FCC's speculative assumption

that marketing partners will fail to protect CPNI, especially in light of the lack of evidence of a problem, *supra* Part II, was patently unreasonable.

Finally, the agency ignored numerous other less restrictive alternatives that could address the risk of CPNI disclosure by joint venture partners and independent contractors. For instance, the FCC could have investigated, in a meaningful way, enhancing its safeguards through strengthened confidentiality agreements, limiting the opt-in rule to the call detail information that pretexters target, or imposing further requirements relating to the form and content of opt-out notices. Verizon *Ex Parte* 25-27 (J.A. 700-02); Anti-Pretexting Working Group *Ex Parte* 2 (Oct. 31, 2006) (J.A. 658). The Commission, in fact, adopted many new measures to protect against pretexting in the *Order* itself, and concluded that those new measures (in combination with opt-out notices and other safeguards already in place) are adequate to address any concerns in all other circumstances. Order ¶¶ 15, 20 (J.A. 12, 15) (password-protection requirements); *id.* ¶ 43 n.137 (J.A. 24). The FCC also failed to adequately account for the impact of Congress' decision to directly address the problem by criminalizing pretexting in the interim as well. 18 U.S.C. § 1039.

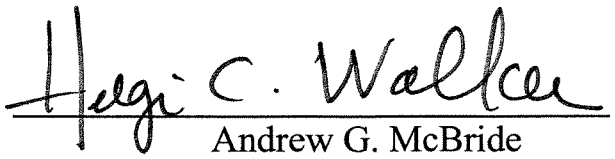
In sum, the FCC failed to consider or adopt a number of alternatives less restrictive than the opt-in approach that would have been sufficient to address any legitimate concerns. In particular, the opt-out approach itself, with appropriate

additional safeguards as needed, has been identified by at least two federal courts and the FCC itself as a less restrictive and equally effective approach. Further, the FCC entirely ignored other, less speech-restrictive alternatives for advancing the stated goal of protecting consumers' personal information.

CONCLUSION

For all these reasons, the petition for review should be granted and that portion of the *Order* adopting the CPNI opt-in rule vacated.

Respectfully submitted,



Michael E. Glover
Karen Zacharia
Mark J. Montano
VERIZON
1515 North Courthouse Road, Suite 500
Arlington, VA 22201
TEL: 703-351-3175
FAX: 703-351-3658

Counsel for Verizon

Richard B. McKenna, Jr.
Kathryn Marie Krause
Qwest Communications International Inc.
607 14th Street, N.W.
Suite 950
Washington, DC 20005
TEL: 303-383-6651
FAX: 303-896-1107

Counsel for Qwest

May 30, 2008

Andrew G. McBride
Helgi C. Walker*
William S. Consovoy
Brett A. Shumate
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

Counsel for Verizon and Qwest

* *Counsel of Record*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(B) because this brief contains 8,685 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

Helgi C. Walker

CERTIFICATE OF SERVICE

I, Helgi C. Walker, hereby certify that, on behalf of Verizon and Qwest, on May 30, 2008, I caused two copies of the foregoing **Brief for Intervenors Verizon and Qwest** to be mailed via first-class postage prepaid mail to the following:

Joel Marcus
Samuel Feder
Richard Welch
Federal Communications Commission
Office of General Counsel
445 12th Street, SW
Washington, DC 20554

Counsel for Respondent Federal Communications Commission

Nancy Caroline Garrison
Catherine G. O'Sullivan
United States Department of Justice
Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Counsel for Respondent United States of America

Christopher J. Wright
Harris, Wiltshire & Grannis
1200 18th Street, NW
Suite 1200
Washington, DC 20036

Counsel for Sprint Nextel Corporation

Matthew A. Brill
J. Scott Ballenger
Latham & Watkins LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004

Counsel for National Cable & Telecommunications Association

Daniel Leslie Brenner
Neal Morse Goldberg
National Cable & Telecommunications Association
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001-1431

Joseph Springsteen
Mick Stawasz
United States Department of Justice
1301 New York Avenue NW
Suite 600
Washington, DC 20530

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

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

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

Helgi C. Walker