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Control Over Personal Information: Who Has It, The Consumer or the Industry?

Antonia Runac

I. INTRODUCTION

Have you ever found yourself at home on a Sunday evening reading the newspaper, watching television, or spending time with your family when you receive a telephone call from your telecommunications carrier attempting to sell you additional products and services? You may have found yourself wondering whether you purchased a service that entitled your communications carrier to contact you at home on a Sunday evening to market additional services. If you knew you could stop these calls from your carrier, would you?

The 10th Circuit in *U.S. West, Inc. v. Federal Communications Commission* vacated a 1998 FCC Order which interpreted Section 222 of the Telecommunications Act of 1996 and adopted regulations to restrict telecommunications carriers' ability to use confidential customer information.¹ The court ruled that the Federal Communications Commission's ("FCC") regulations could not withstand First Amendment scrutiny² under the Supreme Court's test in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.³ The 10th Circuit's decision has vast implications for consumers and their ability to control personal information.

Part II of this student article first discusses the FCC regulations at issue in *U.S. West* and then identifies the elements of the *Central Hudson* test which were applied by the 10th Circuit. Part III discusses the *U.S. West* decision. Part IV analyzes the *U.S. West* decision as it applied the *Central Hudson* analysis. Part V explores the implications of the decision on consumers and questions whether the consumer actually has control over his personal information.

II. BACKGROUND

A. Section 222 of The Telecommunications Act of 1996

1. Overview of The Language of Section 222

Congress' goal in passing the Telecommunications Act of 1996 ("TCA")

was to establish a “new pro-competitive, deregulatory national policy framework’ that would replace the statutory and regulatory limitations on competition” in the telecommunications industry.⁴ While the TCA paved the way for new telecommunications technologies and competitive market forces, it also carried the risk of curbing consumer privacy interests.⁵ Congress’ attempt to strike a balance between consumer privacy and competitive interests relating to the telecommunications industry resulted in the enactment of Section 222 of the Telecommunications Act of 1996 (“TCA”).⁶

Section 222 is entitled “Privacy of customer information” and states that “every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to...customers.”⁷ In order to protect consumer privacy, Section 222 places restrictions on the use of customer proprietary network information (“CPNI”) obtained by telecommunications carriers in providing telecommunications service to customers.⁸ Section 222(f)(1) defines customer proprietary network information as:

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

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.”⁹

Simply put, CPNI is information that the carrier obtains from the customer in its provision of a telecommunications service. Furthermore, restrictions on use, disclosure, or access of CPNI are embodied in Section 222(c)(1) which states the following:

“Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from

which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.”¹⁰

In other words, unless the carrier has customer approval, a telecommunications carrier may not use, disclose, or permit access to CPNI for purposes unrelated to the service from which the information is derived. Finally, Section 222(d) provides three exceptions to the privacy requirements elucidated in Section 222(c)(1). A telecommunications carrier may use, disclose, or permit access to CPNI:

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

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

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.”¹¹

On the most fundamental level, Congress’ language indicates that a telecommunications carrier is prohibited from using, disclosing, or permitting access to CPNI in a manner not delineated in Section 222, unless it obtains customer approval.

2. The FCC Regulations Implementing Section 222

The FCC released its Second Report and Order on February 26, 1998 (“CPNI Order”) which promulgated regulations to implement Section 222 of the TCA relating to telecommunications carriers’ use of CPNI.¹² The purpose of the CPNI Order was to resolve questions for telecommunications carriers regarding their statutory obligations under Section 222.¹³ The two most pervasive concerns that carriers expressed were: what the term “telecommunications service” meant under Section 222(c)(1) and what form of customer approval is

required under Section 222(c)(1).¹⁴

Although the 10th Circuit vacated the FCC's order on the grounds that the government chose a form of approval that raises constitutional doubt, a brief background of the government's approach to both concerns expressed by carriers is informative.

a. The Total Service Approach

The FCC regulations interpret Section 222(c)(1) by means of a structure known as the "total service approach."¹⁵ Under this framework, the term "telecommunications service" is divided into three categories: (1) local service; (2) interexchange service (most long-distance service); and (3) commercial mobile radio service ("CMRS") (mobile or cellular service).¹⁶ The regulations state that a carrier may use, disclose, or permit access to CPNI "for the purpose of providing or marketing service offerings among the categories of service (i.e., local, interexchange, and CMRS) already subscribed to by the customer from the same carrier, without customer approval."¹⁷

In other words, a carrier is permitted to use, disclose, or share CPNI for marketing purposes within a category of service, without customer approval, as long as the customer already subscribes to that category of service.¹⁸ In turn, a carrier may not use, disclose or permit access to CPNI to market categories of service to which the customer does not subscribe unless the carrier obtains customer approval.¹⁹

The total service approach "allows carriers to use the customer's entire record, derived from the complete service subscribed to from that carrier, for marketing purposes within the existing service relationship."²⁰ For example, "a carrier whose customer subscribes to service that includes a combination of local service and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, but not to market long distance service to that customer because the customer's service excludes any long distance component."²¹ If the customer has subscribed to a service, carriers are permitted to use CPNI to market offerings related to that service.

Finally, the regulations prohibit a carrier from using, without customer approval, CPNI gained from any of the three mentioned services to (1) market customer premises equipment ("CPE") or information services (i.e., call answering, voice mail, Internet access services); (2) identify or track customers who call competing carriers; and (3) to regain the business of a former customer.²²

b. Customer Approval

Section 222(c)(1) does not indicate what form customer approval should take in relation to use, disclosure, and access to CPNI. Nonetheless, the regulations implement an “opt-in” approach.²³ This approach requires a carrier to obtain prior express approval from a customer through written, oral or electronic methods.²⁴ The FCC determined that an express approval mechanism would be the best way to further Congress’ desire to “protect privacy and competitive interests, while preserving the customer’s ability to control dissemination of sensitive information.”²⁵ In addition, the regulations state that if a carrier obtains express approval for the use of CPNI outside of the customer’s total service relationship, the approval must stay in effect until the customer revokes or limits the approval.²⁶ Finally, before a carrier can solicit customer approval, it must provide the customer a one-time notification of his right to restrict the use of, disclosure of, and access to his CPNI.²⁷

B. The First Amendment and Commercial Speech: Central Hudson Gas & Electric Corporation v. Public Service Commission of New York

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* (“*Central Hudson*”), the United States Supreme Court reversed the New York Court of Appeals’ decision sustaining a regulation of the New York Public Service Commission which banned, in totality, promotional advertising by an electrical utility.²⁸ The regulation was based on the Commission’s finding that the interconnected utility system in the state of New York did not have a sufficient fuel supply to satisfy consumer demands for the 1973-74 winter.²⁹ The Supreme Court held that the regulation violated the First and Fourteenth Amendments because the state’s complete suppression of commercial speech was more extensive than necessary to further the state’s asserted interest in energy conservation.³⁰

The Supreme Court has defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”³¹ Likewise, commercial expression “assists consumers and furthers the societal interest in the fullest possible dissemination of information.”³² Accordingly, commercial speech is protected by the First Amendment, as applied to the States through the Fourteenth Amendment, from unjustified governmental regulation.³³ However, the Supreme Court noted that commercial speech is afforded lesser protection than other constitutionally guaranteed expression.³⁴ Thus,

in order to determine what protection shall be afforded commercial expression, the Court will examine the nature of the expression and the governmental interests served by its regulation.³⁵

To preserve the informational function of advertising, the government may prohibit forms of commercial speech that are misleading or related to unlawful activity.³⁶ As a general rule, commercial messages that give the public accurate information about a lawful activity, such as the sale of a product or service, may not be regulated by the government.³⁷ However, the government may regulate commercial speech if it is intended to deceive the public.³⁸ If the communication is neither misleading nor related to unlawful activity, the government must assert a substantial interest for its restrictions on commercial speech.³⁹ Thus, the initial inquiry in cases determining the constitutionality of government regulation of commercial speech is whether the communication is not misleading and concerns lawful activity.⁴⁰

As noted, if the court finds that the communication is not misleading and concerns a lawful activity, the court must then ask whether the government has asserted a substantial interest in restricting commercial speech.⁴¹ If the asserted government interest is substantial, the court will then determine whether the limitation on commercial expression is proportional to the interest.⁴² The Court has espoused two criteria by which this requirement can be assessed.⁴³ First, the regulation must directly advance the asserted governmental interest.⁴⁴ Second, if the government's asserted interest can be furthered by less restrictive means, the "excessive restrictions cannot survive."⁴⁵

The Supreme Court held that the electrical utility's promotional advertising was protected commercial speech because it increased the amount of information available for consumer decisions.⁴⁶ The Court also held that based on "our country's dependence on energy resources beyond our control," the state had a substantial interest in energy conservation and the state's interest was directly advanced by the order.⁴⁷ However, the Court concluded that the state's complete ban on promotional advertising, which is commercial speech protected by the First and Fourteenth Amendments, was more extensive than necessary to further the state's interest.⁴⁸ The Court held that instead of completely banning promotional advertising, the state could have attempted to restrict the content of the advertising by requiring "advertisements to include information about the relative efficiency and expense of the offered service, both under current conditions and the foreseeable future."⁴⁹

The Supreme Court's four part analysis in *Central Hudson* can be summarized as follows: (1) Is the expression protected by the First Amendment; (2) Is the asserted governmental interest substantial; (3) Does the regulation directly advance the governmental interest; and (4) Is the regulation more extensive than necessary to serve that interest?⁵⁰

III. *U.S. WEST, INC. V. FEDERAL COMMUNICATIONS COMMISSION*

In *U.S. West, Inc. v. Federal Communications Commission*, U.S. West, Inc., challenged the FCC's CPNI Order on the grounds that the regulations interpreting Section 222 of the TCA, which required telecommunications companies to obtain express approval from a customer before the company can use the customer's CPNI violated the First and Fifth Amendments.⁵¹ The United States Court of Appeals, 10th Circuit, vacated the FCC's CPNI Order, concluding that the regulations violated the First Amendment.⁵² The 10th Circuit held: "(1) CPNI was 'commercial speech,' for purposes of the First Amendment's free speech clause; (2) FCC failed to show that its regulations directly and materially advanced FCC's asserted interests in privacy and increased competition; and (3) the regulations were not narrowly tailored to further those asserted interests."⁵³

A. *Standard of Review*

The appropriate standard of review in cases where a final FCC order and interpretation of a federal statute are at issue is governed by the Administrative Procedure Act and the standard set forth by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵⁴ Under the Administrative Procedure Act, the court will determine whether the FCC order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or "contrary to constitutional right, power, privilege, or immunity."⁵⁵ In addition, when an agency's interpretation of a statute is at issue, the court will apply the two-step approach espoused by the Court in *Chevron*: (1) If Congress has addressed the question at issue, the court must give effect to Congress' express intent; (2) If Congress has not spoken to the question at issue (the statute is silent or ambiguous), the court will defer to the agency's interpretation as long as it is reasonable.⁵⁶ However, if the agency interpretation is unconstitutional, it will not be given *Chevron* deference.⁵⁷ Not only will an agency interpretation not be given deference if it is unquestionably unconstitutional, it will also not be given deference if it raises "serious constitutional questions."⁵⁸

B. Applying Central Hudson to U.S. West, Inc.

1. Do CPNI Regulations Implicate the First Amendment?

The 10th Circuit rejected the government's argument that the FCC's CPNI regulations did not violate or restrict the petitioner's First Amendment rights.⁵⁹ The government asserted that the regulations only kept the petitioner from using CPNI to target customers and did not prohibit or limit communication between the petitioner and its customers, thereby eliminating the implication of the First Amendment.⁶⁰ The court stated that the government's argument was "fundamentally flawed" because the First Amendment protects both the speaker and the audience and "a restriction on either of these components is a restriction on speech."⁶¹ Thus, the court dismissed the government's argument by first extracting the notion of targeted speech from the relationship between a speaker and a composite audience, and then by equating speech designed for a particular audience with speech designed for a larger random audience for all intensive purposes of implicating the First Amendment.⁶² Finally, the court went on to conclude that the purpose of petitioner's targeted speech was solicitation, and in turn, the targeted speech qualified as commercial speech.⁶³ Following the court's reasoning, the regulations implicated the First Amendment by restricting protected commercial speech.⁶⁴ (Both parties stipulated that the commercial speech based on CPNI was truthful and not misleading.)⁶⁵

2. Does Government Have a Substantial Interest in Regulating Use of CPNI?

The government argued that the CPNI regulations advanced two substantial state interests: customer privacy and promoting competition.⁶⁶ Although the court conceded that concerns for privacy compelled the enactment of Section 222 of the TCA, it concluded that unless the government could specifically state and justify the privacy interest, the second prong of the *Central Hudson* analysis could not be satisfied.⁶⁷ Moreover, the court stated that "in the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information...would inflict specific and significant harm on individuals."⁶⁸ The court then inferred from the CPNI Order, with reservation, that disclosure of CPNI could be embarrassing for some individuals and therefore, could constitute harm on the individual.⁶⁹

However, it questioned whether the privacy interest was truly substantial and assumed, “for sake of the appeal,” that the government asserted a substantial interest in shielding consumers from the disclosure of sensitive and embarrassing information.⁷⁰

The court rejected the government’s asserted interest in competition.⁷¹ The court went on to conclude that even though the broad purpose of the TCA is to promote competition, Section 222 is designed to promote customer privacy.⁷² Because the court viewed these two purposes as conflicting, it decided that Section 222’s attempt to balance competitive and privacy interests contradicts the pro-competitive purpose of the TCA.⁷³ Additionally, the court addressed three considerations that fostered its conclusion: (1) the plain language of Section 222 deals mainly with privacy; (2) Section 222 is different from prior CPNI restrictions formulated to advance competition because it applies to all telecommunications carriers, not just the chief ones, which according to the court, indicates restriction on competition; (3) Section 222 allows for full use of CPNI if customer approval is procured.⁷⁴ Based on these considerations and the overall purpose of Section 222, the 10th Circuit concluded that the government’s asserted interest in competition, alone, did not justify the CPNI restrictions.⁷⁵ At the same time that the court concluded that competition was not the primary purpose in the enactment of Section 222, the court stated that it would consider the government’s asserted interest in competition in conjunction with the government’s asserted interest in protecting consumer privacy which in turn, led the court to the next prong of the *Central Hudson* analysis.⁷⁶

3. Do the Regulations Directly Advance the Government’s Interest?

The court began its analysis of the third prong of the *Central Hudson* test by identifying the government’s burden as it relates to the third prong: “The government must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁷⁷ The court determined that the government failed to provide any evidence indicating that the harm to either privacy or competition was real.⁷⁸ The court stated that the government presented no evidence as to how disclosure might occur, or that disclosure of CPNI would actually occur, and therefore, the government’s concern that dissemination of the information might cause embarrassment was an unsupported abstract concern.⁷⁹ Similarly, the court concluded that the government provided no analysis to show how allowing carriers to market new services by means of CPNI might deter competition, or if

that might actually occur.⁸⁰

4. *Are Regulations Narrowly Tailored?*

The court stated that even if the government asserted substantial interests in privacy and competition and the regulations directly advanced those interests, the FCC regulations are not properly tailored to the objective.⁸¹ According to the court, "in order for a regulation to satisfy this final *Central Hudson* prong, there must be a fit between the legislature's means and its desired objective - 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'"⁸² Thus, the means chosen by the government have to be "narrowly tailored" to the government's objective.⁸³

The government argued that the record provided ample support that the regulations were narrowly tailored because a U.S. West, Inc. study showed that when affirmatively asked for approval to use CPNI, a majority of individuals denied authorization.⁸⁴ Furthermore, the study demonstrated that 33% of individuals who were called refused to grant approval to use their CPNI, 28% granted approval, and 39% hung up or asked not to be called again.⁸⁵ In addition, the government argued that it could "rely upon its common sense judgment based on experience, notwithstanding the inclusiveness of the rulemaking record."⁸⁶

The court refused to extend the "common sense judgment" rule to the government in the case at hand because the FCC's common sense judgment could only support a finding that it acted rationally in promulgating the regulations, and under *Central Hudson*, the government must also prove that the regulations were narrowly tailored.⁸⁷ Here, the court rejected U.S. West, Inc.'s study as insufficient evidence that customers do not want carriers to use their CPNI, thereby renouncing the government's belief that the regulations were narrowly tailored.⁸⁸ In reaching its conclusion that the regulations were not narrowly tailored, the court noted that the FCC record did not "adequately show that an opt-out strategy (one in which customer approval for the use of CPNI is inferred until the customer opts-out of such use) would not sufficiently protect consumer privacy."⁸⁹ Furthermore, the court stated that the absence of a discussion regarding the implications of an opt-out strategy in the FCC record "hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires."⁹⁰

5. *The 10th Circuit's Holding*

The Court held that the government failed to consider First Amendment implications when it promulgated regulations pursuant to Section 222 of the TCA.⁹¹ According to the court, even if the government's asserted interests were substantial, the FCC failed to justify its decision to adopt an opt-in procedure.⁹² Following its own reasoning, the court held that the regulations failed to satisfy the *Central Hudson* four-part test and therefore, the regulations, at the very least, raise constitutional doubt.⁹³ Because the 10th Circuit found that the FCC's raise serious constitutional concern, the court did not give the regulations deference under *Chevron*. As a result, the court vacated the FCC's CPNI Order and the regulations adopted in connection therewith.⁹⁴

IV. ANALYSIS

A. *The First Amendment Challenge*

The 10th Circuit did not answer whether the FCC regulations implicated the First Amendment. The CPNI Order properly noted, "Carriers remain free to communicate with present or potential customers about the full range of services they offer ... what carriers cannot do is use confidential CPNI in a manner that is not permitted by the statute."⁹⁵ At the very least, the CPNI Order impacts a carrier's ability to target certain customers for marketing purposes by requiring it to obtain express instead of implied approval.⁹⁶ Instead of concentrating on the method of approval adopted by the regulations, the 10th Circuit improperly focused on the usage of CPNI as defined by Section 222.⁹⁷ By doing so, the court addressed the constitutionality of Section 222, not the method of approval adopted by the FCC. Therefore, the court's analysis under *Central Hudson* was immaterial.

B. *The FCC's Interpretation of Section 222 Is Worthy of Chevron Deference*

The plain language of the Section 222(c)(1) clearly indicates that Congress intended for telecommunications carriers to obtain customer approval prior to using, disclosing, or sharing CPNI.⁹⁸ When Congress does not explicitly define a statutory term, a court should read the term in accordance with its "ordinary or natural meaning."⁹⁹ Judge Briscoe, the dissent in *U.S. West*, properly noted that although Congress did not specifically define the term "approval" in Section

222(c)(1), the term's ordinary and natural meaning implies an informed decision, thereby indicating that "Congress intended for customers to make an informed decision as to whether they would allow their CPNI to be used."¹⁰⁰

However, Section 222(c)(1) is ambiguous as to what method or form of approval carriers may use to obtain CPNI.¹⁰¹ Since the statute is ambiguous in this sense, the question then becomes whether the agency interpretation is reasonable.¹⁰² Following Congress' purpose to balance both competitive and consumer privacy interests, the CPNI Order concluded that an opt-in approach to customer approval was the best way to further Congress' purpose:

"In order to implement this provision (Section 222), we therefore must determine what method of approval will best further both privacy and competitive interests, while preserving the customer's ability to control dissemination of sensitive information. We conclude, contrary to the position of a number of parties, that an express approval mechanism is the best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI."¹⁰³

Where the opt-out approach burdens the consumer by requiring him to exert extra effort to protect his confidential information, the opt-in approach alleviates the burden by assuring the customer his right to privacy. Clearly, an express approval method is the most reasonable interpretation in light of Congress' purpose. The FCC regulations adopting the opt-in approach should have been upheld.

V. IMPACT

The 10th Circuit's decision exhibits a disregard for consumer privacy and control issues. By vacating the CPNI Order which adopts a prior express approval method, the court overlooked the consumer's genuine concern for privacy and control over personal information. The consumer is left in the hands of the carrier who has little to no interest for the consumer's privacy.

In a telecommunications carrier-customer relationship, the consumer should pay a carrier for a telecommunications service and in turn, the carrier should provide the service without violating the consumer's privacy. However, this very simple notion becomes complicated when the telecommunications carrier must obtain

information which is essential to the provision of the service, but which is ultimately the consumer's personal information. The carrier is benefitting two-fold. Not only is the carrier receiving money from the consumer for the service, it is obtaining confidential information from the consumer which it uses to market other products and services. As a result of this unequal exchange between carrier and consumer, and without federal regulation and court decisions balancing the competing interests between consumer and carrier, the carrier is in a better position to serve its own interest in making a profit, while the consumer, often unknowingly, relinquishes control over personal information which aids the carrier's venture.

The 10th Circuit decision to ignore the inherent unequal relationship between a carrier and a consumer gives free reign to carriers to exploit the consumer. The court's ruling does not promote good business and competition. It simply creates an incentive for existing carriers and those looking to build a telecommunications business to do whatever they want within the industry without fear of government intrusion, even if it means exploiting the people. The court's outright distaste for an opt-in method of approval for the use of CPNI, flies in the face of Congress and ultimately, the people.

VI. CONCLUSION

The 10th Circuit, in *U.S. West v. FCC*, failed to accept the FCC's consumer-focused attempt to implement Section 222 of the TCA. Instead, the court ruled that the FCC rules violated the First Amendment. The court reversed the opt-in method of consumer approval regarding use, disclosure, and access to CPNI. The court's decision gives carriers permission to make use of CPNI for purposes of widespread marketing without having to obtain prior express approval. If the decision stands, the carrier has implied approval from the consumer to use CPNI, unless the consumer opts-out. Unfortunately, the consumer ends up paying his hard-earned dollar to lose control over personal information.

Endnotes

1. 182 F.3d 1224 (10th Cir.1999).
2. *See id.*

3. See 447 U.S. 557 (1980).
4. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); see also In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking ("CPNI Order"), February 19, 1998, ¶ 1 (visited Sept. 25, 1999) <<http://www.fcc.gov/Bureaus/Common Carrier/Orders/fcc98-27.wp>>.
5. See CPNI Order ¶ 1.
6. See *id.* ¶ 3.
7. 47 U.S.C.A. §222(a) (1999).
8. See *id.* at §222(c)(1).
9. See *id.* at §222(f)(1).
10. See *id.* at §222(d).
11. See *id.*
12. See CPNI Order.
13. See *id.*
14. *Id.*
15. See 47 C.F.R. §64.2005 (1999); see also, CPNI Order at ¶25 (stating that "the total service approach appropriately furthers Congress' intent to balance customer privacy and competitive concerns, and maximize customer control over carrier use of CPNI).
16. See *id.* at §64.2005(a).
17. See *id.*
18. *Id.*; see also, Telecommunications Carriers' Use of Consumer Proprietary Network Information and Other Customer Information, 63 Fed.Reg. 20326,27 (1998) (to be codified at 47 C.F.R. pt. 22) (stating that "[T]he statutory language makes clear that Congress did not intend for the implied customer approval to use, disclose, or permit access to CPNI under section 222(c)(1)(A) to extend to all of the categories of telecommunications services offered by the carrier...Congress' repeated use of the singular 'telecommunications service' must be given meaning. Section 222(c)(1) prohibits a carrier from using CPNI obtained from the provision of a 'telecommunications service' for any purpose other than to provide 'the telecommunications service from which such information is derived' or services necessary to, or used in, provision of 'such telecommunications service'...this language plainly indicates that Congress both contemplated the possible existence of more than one carrier service and made a deliberate decision that section 222(c)(1)(A)

not extend to all.”.

19. See 47 C.F.R. §64.2005(a).

20. See CPNI Order ¶ 30.

21. See *id.*

22. See §64.2005(b)(1)-(3).

23. See *id.* at §64.2007(b).

24. *Id.*

25. See CPNI Order ¶ 91. (stating: “We conclude, contrary to the position of a number of parties, that an express approval mechanism is the best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI...Our conclusion is guided by the natural, common sense understanding of the term ‘approval,’ which we believe generally connotes an informed and deliberate response.”); see also 63 Fed.Reg. 20329 (quoting H.R. 458, 104th Cong. (1996)) (“We believe that, although the legislative history offers no specific guidance on the meaning of ‘approval’ in section 222(c)(1), the language in the Conference Report, explaining that section 222 strives to ‘balance both competitive and consumer privacy interests with regard to CPNI,’ strongly supports our conclusion that express approval is the better reading of the statutory language”).

26. See 47 C.F.R. §64.2007(d).

27. See *id.* at §64.2007(d)(2) (stating that “[t]he notification must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose or permit access to, the customer’s CPNI.”).

28. 447 U.S. at 557 (1980).

29. See *id.* at 558.

30. See *id.* at 557.

31. See *id.* at 561 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (holding “speech does not lose its First Amendment protection...even though it may involve solicitation to purchase or otherwise pay or contribute money”).

32. See *id.* at 561-562.

33. *Id.* (citing *Virginia Bd.*, 425 U.S. at 761-762).

34. *Id.* (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 at 456, 457 (1978)).

35. See *id.* at 563.

36. *See id.* at 563-564 (stating that “[t]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”).
37. *Id.*
38. *Id.*
39. *Id.*
40. *See id.* at 566.
41. *See id.*
42. *See id.* at 564.
43. *See id.*
44. *Id.*
45. *Id.*
46. *See id.* at 567.
47. *See id.* at 568.
48. *See id.* at 570.
49. *See id.* at 571.
50. *See id.* at 557.
51. 182 F.3d at 1227.
52. *See id.* at 1224.
53. *See id.*
54. 467 U.S. at 837 (1984); *see also* 5 U.S.C. §706.
55. 5 U.S.C. §706(2)(A)-(B).
56. 467 U.S. at 837.
57. 182 F.3d. at 1230.
58. *See id.* (citing *Rust v. Sullivan and New York*, 500 U.S. 173 (1991)).
59. 182 F.3d at 1232.
60. *See id.*
61. *Id.* (citing *Virginia State Bd.*, 425 U.S. at 756-757).

62. *See id.* (stating that “a restriction on speech tailored to a particular audience, ‘targeted speech,’ cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, ‘broadcast speech’”).

63. *See id.* at 1233.

64. *See id.*

65. *Id.*

66. *See id.* at 1234.

67. *See id.* at 1234. (examining the concept of privacy in broad terms and concluded that the expansive scope of privacy requires “particular attention to attempts by the government to assert privacy as a substantial state interest”)

68. *See id.* at 1235. Examples of harm included embarrassment, ridicule, harassment, or misappropriation.

69. *See id.* at 1235. (examining portions of the CPNI Order which state that CPNI involves personal information ... “such as to whom, where, and when a customer places a call, as well as the types of service offerings to which the customer subscribes” (quoting CPNI Order ¶ 2).

70. *See id.* at 1235.

71. *See id.* at 1236.

72. *See id.*

73. *Id.*

74. *Id.*

75. *See id.* at 1237.

76. *See id.*

77. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) which states: “This burden is not satisfied by mere speculation or conjecture.”).

78. *Id.*

79. *Id.*

80. *See id.* at 1238.

81. *See id.*

82. *Id.* (quoting *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. at 480 (1989)).

83. *Id.* (stating that “while clearly the government need not employ the least restrictive means to accomplish its goal, it must utilize a means that is ‘narrowly tailored’ to its desired objective”) (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. at 632 (1995)).
84. *See id.* at 1239; *see also* CPNI Order ¶ 100.
85. 182 F.3d. at 1239.
86. *See id.* (citing *FCC v. Nat’l Citizens Comm’n for Broad.*, 436 U.S. at 775 (1978)).
87. *See id.* at 1239.
88. *See id.* (stating that “the results may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally”).
89. *Id.*
90. *Id.*
91. *See id.* at 1240.
92. *See id.*
93. *Id.*
94. *Id.*
95. *See* CPNI Order ¶ 106.
96. *See id.* ¶ 86.
97. 182 F.3d at 1244 (Briscoe, dissent stating that “[a]lthough the majority attempts to explain how the CPNI Order impacts U.S. West’s free speech rights, its analysis is frustratingly vague. Instead, the majority strays from the narrow scope of the CPNI Order and effectively takes into account the statutory restrictions on CPNI usage. Unfortunately, this error permeates not only the majority’s threshold analysis of whether the CPNI Order implicates U.S. West’s free speech rights, but its subsequent First Amendment analysis as well”).
98. *See* 47 U.S.C.A §222(c)(1).
99. *Smith v. United States*, 508 U.S. 223, 228 (1993).
100. 182 F.3d at 1241.
101. *See* CPNI Order ¶ 87.
102. 467 U.S. at 843.

103. CPNI Order ¶ 87.

