

# Will the FCC's New CPNI Rules Survive Judicial Review?

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# Appeal Topics

- Likely future appeals
  - Burden of proof after CPNI disclosure
  - Application to wholesalers
- The NCTA petition in the D.C. Circuit

# Pending Petitions for Reconsideration

- USTA

Seeks amendment to make clear that the FCC has the burden of proof when alleging violations of the CPNI rules.

- Challenges the FCC's assertion that when CPNI disclosure occurs, it will assume that the carrier's "policies and procedures, are [not] reasonable in light of the threat posed by pretexting and the sensitivity of the customer information at issue."

- CTIA
  - Same argument as USTA regarding the burden of proof in enforcement proceedings.
  - Also requests further guidance regarding the “reasonable measures” that a carrier must take to protect CPNI.
- Appeal is likely next year if the rule is not changed

# Are wholesalers covered by the CPNI rules?

- Section 222 states that “[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of . . . customers.”
  - The FCC has not defined “customers” for purposes of Section 222
- Carriers are customers of wholesalers
  - Information about carriers’ activities meets the definition of “CPNI” in Section 222(h)(1)
    - It “relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship . . . .”

- Does this mean wholesalers must
  - put in place all the safeguards required by the 2007 CPNI Order and
  - File certifications required by the Order?
- Will an answer come through an enforcement proceeding and a court appeal?

# Petition for Review

- *National Cable & Telecommunications Association v. FCC*, D.C. Cir. No. 07-1312, filed August 2007
- “[R]equiring telecommunications carriers and providers of interconnected voice-over-IP services to obtain “opt in” customer approval before disclosing CPNI to joint venture partners and independent contractors is arbitrary and capricious and violates the First Amendment to the United States Constitution.”

# Business Implications of New Rule

- Independent contractors
  - Used by most carriers for marketing purposes
  - Burden of new rule is relatively equal
- Joint venture partners
  - JVs not used by most carriers for marketing
  - JVs not used by the national wireless carriers for most of their network coverage
  - Cable companies do use JVs to obtain regional and national wireless coverage
    - Sprint
  - Burden of new rule falls on cable companies and smaller regional wireless carriers, who will only be able to share a limited amount of data and at greater expense in providing a “triple play”

# Litigation Positions

- NCTA and others will challenge opt-in globally
- Large wireless carriers could challenge the opt-in rule for independent contractors but defend the opt-in rule for joint venture partners
  - Difficult balancing act with significant downside potential

# Did the FCC act arbitrarily or capriciously?

- Section 222 states that “[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of . . . customers.”
  - Is any opt-in rule an unreasonable interpretation of Congress’s broad command in section 222?
- Assuming the answer is no, was it arbitrary and capricious
  - to apply an opt-in requirement to disclosure of CPNI to outside contractors and joint venture partners but not to carrier employees?
  - to apply the same rule to outside contractors and joint venture partners?

# Does the opt-in rule violate the First Amendment ?

- Under the Central Hudson test the government can restrict lawful commercial speech that is not misleading only if:
  - 1- there is a substantial state interest in regulating the speech
  - 2- the regulation directly and materially advances that interest
  - 3- the regulation is no more extensive than necessary to serve the interest

# *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999)

The Tenth Circuit found the global FCC opt-in rule lacking on all three substantive prongs of the *Central Hudson* test:

- It expressed doubt that protection of privacy interests was a substantial state interest justifying regulation.
  - “The government presents no evidence showing the harm to either privacy or competition is real.”
- It concluded that the FCC had not shown that the rule materially advanced the state’s interests.
  - “While protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. Indeed, we do not even have indication that the disclosure might actually occur.”
- It concluded that the rule was not narrowly tailored.
  - Even if there was evidence showing harm to privacy interests from unauthorized disclosure of CPNI, the record “d[id] not adequately show that an opt-out strategy would not sufficiently protect customer privacy.”

# What's different between 1999 and 2007?

- Narrower scope of the opt-in rule
  - Does not apply to carriers' internal use of CPNI
- Substantial state interest in protecting personal data such as CPNI is now widely acknowledged
- Fuller FCC evidentiary record regarding
  - How the rule materially advances the state's interests
  - Whether the rule is sufficiently narrowly tailored

# Key Findings in the 2007 CPNI Order

We find, based on the record in this proceeding, that requiring carriers to obtain opt-in consent from customers before sharing CPNI with joint venture partners and independent contractors for marketing purposes satisfies the *Central Hudson* test. Specifically, we find that: (1) unauthorized disclosure of CPNI is a serious and growing problem; (2) the government has a substantial interest in preventing unauthorized disclosure of CPNI because such disclosure can have significant adverse consequences for privacy and safety; (3) the more independent entities that possess CPNI, the greater the danger of unauthorized disclosure; (4) an opt-in regime directly and materially advances privacy and safety interests by giving customers direct control over the distribution of their private information outside the carrier-customer relationship; and (5) an opt-in regime is not more extensive than necessary to protect privacy and safety interests because opt-out rules, the alternative cited by the Tenth Circuit in *U.S. West, Inc. v. FCC*, do not adequately secure customers' consent for carriers to share CPNI with

unaffiliated entities. In short, given the undisputed evidence demonstrating that unauthorized disclosures of CPNI constitute a serious and prevalent problem in the United States today, we believe that carriers should be required to obtain a customer's explicit consent before sending such sensitive information outside of the company for marketing purposes. In light of the serious damage that unauthorized CPNI disclosures can cause, it is important that individual consumers determine if they want to bear the increased risk associated with sharing CPNI with independent contractors and joint venture partners, and the only way to ensure that a consumer is willingly bearing that risk is to require opt-in consent. In this vein, we note that most United States privacy laws, such as the Family Educational Rights and Privacy Act, Cable Communications Policy Act, Electronic Communications Privacy Act, Video Privacy Protection Act, Driver's Privacy Protection Act, and Children's Online Privacy Protection Act, do not employ an opt-out approach but rather require an individual's explicit consent before private information is disclosed or employed for secondary purposes.

Paragraph 45, 2007 CPNI Order [footnotes omitted].

# Definitive Issues on Review

- Does the rule materially advance the state's interest?
  - FCC has identified the interest as preventing any type of CPNI disclosure, whether through pretexting, insider disclosure, or computer intrusion

Is the rule is sufficiently narrowly tailored?

- Did the FCC adequately consider other options that would achieve the same result?
- Is there evidence in the record to justify treating joint venture partners and independent contractors the same way?
  - Are the risk of disclosure and the extent of carrier control (or lack thereof) similar for both groups?

# Update on Appeal Status

- No schedule for briefing and argument yet.
- No decision likely until late 2008.
- Opt-in rule will likely go into effect in the meantime.

# Thank you

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