OPTING IN IS OUT: BALANCING TELECOMMUNICATIONS CARRIER COMMERCIAL SPEECH RIGHTS WITH CONSUMER DATA PRIVACY

by

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A. Introduction

In early 1998, the Federal Communications Commission (FCC) adopted an order broadly interpreting the consumer data privacy protection addressed in section 222 of the Telecommunications Act of 1996.[1] That Order stated that telecommunications carriers must obtain express customer permission before using certain types of customer data obtained by virtue of the carrier-customer relationship.[2] Section 222 of the Act defines information obtained via the carrier-customer relationship as Consumer Proprietary Network Information (CPNI).[3] CPNI is information relating to the "quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier."[4] CPNI includes information such as when a customer makes a call, whom and where a customer calls, and services to which a customer may subscribe.[5] The FCC requirement of express customer consent, before carrier use of CPNI, imposed substantial restrictions on the marketing activities of carriers.[6]

US West, Inc. (US West), challenged the FCC's interpretation of section 222 in the Tenth Circuit. US West alleged that requiring express customer consent, before using CPNI as a marketing tool, was a constitutionally impermissible restriction on its ability to engage in commer-

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1 *See* FCC Clarifies Customer Privacy Provisions of the 1996 Act, F.C.C. News, Federal Comm. Comm'n, Report No. CC 98-5, (1998).

2 *See id.*

3 *See* The Telecommunications Act of 1996, § 222(f)(1)(A)-(B), 47 U.S.C. § 222 (1999).

4 *See id.* at § 222(f)(1)(A).

5 *See* In the Matter of Implementation of the Telecommunications Act of 1996, Report and Order and Further Notice of Proposed Rulemaking (hereinafter "CPNI Order"), February 19, 1998, ¶ 1 (visited March 30, 2000) <http://www.fcc.gov/Bureaus/Common Carrier/Orders/fcc98-27.wp>. The FCC summarized the CPNI Order in the Federal Register. *See* Telecommunication's Carrier's Use of Customer Proprietary Network Information and Other Customer Information, 60 Fed. Reg. 20,326 (1998)(to be codified at 47 C.F.R. pts. 22 and 64).

6 *See* CPNI Order ¶ 106.

cial speech with its customers.[7] The FCC responded that its interpretation of the customer approval requirements in section 222 raised no constitutional concerns, was reasonable, and was entitled to deference by the court.[8] The Tenth Circuit decided in favor of US West, vacating the FCC's CPNI Order.[9]

Part II of this paper briefly examines the background of consumer data privacy concerns. It also briefly examines other commercial speech restrictions similar to the CPNI restrictions in section 222. Part III details the regulatory requirements imposed by section 222, and explores the conflict between competing interpretations of that section. Part IV discusses carrier challenges to the FCC's interpretation in the rulemaking process. Parts V and VI examine the Tenth Circuit's analysis of the CPNI Order under the *Central Hudson* doctrine. Part VII briefly examines the ability of the FCC, through the Administrative Procedures Act, to regulate carriers' use of consumer database information.

This comment reaches the conclusion that the FCC, by attempting to enact strong data privacy measures, defeated its mission of structuring a competitive, deregulatory communications paradigm. What then is the proper role of the FCC in regulating telecommunications customer data privacy? Without substantial evidence showing real harm from free-market data use, the FCC's role as a regulator of data privacy is questionable at best. The FCC must develop evidence sufficient not only to show a need for data protection, but also to overcome the adverse balance of costs imposed by broad data privacy restrictions.

Telecommunications carriers, on the other hand, can successfully fight restrictive customer data regulations on grounds of commercial speech. They can force the FCC into the awkward position of having to produce regulatory justifications that have extremely limited evidentiary support. In addition, that same strategy forces the FCC into a position where the normally deferential standards surrounding the Administrative Procedures Act do not assist the FCC when those regulations are subject to judicial review.

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7 *See* U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1224,1227 (10th Cir. 1999). In addition to the First Amendment challenge, US West also challenged the CPNI Order on Fifth Amendment grounds. US West alleged that CPNI was a valuable business asset, and the inability to use that asset constituted a "taking" under the Fifth Amendment. By reversing the Order on First Amendment grounds, the court did not reach the Fifth Amendment question. *See id.* at 1239 n. 14.

8 *See id.* at 1230.

9 *See id.* at 1240. In addition to privacy, the FCC also urged the court to sustain the CPNI Order because it promoted competition. The *US West* court rejected this argument on the plain language of section 222 and on the broad applicability of the statute to all carriers, large and small. *See id.* at 1236-37.

B. Background

I. Congressional concern with CPNI privacy

In recent times, the suspicion of data privacy invasion has grown. Consumers are increasingly aware of the advent of sophisticated computerized marketing techniques.[10] In addition, privacy advocates have long questioned the data collection practices of businesses having access to data similar to CPNI.[11] Marketers make increasingly aggressive attempts to create efficient and competitive business models through the acquisition of CPD.[12] Privacy advocacy groups such as Junkbusters and the Electronic Privacy Information Center (EPIC) claim that marketers and advertisers, with their ability to track consumer electronic media usage patterns, purchase habits, and interests are secretly compromising the privacy interests of the public.[13] Privacy advocates point to various consumer and Internet user surveys as evidence of widespread public concern for how corporations handle consumer personal data.[14] When concerned individuals and organizations have brought concrete abuses to light, Congress has responded with privacy protecting legislation.

II. Congressional reactions to commercial privacy intrusions

Congress has responded to perceived privacy issues, such as that found in section 222, with statutes that limit the commercial uses of CPD. In 1984, Congress enacted The Cable Communications Policy Act.[15] That Act limits the use of cable television viewing and subscription data by cable operators.[16] Under that Act, cable subscribers must be given notice as to uses

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10 *See generally* Michael F. Jacobson & Laurie Ann Mazur, Marketing Madness [A Survival Guide For A Consumer Society] 119-127(1995).

11 *See id.*

12 *See generally* Junkbusters Corporation, Department of Commerce and the Federal Trade Commission Public Workshop on Online Profiling (visited February 13, 2000) <http://www.ftc.gov/bcp/profiling/comments/Catlett.htm>.

13 *See id. See also* Electronic Privacy Information Center, Department of Commerce and the Federal Trade Commission Public Workshop on Online Profiling (visited February 13, 2000) <http://www.ftc.gov/bcp/profiling/comments/shen.pdf>. The FCC noted that it examined this type of commentary in the CPNI Order. There the FCC stated that "Indeed, contrary to US WEST's assertion that customers do not suffer from "privacy angst," other sources suggest just the opposite. Within the last several months, numerous published articles have chronicled customer concern over the loss of privacy in this "information age." *See* CPNI Order ¶ 62.

14 *See* Electronic Privacy Information Center, Department of Commerce and the Federal Trade Commission Public Workshop on Online Profiling 23(visited February 13, 2000) <http://www.ftc.gov/bcp/profiling/comments/shen.pdf>. *But see* CPNI Order ¶¶ 61-62 where the FCC rejected survey findings that suggested the opposite.

15 *See* Cable Communications Policy Act of 1984, 47 U.S.C. §§ 551 (1999).

16 *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (1999). *See also* Erika S. Koster, *Zero Privacy: Personal Data On The Internet*, 16 NO.5 Computer Law. 7 (1999).

to which their CPD will be put, and cable operators cannot use, for marketing purposes, the information of those consumers who have opted-out of the cable operator's marketing program.[17]

In 1998, Congress enacted the Video Privacy Protection Act.[18] That Act regulates the disclosure of private video rental activity, providing for an opt-in scheme whereby customer records cannot be released without the express written permission of the customer.[19] However, that Act contains an exception for the kinds of marketing activities that the CPNI Order forbids without express approval.[20] In addition, the Video Privacy Protection Act only requires a notice and opt-out scheme; it requires that customers receive conspicuous notice that they have the ability to prevent the use of personal data for marketing purposes.[21]

Congress enacted the Telephone Consumer Protection Act in 1991 to regulate unsolicited telephone calls.[22] The regulation developed from that Act contains the opt-out exception present in the Acts mentioned above.[23] Although that Act does limit the manner and time of calls,

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17 *See* Cable Communications Policy Act of 1984, 47 U.S.C. §§ 551(c)(2)(C)(1999). *See also* Erika S. Koster, *Zero Privacy: Personal Data On The Internet*, 16 NO.5 Computer Law. 7 (1999).

18 *See* Video Privacy Act of 1998, 18 U.S.C. §§ 2710-11 (1999). *See also* Erika S. Koster, *Zero Privacy: Personal Data On The Internet*, 16 NO.5 Computer Law. 7 (1999).

19 *See* Video Privacy Act of 1998, 18 U.S.C. § 2710. Section 2710(b)(2)(D)(i) and (ii) read:

(b)Video tape rental and sale records.--(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer-

(D) to any person if the disclosure is solely of the names and addresses of consumers and if--

(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, *the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer. . . . See id* (emphasis added).

20 *See* Video Privacy Act of 1998, 18 U.S.C. § 2710(b)(2)(D)(i) and (ii) (1999).

21 *See id. See Also* Jonathan P. Cody, Comment, *Protecting Privacy Over The Internet: Has The Time Come To Abandon Self-Regulation?*, 48 Cath. U.L. Rev. 1183 (1999).

22 *See* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1999).

23 Section 227 of Title 47 authorized the creation of regulations governing the telemarketing industry. The regulations cover the use of automatic dialing machines and prerecorded messages. The pertinent section reads:

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(1) Before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), and

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted

it is incumbent on those individuals who wish to avoid telemarketing calls to take affirmative steps to block such calls.[24] In addition, that Act provided legislative authority for the creation of a national database of telephone customers who wish to block such calls.[25] The FCC did not create such a database. Instead, the FCC allowed self-regulatory measures adopted by the telemarketing industry to protect the interests of consumers.[26]

Congressional interest in the protection of personal data privacy is piecemeal at best. When intrusions appear particularly egregious, Congress has enacted protections. It is important to note, however, that those protections generally provide safe harbor for appropriate business use. In the case of the CPNI Order, telecommunication carriers sought a customer privacy scheme similar to that of the Telephone Consumer Protection Act and the Video Privacy Protection Act.[27]

C. Section 222 of the Telecommunications Act of 1996

I. The purpose of Section 222

Congress enacted section 222 to protect the confidentiality of CPNI and to promote competition among telecommunications providers.[28] To manifest that purpose, section 222(a) states that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of and relating to. . . customers."[29] The customer approval mechanism contained in section 222 protects the confidentiality of CPNI. That same mechanism limits the ability of a carrier to use CPNI to gain unfair competitive positioning in relation to other carriers.

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must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call

list . . .

(vi) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made.

See 47 CFR 64.1200(e) (1999).

24 *See id.*

25 *See* 47 U.S.C. § 227(c)(3)(1999).

26 Telemarketing organizations have access to the "do not promote" databases maintained by the Direct Marketing Association. The Direct Marketing Association,(visited Jan. 18, 2000)<http://www.the-dma.org/framesets/consumer/telephoneframeset.html>.

27 *See* CPNI Order ¶ 34.

28 *See* 47 U.S.C. § 222 (1999).

29 *See id.* at § 222(a).

Section 222 identifies three tiers of customer information, each with its own level of protection. First, section 222 states that subscriber list information (name, address, and telephone number) is freely available for the publishing of directories.[30] Customer approval or notice is not required to release subscriber list information.[31] Second, carriers may disclose aggregate customer information (essentially "anonymous" CPNI[32]) that cannot identify individuals, as long as the disclosure is on reasonable and non-discriminatory terms.[33] Again, no approval or notice is required for the carrier to use or release aggregate customer information.[34] Third, carriers cannot access, use, or disclose individually identifiable CPNI without the approval of the identified individual customer.[35] Thus, section 222 of the Act affords a greater degree of privacy protection as the probability of identifying individual behavior increases.

II. The FCC interpretation of section 222(c)(1)

Congress created ambiguity in the Act by not defining several terms in section 222. Congress required carriers to obtain customer "approval" before using CPNI, but did not define "approval" along with other important terms in section 222(f).[36] In addition, Congress did not define what it meant by the term "telecommunications service" in that section of the Act.[37]

Out of a desire to use CPNI information to market communications services to existing and potential customers, several telecommunications carriers requested that the FCC commence a rulemaking proceeding to interpret the ambiguities in section 222(C)(1).[38] Those carriers wanted to determine (1) the scope of the term "telecommunications service" and (2) what type of customer approval was required by section 222(c)(1).[39]

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30 *See id.* at § 222(f)(3)(A).

31 *See id.* at § 222(f)(1)(B). Subscriber list data is exempt from the definition of CPNI. *See id.*

32 *See* 47 U.S.C. § 222(f)(2)(1999). *See also* CPNI Order ¶¶ 2-4.

33 *See* 47 U.S.C. § 222(c)(3)(1999). *See also* CPNI Order ¶¶ 2-4.

34 *See id. See also* CPNI Order ¶¶ 2-4.

35 *See* 47 U.S.C. § 222 (c)(1). *See also* CPNI Order ¶¶ 2-4.

36 *See id.* at § 222(f). *See also* CPNI Order ¶¶ 6, 86.

37 *See id.* at § 222(f). *See also* CPNI Order ¶ 6.

38 *See* CPNI Order ¶¶ 6,11.

39 *See id.* at ¶ 6. *See also* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 61 Fed. Reg. 26483 (1996) (released May 17, 1996).

1. The FCC analytical framework

> Sction 222(c)(1) of the Telecommunications Act of 1996 states:
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> Pivacy requirements for telecommunications carriers
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> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a 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.[40]

To interpret that section of the Act, the FCC applied a "total service approach" (TSA) framework.[41] That framework permits flexible grouping of the three sub-categories of service that carriers may offer: (1) local wireline telephone service, (2) long distance wireline service, and (3) commercial mobile/cellular service.[42] Thus, the TSA is a flexible framework from which a carrier creates a customer's total service package. The FCC interpreted "telecommunications service" within section 222(c)(1) as a customer's total combination of services obtained from any one carrier.[43] The TSA approach to CPNI "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."[44] Thus, without customer approval, carriers cannot use CPNI to cross-promote additional service or product offerings outside the existing service(s) to which a customer subscribes.

2. Express approval of CPNI use within the TSA framework

The FCC interpreted the ambiguous customer approval requirement of section 222(c)(1) to call for express customer approval (an opt-in scheme).[45] Under that scheme, customers must give affirmative consent anytime a carrier wishes to use CPNI to promote new services outside the customer's current total service package.[46] The FCC selected that interpretation of "approval" as the best means to fulfill the consumer-favored balance of privacy and competition

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40 *See* 47 U.S.C. §222(c)(1)(1999).

41 *See* CPNI Order ¶ 25.

42 *See* U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1224, 1230 (10th Cir. 1999).

43 *See* CPNI Order ¶¶ 25, 30.

44 *See* CPNI Order ¶ 30.

45 *See* CPNI Order ¶¶ 86-87, 91.

46 The FCC rejected the argument that, in regard to intra-corporate marketing, CPNI approval requirements should mirror other statutes regulating the such uses of CPD. *See* CPNI Order at ¶ 34. *See also supra* notes 22-26 and accompanying text.

under section 222.[47] Thus, under the CPNI Order, the database of CPNI available for cross-promotion by any particular carrier would consist of CPNI from those customers who supplied affirmative permission for the carrier to access that customer's CPNI.

3. The FCC rationale behind the opt-in approach

The FCC argued that the opt-in approach was a reasonable interpretation of section 222(c)(1). The FCC also argued that Congress intended section 222 to have a dual purpose. The FCC interpreted section 222 to protect consumer personal data from use and disclosure in a regulatory framework engineered to produce aggressive carrier competition.[48] First, the FCC interpreted section 222 to operate as a mechanism for balancing the privacy interests of consumers with the deregulatory approach of the Telecommunications Act in general.[49] Second, the FCC interpreted section 222 as a means to limit the ability of large incumbent carriers to monopolize CPNI to the detriment of smaller competitors.[50] Thus, the FCC attempted interpret section 222 to not only level the playing field among carriers, but also to prevent carriers from abusing the potential privacy rights of telecommunications customers.

III. The interpretation suggested by US West

The level of competition within the telecommunications services marketplace has dramatically increased. Like other businesses, telecommunications carriers attempt to process strategic customer data to increase profit margins and improve market share. In the CPNI Order, the FCC acknowledged the powerful role that CPNI can play in the marketing strategies of carriers. The FCC stated ". . .as competition grows and the number of firms competing for consumer attention increases, CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response."[51]

To achieve the highest level of promotional efficiency possible, US West suggested that the FCC adopt the "single category approach" (SCA) in interpreting section 222's approval requirements.[52] The SCA is effectively the opposite of the TSA. The SCA defines the category of telecommunications services addressed in section 222(c)(1) as the bundle of services offered by a telecommunications carrier, and not as the portion of those services selected on a subscriber by subscriber basis.[53] Thus, under the SCA, carriers could freely use CPNI to market any service a carrier might offer to a customer of that carrier.

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47 *See* CPNI Order ¶ 87.

48 *See* CPNI Order ¶¶ 1, 3, 14.

49 *See id.*

50 *See id.*

51 *See* CPNI Order ¶ 22.

52 *See* CPNI Order ¶ 29.

53 *See id.*

In the CPNI Order the FCC acknowledged that the TSA opt-in interpretation of section 222(c)(1) would substantially affect the marketing efficiency of telecommunications carriers.

The Order stated:

> . . .carriers may not use CPNI without prior customer approval to target customers they believe would be receptive to new categories of service. While this limitation under the total service approach might make incumbent carriers' marketing efforts less effective and potentially more expensive than the single category approach, we disagree that this is a wholly undesirable outcome or contrary to what Congress intended.[54]

The FCC's narrow interpretation of the approval requirements in section 222 struck a blow to any telecommunications carrier interested in using their customer database for all but the most rudimentary targeted marketing purposes.[55]

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54 *See* CPNI Order ¶ 106.

55 *See* David Shepard Associates, The New Direct Marketing: How to Implement a Profit Driven Direct Marketing Strategy 3-4 (2nd ed. 1995). In that book David Shepard wrote that:

[targeted] marketing is an information-driven marketing process, managed by database technology, that enables marketers to develop, test, implement, measure, and appropriately modify customized marketing programs and strategies. To implement [targeted] marketing you need to know how to identify and gather relevant data about customers and prospects.

- Use database technology to transform raw data into powerful and accessible marketing information.
- Apply statistical techniques to customer and prospect databases to analyze behavior, isolate relatively homogeneous market segments, and score and rank individuals in terms of their probability of behaving in a variety of predictable ways (responding, buying, returning, paying, staying or leaving, and so on).
- Evaluate the economics of gathering, manipulating and analyzing data and capitalize on the economics of developing and implementing data-driven marketing programs.
- Creatively act on the marketing opportunities that emerge from these processes to develop individual customer relationships and to build business. Given the above elements, [targeted] marketing is much broader in scope than what has been regarded traditionally as. . . .direct marketing.

In the past, direct marketing has been distinguishable from other marketing disciplines because of its emphasis on initiating a direct relationship between a buyer and a seller, a relationship that until recently centered primarily on the exchange of goods and services. . . However, in today's marketing environment. . . smart marketers are not just using [targeted] marketing to efficiently consummate a sale, they are also using it to build store traffic and identify the most efficient ways to generate leads and sales across multiple communication and distribution channels."

See id.

IV. Consequences of the FCC's interpretation of section 222(c)(1)

As applied to section 222, the CPNI Order provides that a telecommunications carrier could use CPNI to market within those categories to which a customer already subscribed. However, without the express approval of the customer, the carrier could not market horizontally among different services to which a customer did not subscribe.[56] For example, if a carrier determined that a customer without cellular service made a large number of wireline long distance calls during particular periods, that carrier could market calling plans to that customer based on that information. If that same customer were to receive numerous calls from widely disbursed pay telephones, however, the carrier could not solicit that customer with an offer for cellular service without that customer's express prior consent.[57] The ability to use customer intelligence to market and provide improved services to customers is essential in the modern business environment. The FCC's decision to limit carrier's use of that valuable resource reflects the agency's inadequate consideration of the practical results of its decision.

D. Challenging the FCC's proposed CPNI order: Comments and Responses

I. The CPNI Order rulemaking process

US West submitted comments during the rulemaking stating that the FCC need not promulgate additional rules interpreting section 222.[58] US West stated "[w]e argue that no further extension of "rights" with respect to CPNI associated with a customer's "total service" is appropriate in light of the absence of any Congressional suggestion that any such "rights" exist."[59] To support that argument US West pointed to the fact that the Commission did not make a case for such a privacy interest in the CPNI Order.[60] US West argued that the FCC merely looked to its own experience and to general privacy matters, across industry and market segments, to support the Order.[61]

The FCC justified its use of broad privacy rights language over detailed documentation, by stating that the Supreme Court already recognized consumer data privacy rights.[62] The FCC

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56 *See* U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1224, 1230 (10th Cir. 1999).

57 The use of some "index" of a customer's inclination to purchase a particular product (affinity) is a fundamental principle in marketing goods and services. The inability to use CPNI to determine subscriber affinity for new services or equipment interferes with carrier's marketing efforts at a fundamental level. *See generally* Walter s. McKenzie, *Magazine Advertising, in* The Direct Marketing Handbook 307, 307-08 (Edward L. Nash ed., 1984).

58 *See generally* Kathryn Marie Krause, *Comments of US WEST, INC., CC Docket No.96-115, filed March 30, 1998*,2 (visited Apr. 4, 2000) < https://gullfoss.fcc.gov/cgi-bin/ws.exe/prod/ecfs/comsrch_v2.hts>.

59 *See id.* at 2.

60 *See id*. at 3.

61 *See id.* at 3 n.9.

62 *See* CPNI Order ¶ 107.

stated that given that such a right exists, the CPNI regulations were reasonable, raised no constitutional concerns, and thus were entitled to deference under the standards announced in *Chevron U.S.A., INC.*, v. *Natural Resources Defense Council, Inc.*[63]

1. US West's speech rights under the First Amendment

US West also argued that the regulations were impermissible because they violated its commercial speech rights under the First Amendment. US West alleged that the FCC's interpretation of section 222 (c)(1) would "seriously impair carriers' ability to communicate valuable commercial information to their customers in violation of the First Amendment."[64]

The FCC responded to US West's First Amendment challenge by arguing that the CPNI regulations were constitutionally valid because they merely prohibited using CPNI to target customers, and did not limit the content or scope of US West's customer communications.[65] The FCC stated:

> [w]hile section 222 may constrain carriers' ability to more easily "target" certain customers for marketing by limiting in some circumstances their internal use of confidential customer information, we question whether that of itself constitutes a restriction on protected "speech" within the purview of the First Amendment . . .As the Supreme Court has observed, it has never deemed it an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated or conducted in part through language; to the contrary, similar regulation of business activity has been held not to violate the first [sic] Amendment.[66]

Thus, the FCC dismissed US West's argument by classifying the CPNI order as more a regulation on conduct than on speech.

In addition, the FCC rejected US West's argument that the CPNI Order restricted the First Amendment rights of subscribers by limiting the information that they are able to receive.[67] The FCC argued that subscribers who wish to receive information concerning additional products or services need only release their CPNI to their carrier.[68]

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63 *See U.S. West*, 182 F.3d at 1230. *See generally* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *See also supra* notes 144-146 and accompanying text.

64 See CPNI Order ¶ 42.

65 *See U.S. West*, 182 F.3d at 1232.

66 *See* CPNI Order ¶ 106.

67 *See* CPNI Order ¶ 107.

68 *See id.*

E. Judicial review of the CPNI Order under Central Hudson

US West appealed the FCC's interpretation of section 222 of the CPNI Order to the Tenth Circuit.[69] In the introduction to the case, Circuit Judge Tacha underscored the overarching issues presented by the FCC's rulemaking. Judge Tacha stated that "this case is a harbinger of difficulties encountered in this age of exploding information, when rights . . . must be guarded as vigilantly as in the days of handbills on public sidewalks."[70] The court then determined that the CPNI Order raised significant constitutional questions regarding the appropriate role of the FCC in the regulation of the commercial speech of telecommunications carriers.[71]

I. How the CPNI Order restricts speech

The court made an initial determination that the CPNI Order was a restriction on speech. The court reasoned that the First Amendment protects not only the right to speak, but also the right to listen.[72] A restriction on either component of a communication is a restriction on speech.[73] The court stated 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."[74] The court compared the case before it to the Supreme Court case of *Florida Bar* v. *Went for It, Inc.* In that case, an attorney and a lawyer referral service challenged the Florida Bar's restriction on the solicitation of personal injury and wrongful death clients within thirty days of the event causing the death or injury.[75] Although Florida attorneys could solicit via untargeted mailings at any time, the Supreme Court found that the targeting restriction implicated the First Amendment. Similarly, the US West court determined that the FCC's argument that the CPNI Order did not affect the scope or content of US West's speech was fundamentally flawed.[76] The court concluded, "the existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI [targeting restrictions] restrict speech."[77]

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69 *See* Generally U.S. West, 182 F.3d 1224.

70 *See id.* at 1228.

71 *See id.* at 1231.

72 *See id.* at 1232.

73 *See id.*

74 *See U.S. West*, 182 F.3d at 1232.

75 *See* Florida Bar v. Went For It, Inc. 515 U.S. 618, 620 (1995).

76 *See U.S. West*, 182 F.3d at 1232.

77 *See id.*

II. The nature of the CPNI restricted speech

The nature of the restricted speech –- commercial or non-commercial –- determines the level of scrutiny the restriction will face.[78] The court concluded that the CPNI Order was commercial speech.[79] The court reasoned that since US West wanted to use CPNI as a tool to target solicitations for additional telecommunications services, US West's CPNI-based speech amounted to no more than proposals for commercial transactions.[80] The court stated that "when the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation. Therefore, the speech is properly categorized as commercial speech."[81] Once the court identified the CPNI Order as a restriction on commercial speech, it applied the *Central Hudson* test to determine the constitutional validity of the Order.

F. The Tenth Circuit's *Central Hudson* Analysis

To analyze the constitutionality of the FCC's CPNI Order the court applied the four-part framework of the *Central Hudson* test.[82] That test is applicable to all government regulations that limit commercial speech.[83] The *Central Hudson* test consists of a threshold inquiry and three subsidiary tests. To pass the threshold inquiry, commercial speech must concern lawful activity and not be misleading.[84] If the speech does not concern lawful activity, or is misleading, the government may regulate it freely.[85] Here, the legality and the non-misleading quality of CPNI-based commercial speech were not in dispute.[86]

If the restricted speech passes the threshold inquiry above, the burden of proof shifts to the government.[87] To uphold a restriction on non-misleading commercial speech that concerns a lawful activity the restriction must meet three criteria. The government must prove that (1)

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78 *See* U.S. West, Inc. 182 F.3d at 1232-33. US West also argued that the restriction burdened its internal communications. It argued, therefore, that the restriction should be subject to strict scrutiny as non-commercial speech. The court rejected that argument. *See id.*

79 *See U.S. West*, 182 F.3d at 1233.

80 *See id.* at 1233.

81 *See id.*

82 *See U.S. West*, 182 F.3d at 1233-34.

83 *See* Central Hudson Gas & Electric Corp. v. Public Service Commission, 477 U.S. 557, 566 (1980).

84 *See id.*

85 *See id.* at 563.

86 *See U.S. West*, 182 F.3d at 1234.

87 *See id.*

there is a substantial state interest in regulating the speech, (2) the restriction directly and materially advances that interest, and (3) the restriction is narrowly drawn in relation to that interest.[88]

In the Supreme Court case of *Greater New Orleans Broadcasting Association, Inc.*, v. *United States*, Justice Stevens commented that the four parts of the *Central Hudson* test are not discrete.[89] Justice Stevens stated that "Each [part] raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."[90] The following analysis will illustrate how the FCC's inability to develop an adequate administrative record, on which to justify the CPNI Order, formed a common thread of doubt under all three subsidiary prongs of the *Central Hudson* analysis.

I. The substantial government interest in restrictions on CPNI-based commercial speech

The FCC alleged that telecommunications consumers have a reasonable expectation of privacy in CPNI.[91] The FCC reasoned that protecting that expectation of privacy was a substantial state interest.[92] The FCC used that rational to justify its actions in restricting the commercial speech of carriers via the CPNI Order.

1. Privacy as a substantial state interest

Supreme Court holdings do not prevent a privacy interest from rising to the level of a substantial state interest.[93] The instances where it has, however, differ from the factual circumstances and justifications of the CPNI Order. A brief examination of Supreme Court cases where privacy constituted a substantial state interest will illustrate that privacy in CPNI not only varies from established substantial privacy interests by degree, but also by kind.

In the case of *Edenfield* v. *Fane*[94] the Supreme Court addressed Florida's ban on in-person solicitation of clients by certified public accountants (CPA).[95] There, the court reasoned that the protection of potential clients' privacy qualified as a substantial state interest.[96] The Court stated "[e]ven solicitation that is neither fraudulent nor deceptive may be pressed with such frequency

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88 *See* Central Hudson Gas & Electric Corp. v. Public Service Commission, 477 U.S. 557, 566 (1980).

89 *See* Greater New Orleans Broadcasting Inc. v. United States, 119 S.Ct. 1923, 1930 (1999).

90 *See id.*

91 *See* CPNI Order ¶ 53.

92 *See id.*

93 *See* Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995). There, the court stated that the protection of potential client's privacy is a substantial state interest. *See id.*

94 *See generally* Edenfield v. Fane, 507 U.S. 761 (1993).

95 *See Edenfield*, 507 U.S. at 764.

96 *See id.* at 769.

or vehemence as to intimidate, vex, or harass the recipient. "[P]rotection of the public from these aspects of solicitation is a legitimate and important state interest."[97]

The nature of the CPNI Order differs from the in-person solicitation that the Florida Board of Accountancy wished to prevent in two important ways. First, in *Edenfield* the Court notes that the protection which rises to the level of a substantial state interest is in potential clients, not in existing clients. CPNI exists only because of a pre-existing customer-carrier relationship. Carriers primary use of CPNI is in that context only, and carriers face economic disincentives to use it otherwise.[98] Second, there is no evidence in the record that carriers have engaged in overly aggressive marketing practices. In fact, the use of CPNI prevents "vexatious" marketing techniques by assisting carriers in accurate targeting of marketing messages; only those customers with a potential interest in a service offering will receive a solicitation.[99]

In the Supreme Court case of *Florida Bar* v. *Went For It*,[100] the Court addressed the Florida Bar's limited ban on direct mail solicitation of clients by personal injury lawyers.[101] In that case the Florida Bar prohibited personal injury lawyers from sending direct mail to potential plaintiffs, or the relatives of potential plaintiffs, for a 30-day period following the plaintiff's accident or disaster.[102] Quoting *Edenfield*, Justice O'Conner's opinion stated that the protection of potential client's privacy is a substantial state interest.[103]

To back up the point, Justice O'Conner pointed to *Carey* v. *Brown* stating that the Court has recognized the protection of privacy in the home as a substantial state interest.[104] The factual circumstances of Carey centered on the rights of protestors to picket around the personal residence of the target of the protest.[105] Clearly, the use of CPNI by a carrier, to communicate with its own customer, does not approach the magnitude of sign carrying protestors surrounding a person's home.

Indeed, in *Went For It*, four Justices dissented partly because the majority misidentified the interest at question in the case.[106] The dissent looked to the mode of the solicitation, and not to

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97 *See id.*

98 *See* Kathryn Marie Krause, *Comments of US WEST, INC., CC Docket No.96-115, filed March 30, 1998*,5 n.11 (visited Apr. 4, 2000) < https://gullfoss.fcc.gov/cgi-bin/ws.exe/prod/ecfs/comsrch_v2.hts>.

99 *See id.* at 2-5.

100 *See generally Went For It*, 515 U.S. 618 (1995).

101 *See id.* at 4.

102 *See Went For It*, 515 U.S. at 620.

103 *See id.* at 625.

104 *See generally* Carey v. Brown 447 U.S. 455 (1980).

105 *See id.*

106 *See Went For It*, 515 U.S. at 637.

the qualities of the recipient, to determine the harm the solicitation might cause.[107] Again, CPNI-based marketing occurs within the carrier-customer relationship. Thus, it does not implicate the Court's concerns about "potential" clients, and does not involve aggressive, in-person sales techniques. Although the FCC could have looked to prevent in-person CPNI based solicitation, such as telemarketing, it did not. Section 222(c)(1) limits all modes of CPNI-based communications.

2. CPNI and the expectation of privacy in the Fourth Amendment Context

The Supreme Court examined a privacy interest similar to the interest upon which the FCC justified the CPNI Order.[108] The 1979 case of *Smith* v. *Maryland* examined a telephone subscriber's reasonable expectation of privacy in the same type of data protected by the CPNI Order.[109] There, police collected the out-bound telephone numbers dialed from the appellant's home telephone without a warrant.[110] The appellant challenged the collection as an unreasonable search in violation of the Fourth Amendment.[111] In *Smith*, the Supreme Court reasoned that telecommunications subscribers, in general, do not entertain any actual expectation of privacy in the telephone numbers they dial.[112] The Supreme Court reasoned further that subscribers know they convey information to their carrier, that the carrier records the information, and that the carrier uses this information for business purposes.[113] The Court held that the collection of the Appellant's CPNI did not amount to a search under the Fourth Amendment because the Appellant did not have an expectation of privacy that society would regard as reasonable.[114]

In the context of the CPNI Order, *Smith* does not suggest that rights under the Fourth and First Amendments are cut from the same cloth. What *Smith* does show is that CPNI-based privacy rights are not self-evident, recognized rights. Thus, where the FCC creates a zero sum balance favoring individual privacy over protected commercial speech, it must show proof that harm it seeks to prevent, or the rights it seeks to protect, are real.

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107 *See Went For It*, 515 U.S. at 637. The dissent in *Went For It* notes the difference in degree between normal marketing solicitations – such as direct mail – and the type of in-person solicitation that would properly be the subject of a substantial state interest. *See id.* (Justice Kennedy dissenting).

108 *See generally* Smith v. Maryland, 422 U.S. 735 (1979). The *US West* court distinguishes between the rights of an individual and the privacy right that the FCC alleges is a substantial state interest. *See* U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1224, 1234 n.6 (10th Cir. 1999). There, the court points out that the two rights are substantially different. *See id.* One cannot ignore, however, the fact that the FCC is basing its interpretation of §222 on the premise that such an individual right exists, and that it should act to protect that right.

109 *See generally Smith,* 422 U.S. 735.

110 *See Smith*, 422 U.S. at 737.

111 *See id.*

112 *See id.* at 742.

113 *See Smith*, 422 U.S. at 743.

114 *See id.* at 745.

3. The need for empirical evidence

To uphold a restriction on commercial speech the state must provide evidence that the release of the information will inflict specific and significant harm on individuals.[115] The *US West* court provided examples of what it considered specific and significant harms. The court stated that specific and significant harm would result from situations where the release of information would cause undue embarrassment, ridicule, intimidation or harassment, or where misappropriation of information would result in identity theft.[116] The FCC's sole argument, that it had a broad interest in protecting the privacy interests of telecommunications customers, failed to meet any of those requirements head-on.

The FCC's lack of empirical evidence prevented the court from readily sustaining the CPNI privacy interests asserted by the FCC. The court stated "[w]e have some doubts about whether this interest, as presented, rises to the level of "substantial." We would prefer to see a more empirical explanation and justification for the government's asserted interest."[117]

In *Edenfield*, the Court found that the mission of the Board of Accountancy was a substantial state interest. The Court noted that CPA's must maintain total independence and when acting as independent auditors, they must serve with complete fidelity to the public trust.[118] Thus, by pointing to what would be a commonly recognized public harm, the Board of Accountancy met the substantial state interest prong of *Central Hudson*. The FCC, however, did not produce even anecdotal evidence of harm in its order interpreting section 222(c).

Similarly, in *Went For It*, the Florida Bar submitted evidence in support of its restriction. There, the Bar submitted a 106 page summary of a two-year study of the advertising the Bar hoped to restrict.[119] The summary contained both statistical and anecdotal data regarding the negative effects of the type of solicitation the Bar hoped to restrict.[120] There, the majority read-

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115 *See* Edenfield v. Fane, 507 U.S. 761, 770 (1993)(no studies to suggest that personal solicitation of clients by CPA's created danger of fraud, over reaching, or compromised independence). *See also* Greater New Orleans Broadcasting Inc. v. United States, 119 S.Ct. 1923, 1932 (1999) (Proponents of regulation on commercial speech should show that costs and benefits of the regulation are carefully calculated). *See also* U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1233-34 (10th Cir. 1999)(Empirical evidence helpful in determining whether substantial state interest in fact exists. Speculation as to harm created by speech is insufficient to sustain speech restrictions).

116 *See U.S. West*, 182 F.3d at 1235.

117 *See U.S. West*, 182 F.3d at 1235(The court expressed that it would have liked to see some empirical evidence of the type produced in *Went For It*. In that case, the Florida State Bar produced a 106-page report on the harm that the proposed speech restriction would prevent). *See Also* P. Cameron DeVore, *Summary of Major 1999 Commercial Speech Developments*, 582 PLI/PAT 673, 678 (1999)(stating that the Supreme Court usually accepts the government's asserted interests as substantial).

118 *See Edenfield*, 507 U.S. at 770.

119 *See Went For It*, 515 U.S. at 626.

120 *See id.*

ily recognized that the privacy interests of the Florida Bar's potential clients could rise to the level of a substantial state interest.

Ultimately, for the sake of the appeal, the *US West* court "assumed" that the government asserted a substantial interest.[121] The court rationalized the FCC's substantial interest on a privacy concern announced by the court itself – that a state interest existed in preventing the disclosure of sensitive and potentially embarrassing CPNI.[122]

II. Materially advancing that state interest

Under *Central Hudson's* second prong, a government body seeking to uphold a restriction on commercial speech must show that the restriction materially and substantially advances the state interest behind the restriction. Under recent Supreme Court commercial speech cases, empirical evidence within the record is essential to meet that burden. This section will briefly examine a number of cases to illustrate how the CPNI Order lacked that essential showing.

1. Articulating a basis for material and substantial advancement of a state interest in privacy

The second prong of *Central Hudson* cannot be met with speculation or conjecture.[123] The government must create a record that clearly articulates and justifies the restriction.[124] In addition, when applying the *Central Hudson* test, a court must look exclusively to the established record to weigh the validity of the government's justification.[125] Thus, the privacy of telecommunications customers could be advanced only where the FCC sufficiently articulated and justified that advancement in the administrative record. The FCC attempted to meet that burden in the CPNI Order by stating that the Order "would protect customers' reasonable expectations of privacy regarding personal and sensitive information, by giving customers control over CPNI use, both by their current carrier and third parties."[126]

2. The absence of empirical evidence in the FCC record

As discussed in the cases of *Edenfeild* and *Went For It*, supra, the Supreme Court has established a clear requirement for evidence, on the record, to satisfy prong two of *Central Hudson*. In striking down the restriction in *Edenfeild* the Court found that the Board produced "no studies that suggest personal solicitation of prospective business clients by CPA's creates [the dangers] the Board claims to fear. The record does not disclose any anecdotal evidence. . . that validates

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121 *See U.S. West*, 182 F.3d at 1235-6.

122 *See id.*

123 *See id.* at 1237.

124 *See id.* at 1234.

125 *See Went For It*, 515 U.S. at 624.

126 *See* CPNI Order ¶ 53.

the Board's suppositions."[127] In upholding the restriction in *Went for It*, the Court noted the infirmities of the record in *Edenfeild*.

The studies and data presented by the Florida Bar in *Went for It* provide a clear counter-point to the FCC's administrative record developed for the CPNI Order. The FCC did not attempt, even through anecdotal evidence, to determine how the disclosure of CPNI would occur and under what circumstances.[128] In addition, the FCC simultaneously forbid the intra-carrier use of CPNI, while at the same time, stating that it was not as concerned with a carrier's internal use of CPNI.[129] The CPNI Order does not provide an adequate basis for the FCC's decisions. Given that conclusion, the *US West* court could not find that the FCC demonstrated that the harm addressed in the CPNI Order was real, and that the CPNI Order alleviated that harm to a material degree.[130]

III. Narrowly drawn restrictions

The third prong of the *Central Hudson* test requires that the restrictions supporting the proffered state interest be no more extensive than necessary.[131] The restrictions are not required to be the least restrictive means available, or the best available solution.[132] The restrictions are only required to be in proportion to the interest served.[133] The 1992 Supreme Court case of *City of Cincinnati* v. *Discovery Network, Inc.*[134], established an example of the government's empirical burden in showing that a restriction is narrowly drawn. In that case, the Court stated "we require. . .the cost [of the restriction] to be carefully calculated. Moreover, since the state bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require."[135]

1. The availability of less intrusive means

In *Discovery Network*, the Court was clear on the type of calculations it requires. There, a city ordinance prohibited the distribution of commercial handbills on public property.[136] The city used that ordinance as a basis for the removal of newsracks that distributed various sales-

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127 *See Edenfield*, 507 U.S. at 770.

128 *See U.S. West*, 182 F.3d at 1237.

129 *See* CPNI Order ¶ 55.

130 *See U.S. West*, 182 F.3d at 1238.

131 *See id.*

132 *See id.*

133 *See id.*

134 *See generally* Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

135 *See Discovery Network*, 507 U.S. at 416.

136 *See id.* at 412.

oriented flyers and newspapers (as opposed to news-oriented papers) throughout the city.[137] The Court examined the record and determined that the city did not establish the required fit between the restriction and the interest served.[138] The Court stated:

> The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition. The benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it.[139]

The CPNI Order ruling suffers from the same inadequacies as the city ordinance in *Discovery Network*. The FCC's summary of the CPNI Order published in the Federal Register clearly shows the FCC's lack of consideration of the costs associated with a narrow interpretation of section 222(c)(1).[140] That summary states that the CPNI Order imposes a cost of $229,520,000 on carriers (as an industry) merely to attempt to obtain customer CPNI approvals.[141] That figure would most likely pale in comparison to the lost marketing opportunities the Order would have produced.

Although the Supreme Court supplies some idea of what would be required to develop a narrowly drawn restriction in *Discovery Network*, the *US West* court provides no such guidance. Even if the *US West* court were to attempt to elucidate the proper balancing factors, the first question would be "where to begin?" Although Judge Tacha noted some of the general financial and social costs imposed by privacy measures, he did not specify how an agency might measure those costs.[142]

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137 *See id.* at 413-14.

138 *See id.* at 417.

139 *See id.*

140 *See* Telecommunication's Carrier's Use of Customer Proprietary Network Information and Other Customer Information, 60 Fed. Reg. 20,326 (1998)(to be codified at 47 C.F.R. pts. 22 and 64).

141 *See id.* ¶ 6.

142 *See U.S. West*, 182 F.3d at 1235 n.7. To identify some of the costs of privacy Judge Tacha turned to noted privacy commentator Professor Fred Cate. Judge Tacha wrote:

> For example, privacy "facilitates the dissemination of false information," by making it more difficult for individuals and institutions to discover falsities. Privacy also "protects the withholding of relevant true information," such as when an employee fails to disclose a medical condition that would affect his or her job performance. In addition, privacy interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy may lead to reduced productivity and higher prices for those products or services.

CPNI admittedly does hold some privacy value. Few individuals would enjoy having their CPNI data released to the public, although that possibility is extremely remote. In practical terms, the issue is not one of real personal harm, but is more a question of inconvenience to consumers.

Is the burden of the trip from the mailbox to the trashcan a truly substantial one?[143] If it were, does that burden outweigh the right of the sender to put the letter in the mail? Would consumers be willing to forego the opportunity to learn of potential subscription savings at the expense of several telephone calls from their carrier? Beyond the financial impact on the customer, what about the ability of the carrier to examine its marketing efficiencies? In a competitive market, it is undeniable that lower operating costs translate into lower service costs and greater competition. Thus, there is a real question as to whether the FCC could ever conduct a careful calculation of the benefits of the suppression of CPNI for the purposes of restricting carrier commercial speech.

2. Balancing benefits and costs

The search for evidence of specific and significant harm under *Central Hudson* reflects the fact that *Central Hudson* is a complex balancing test. Courts balance the evidence of harm created by the commercial speech in question with the government's interest in alleviating that harm. In addition, courts consider the harm of the restriction itself by requiring the restriction to be narrowly drawn. Under that scheme, the evidence supporting free use of CPNI outweighs perceived privacy intrusions.

First, the FCC acknowledged the harm that would befall carriers under the CPNI Order. Without the ability to use CPNI freely, carriers would experience higher operating costs because of inefficient consumer marketing. Although marketing inefficiencies may appear as a mere financial inconvenience, the ripple effect of those inefficiencies extends far into a carrier's business model. In competitive markets, the ability to efficiently target potential consumers is key. Before deciding to develop a new product or service, businesses perform complex profit and loss models to determine the return on investment that those new products and services will potentially produce.[144] In addition, the ease with which a company can sell products and services figures heavily into that equation. Efficient marketing translates into technological investment, better service, and higher levels of competition, as consumers become educated about the desirability of new products and services. By artificially limiting the efficiencies at which carriers may compete, the FCC will constrain those very market forces it is charged with ex-

See id. (citation omitted).

See generally Fred H. Cate, Privacy In The Information Age (1995).

143 Judge Frankel, of the New York Southern District, did not view that burden, or similar advertising intrusions, to represent a burden worthy of a constitutional challenge. *See* Lamont v. Commissioner of Motor Vehicles, 269 F.Supp 880, 883 (S.D.N.Y. Jun 22, 1967), *aff'd*, 386 F.2d 449 (2nd Cir.(N.Y.) Dec 12, 1967), *cert. denied*, 391 U.S. 915, 391 U.S. 915, 88 S.Ct. 1811, 20 L.Ed.2d 654 (1968).

144 *See* CPNI Order ¶ 105. *See also supra* note 142 and accompanying text.

panding; a deregulatory, pro-competitive framework that replaces old limitations within and between markets.[145] Thus, on economic terms, there is ample evidence within the FCC's administrative record to show that the CPNI Order threatens to produce specific and significant harm to carriers, with little corresponding benefit to consumers.

Second, although the language of the court focuses on the release of CPNI information, that issue is not the one that carriers brought before the court. The issue put before the FCC in carrier comments was the telecommunications carriers intended internal use of CPNI.[146] The telecommunications carriers who objected to the FCC's interpretation of section 222(c)(1) did not mention a desire to sell or divulge CPNI to other entities. In fact, to do so would be against the interests of the carriers.[147] Although the FCC was concerned with incumbent carrier's use of CPNI, it failed to consider full effects of marketing campaigns. Once incumbent carriers kindle consumer demand, competitors will emerge to capitalize on that demand in new and novel ways.

G. Judical Review of the CPNI Order under the Administrative Procedures Act

The *US West* court began its analysis of the FCC's interpretation of section 222(C)(1) with the Administrative Procedure Act (APA). Under the APA, a federal agency cannot promulgate rules that are arbitrary or capricious interpretations of congressional delegations of power.[148] In addition, federal agencies must remain within constitutional bounds.[149] To examine the FCC's interpretation of section 222 the *US West* court turned to the *Chevron* two-step analysis.[150] Under *Chevron*, an agency interpretation of a statute is not entitled to deference if Congress spoke to

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145 *See* CPNI Order ¶ 1.

146 See CPNI Order ¶ 106.

147 See CPNI Order ¶ 95.

148 *See* Administrative Procedure Act §6, 5 U.S.C. § 706(2)(A)(1999). That section of the APA states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and co nclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

149 *See id.*

150 *See* U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1224, 1231 (10th Cir. 1999).

the precise issue in question in that statute.[151] If Congress did not speak to the precise issue at question, the agency interpretation is entitled to substantial deference.[152]

After determining that US West had asserted a challenge raising serious constitutional questions, however, the court immediately proceeded to the *Central Hudson* analysis detailed above.[153] By choosing to frame its challenge to the CPNI Order as an infringement on commercial speech rights, US West removed the issue from the FCC's position of substantial deference under the APA.

The Standard of Review

By proceeding under the APA, US West could have pinned the FCC down on the one issue where the FCC appeared weak - the near absent evidentiary record of basis and purpose of the CPNI rulemaking. US West did in fact argue in terms appropriate to that challenge; US West argued that the CPNI order was an arbitrary and capricious interpretation of the approval mechanism of section 222.[154] Section 706(2)(A) of the APA states that an agency interpretation of a statute cannot be "arbitrary, capricious, an abuse of discretion, or not otherwise not in accordance with law."[155] Under the APA's informal rulemaking procedures, however, an agency need only create a record that can rationally connect to the regulations the agency ultimately promulgates.[156]

The level of deference afforded agencies under the APA increases with the technical nature of the subjects an agency oversees. In reviewing a 1992 Environmental Protection Agency decision, the First Circuit stated that agencies "are normally entitled to substantial deference so long as their decisions do not collide directly with substantive statutory commands and so long as procedural corners are squarely turned. This deference is especially marked in technical areas."[157] In addition, where there is little evidence available from any source, courts are even more deferential to agency decisions. In the 1992 case of *Center for Auto Safety* v. *Federal Highway Administration*[158], the Center for Auto Safety challenged a Federal Highway Administration (FHWA) decision to require the underwater inspection of bridges once every five years instead

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151 *See id.*

152 *See id.*

153 *See* U.S. West, Inc., 182 F.3d at 1232.

154 See *id.* at 1228.

155 *See supra* note 148.

156 *See* Center For Auto Safety v. Federal Highway Admin.,956 F.2d 309, 313 (D.C. Cir.1992). *See Also* Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanations for Legal Conclusions*, 48 Rutgers L. Rev. 313, 316-319 (1996).

157 *See* Puerto Rico Sun Oil Co. v. United States EPA, 8 F.3d 73, 77 (1st Cir. 1993).

158 *See generally* Center For Auto Safety v. Federal Highway Admin.,956 F.2d 309 (D.C. Cir.1992).

of once every two years.[159] The FHWA arrived at the five-year standard because no information was available to suggest that it should rule otherwise.[160] Judge Thomas wrote that the FHWA decision could be found arbitrary and capricious only if it were premised on facts unsupported by substantial evidence.[161] He added that the FHWA examined the small amount of available relevant data, doing "the best it could with the little information it had, and the arbitrary and capricious standard requires no more than that."[162]

In the case of the CPNI order, the FCC did mention that it examined articles surrounding the privacy debate and examined the results of several studies submitted by the carriers affected by the decision.[163] In addition, the CPNI Order noted that the FCC had compared its interpretation of section 222(c)(1) to other statutes regulating the use and release of consumer personal data.[164] Thus, under the standards in *Center For Auto Safety*, the FCC may have complied an evidentiary record sufficient to achieve substantial deference sufficient to sustain the CPNI Order. By framing the CPNI Order in terms of the First Amendment, however, US West sidestepped any deference afforded the FCC under the APA. Thus, the FCC may encounter increasing difficulty in its attempt to regulate the data assets of carriers (and indirectly competition between carriers) because of the rapidly expanding role that consumer data plays in marketing carrier services and products.

H. Conclusion

The debate over the acceptable uses of personal consumer data is only beginning. Not only are commentators unsure as to the existing privacy rights in data such as CPNI, but they also are unsure about the outcome of restricting the use of such data. In the case of CPNI, carriers have strong arguments favoring their side of the balance under *Central Hudson*. They can point to real costs – both direct and competitive - imposed by the regulation of CPNI use. In addition, under the present characterization of CPNI use, the APA is ineffective in assisting the FCC in regulating consumer privacy. Until challenges under either *Central Hudson* or the APA can be satisfied by sufficient evidence, carriers should remain free to use opt-out approval techniques to gain access to CPNI, and other like data, for marketing uses.

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159 *See* Center For Auto Safety v. Federal Highway Admin.,956 F.2d 309, 310 (D.C. Cir.1992).

160 *See id.* at 312.

161 *See id.* at 313.

162 *See id.* at 316.

163 *See* CPNI Order ¶¶ 61-62.

164 See CPNI Order ¶¶ 60-62.