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U.S. West, Inc. v. FCC Interprets in First Amendment Ramifications of Customer Proprietary Network Information

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COMMUNICATIONS LAW: *U.S. WEST, INC. V. FCC* INTERPRETS THE FIRST AMENDMENT RAMIFICATIONS OF "CUSTOMER PROPRIETARY NETWORK INFORMATION"

INTRODUCTION

Perhaps the most broad-sweeping piece of legislation of the last decade, the Federal Telecommunications Act of 1996[1] ("Telecom Act"), radically altered the competitive landscape of the telecommunications market. Essentially, the Telecom Act attempts to level the playing field long held by government-sanctioned monopolist telephone companies. The Act requires infrastructure sharing among competitors,[2] restrains certain markets for Bell Operating Companies ("BOCs")[3], and limits the role of state and local governments.[4] At the same time, the Telecom Act balances the interests of consumers who need affordable telecommunications service provided on a "universal" basis.[5]

As the decade ends, however, courts struggle to interpret the Telecom Act in ways consistent with the intent of Congress, while being fair to the parties before them.[6] Perhaps further complicating this mix of issues is the broad scope of power given the Federal Communication Commission ("FCC") to interpret and enforce the Telecom Act.[7]

The FCC's regulations concerning the use of "Customer Proprietary Network Information" ("CPNI")[8] promulgated pursuant to section 222 of

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (codified as amended at 47 U.S.C. §§ 151-614 (Supp. III 1997)).

2. *See* 47 U.S.C. §§ 251-252, 259 (Supp. III 1997).

3. *See* 47 U.S.C. §§ 271-276. BOCs are those local telephone companies formerly part of the Bell Company monopoly. U.S. West Communications Company, for example, is a BOC. *See id.* § 153(4).

4. *See id.* § 253.

5. *See id.* § 254 (discussing quality, rates, and access); *see also* § 255 (discussing disability access).

6. *See* AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 389-90 (1999).

7. *See* 47 U.S.C. § 401(c) (granting the FCC discretionary forbearance of any regulation compelled under the Telecom Act).

8. 47 C.F.R. § 64.2003(c) (1998).

the Telecom Act[9] recently came within the purview of the Tenth Circuit in *U.S. West, Inc. v. FCC.*[10] This comment discusses the Tenth Circuit's decision in *U.S. West.* First, this comment provides some background information on CPNI and its relationship to the telecommunications industry. This comment then examines the First Amendment issues addressed in *U.S. West.* By way of reference, this comment also explores recent First Amendment cases in other circuits. Finally, this comment attempts to draw a distinction between those cases and the Tenth Circuit's First Amendment analysis in *U.S. West.*

I. CUSTOMER PROPRIETARY NETWORK INFORMATION

A. Background

Generally stated, "CPNI is information about a telephone customer's use of the telephone network, such as the number of lines ordered, service location, type and class of services purchased, usage levels, and calling patterns."[11] The Telecom Act defines CPNI 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 . . . .[12]

Telecommunications carriers use CPNI for a variety of reasons. Most importantly, however, CPNI is a valuable marketing tool. CPNI assists telecommunications carriers in "identifying potential customers, design-

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9. *See* 47 U.S.C. § 222; 47 C.F.R. § 2001.
10. 182 F.3d 1224 (10th Cir. 1999).
11. California v. FCC, 39 F.3d 919, 930 (9th Cir. 1994).
12. 47 U.S.C. § 222(f)(1). Subscriber lists are defined as any information:
(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and
(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Id. § 222(f)(3). Mere lists of subscribers are specifically excluded from CPNI, and the reader is cautioned not to confuse the two. *See id.* § 222(f)(1). Indeed, disclosure of subscriber lists, such as the information one might find in a telephone directory, is compulsory under Section 222. *See id.* § 222(e).

ing more efficient services, and better meeting customer needs."[13] BOCs and competitor service providers use CPNI in their development and marketing of services.[14] Put simply, CPNI can be manipulated into creating a very accurate and highly detailed direct marketing list.[15]

By way of an example, suppose U.S. West knows through aggregate demographics that local telephone service customers who call Philadelphia generally also call Trenton. If U.S. West develops a new Trenton market, it can use CPNI to tailor its pricing, service plan, and marketing campaign particularly to an individual local telephone service customer.[16] Moreover, as an incumbent local exchange carrier, U.S. West possesses a broad customer base and detailed CPNI. Absent regulation to the contrary, U.S. West can use its CPNI to market to individual customers any advance in service or technology in a more effective and less expensive manner than its competitors.

CPNI creates privacy issues in addition to the competitive advantages garnered through its use.[17] Absent regulation to the contrary, U.S. West can sell CPNI at monopoly prices to its competitors without regard to the wishes of its customers. This means that all the potentially private information appearing on a customer bill – whom she called, when, and how often – could be freely disseminated to any carrier willing to pay the price.[18] In other words, CPNI would no longer be proprietary information.

Because of the implications to customer privacy, the federal government has long regulated CPNI.[19] To protect the proprietary and privacy interests of consumers, the FCC permitted the BOCs unrestricted access to CPNI by any of BOC's telephone customer unless the customer specifically opted-out and requested confidentiality.[20] However, competitive carriers had to obtain customer authorization to gain access to CPNI.[21]

This opt-out regulation proved ineffective. The customer could prevent her telephone company from disclosing her CPNI to the other car-

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13. *California*, 39 F.3d at 930. Telecommunications services are divided into two very general categories. California v. FCC, 905 F.2d 1227, 1223 n.3 (9th Cir. 1990). "Basic service" is local exchange service. *California*, 905 F.2d at 1223 n.3. "Enhanced services" include everything else such as long distance service, voice mail, and call forwarding. *Id.* at 1226.

14. *See California*, 39 F.3d at 930.

15. *See id.*

16. *See generally* U.S. West, Inc. v. FCC, 182 F.3d 1224, 1230 (10th Cir. 1999) (discussing how carriers can utilize CPNI information to market products to customers).

17. *See* 47 U.S.C. § 222(c)(1) (Supp. III. 1997).

18. *See U.S. West*, 182 F.3d at 1229 n.1.

19. *See id.* at 1229 (discussing past government restrictions on CPNI disclosures).

20. *See California*, 39 F.3d at 930.

21. *See id.*

rier only by specifically requesting confidentiality.[22] Many customers were not notified of their option to request confidentiality,[23] did not understand their rights to opt-out or failed to opt-out even if they wanted their confidentiality preserved.[24]

The prior CPNI regulation created a competitive disadvantage as well. BOCs had unrestricted access to CPNI "by default" while other carriers had to obtain customer authorization before the carriers were permitted access to CPNI.[25] Thus, consumer inertia had to be overcome for other carriers to gain access to CPNI. The FCC amended these rules before enactment of the Telecom Act by requiring competitive carriers to receive authorization from customers only with 20 lines or less.[26]

As indicated above, section 222 represents the Telecom Act's response to CPNI. Like most of the Telecom Act, section 222 asserts the interests of the government in creating a competitive environment by placing restraints on carriers possessing another carrier's CPNI.[27] As such, section 222 requires all carriers to keep confidential the CPNI of other telecommunication carriers.[28] If a carrier receives proprietary information from another carrier in the course of business, it is required to use the information only for the intended purpose, not for its own marketing purposes.[29]

Following in the tradition of previous CPNI regulation, section 222 also provides safeguards for consumers who want private information gained about them through their use of telecommunications to be kept confidential.[30] Specifically, section 222 provides that:

> [e]xcept as required by law or with the approval of the customer, a telecommunications carrier . . . 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

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22. *See id.*

23. *See id.* This "customer notification" is essentially the same "opt-out" plan that so captivates the Tenth Circuit majority in *U.S. West*. *See U.S. West*, 182 F.3d at 123-39.

24. *See generally* Computer III, 6 F.C.C.R. 7571, 7606-07 (FCC 1991) (Order on Remand) (acknowledging the failure of customers to understand or respond to notices discussing CPNI disclosures).

25. *California*, 39 F.3d at 930.

26. *See id.*

27. *See* 47 U.S.C. § 222(c)(1), (3) (Supp. III 1997).

28. 47 U.S.C. § 222(a).

29. *Id.* § 222(b).

30. *See id.* § 222(c)(1).

> such telecommunications service, including the publishing of directories.[31]

Upon an "affirmative written request by the customer" a telecommunications carrier must disclose customer proprietary network information to any person so "designated by the customer."[32]

Section 222 also recognizes the value of CPNI as a marketing tool and as a sellable commodity. To this end, section 222 only restrains the use of individual CPNI. All carriers are free to "use, disclose or permit access to aggregate customer information."[33] Even incumbent local exchange carriers, who generally are prevented from using their market advantages, may also "use, disclose, or permit access to aggregate customer information" if they provide such aggregate information on a "reasonable and nondiscriminatory" basis.[34] CPNI in a demographic or compiled form is freely transferable.[35] As a result, carriers may use aggregate information to design marketing campaigns, tailor services, or compile and sell the demographic information of its customer base. Of course, carriers are also allowed to use CPNI to collect fees for services rendered, "to protect the rights or property of the carrier," or to provide customer services at the customer's request.[36]

Section 222 is not the only constraint on the use of CPNI. In 1998, the FCC released an order interpreting and promulgating regulations pursuant to section 222.[37] Essentially, the FCC divided the affected telecommunications services into three categories: local, interexchange (long distance), and commercial mobile radio services ("CMRS").[38] Carriers may use or disclose CPNI to market primary or ancillary services within a category to customers who already subscribe within that category.[39] Generally, carriers are not permitted to share CPNI among their affiliates without customer approval.[40] However, if a customer subscribes to services in more than one category from the same carrier, the carrier may share CPNI even if an affiliated company offers one of the services.[41]

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31. *Id.*
32. *Id.* § 222(c)(2).
33. *Id.* § 222(c)(3). Aggregate customer information is defined as "collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed." *Id.* § 222(f)(2).
34. *Id.* § 222(c)(3).
35. *See id.* § 222(c).
36. *Id.* § 222(d).
37. *See* 47 C.F.R. §§ 64.2000- .2009 (1998).
38. 47 C.F.R. § 64.2005(a); *see* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 177 (15th ed. 1999) (noting that CMRS is an acronym for "commercial mobile radio service").
39. *See* 47 C.F.R. § 64.2005(a).
40. *See id.* § 64.2005(b).
41. *See id.* § 64.2005(a)(1).

In addition, carriers may not use or disclose CPNI to track calls to competitors,[42] to regain customers who have switched providers,[43] or to provide customer premises equipment ("CPE") or information services, such as call answering, voice mail, and Internet access without customer approval.[44] However, carriers may, without customer approval, use or disclose CPNI to provide hardware services,[45] to research "health effects of CMRS,"[46] or to market closely-related ancillary services such as speed dialing, directory assistance, call return, call waiting, and caller I.D.[47]

Customer approval may be acquired by any method convenient to the carrier, including oral or electronic means.[48] Before soliciting approval, the carrier must provide the customer with a "one-time notification,"[49] containing, among other specific requirements, sufficient information to make an "informed decision."[50] In addition, the notification must inform the customer of her right to confidentiality.[51] Carriers must keep records of notification for at least one year,[52] and the carrier bears the burden of demonstrating that approval was given.[53] Once given, customer approvals remain in effect until limited in scope or revoked.[54] The FCC also requires carriers to set in place procedural and technical safeguards to protect against the inadvertent dissemination of CPNI.[55]

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42. *See id.* § 64.2005(b)(2).

43. *See id.* § 64.2005(b)(3).

44. *See id.* § 64.2005(b)(1). CPE refers to telephone equipment such as "key systems, PBXs, [and] answering machines," which reside on the customer's premises. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 204 (15th ed. 1999). As used here, "'premises' might be anything from an office to a factory to a home." *Id.* CPE is also known as "customer provided equipment"; the two terms are interchangeable. *See id.*

45. *See* 47 C.F.R. § 64.2005(c)(1) (1998). Hardware services are "inside wiring installation, maintenance, and repair services." *Id.*

46. 47 C.F.R. § 64.2005(c)(2).

47. *Id.* § 64.2005(c)(3).

48. *See* 47 C.F.R. § 64.2007(b).

49. *Id.* § 64.2007(f).

50. *Id.* § 64.2007(f)(2).

51. *See id.* § 64.2007(f)(2)(i).

52. *See id.* § 64.2007(e).

53. *See id.* § 64.2007(c).

54. *See id.* § 64.2007(d).

55. *See id.* § 64.2009(a)-(e) (including, among other things, developing and implementing software, training personnel, establishing supervisory procedures and providing for annual officer approval of compliance measures).

B. U.S. West v. Federal Communications Commission

1. Facts

U.S. West challenged the FCC's regulations discussed above, claiming that the regulations "violate[d] the First Amendment by restricting its ability to engage in commercial speech with customers."[56] The FCC defended its regulations by asserting that CPNI regulations did not implicate any constitutional concerns, were reasonable, and thus were "entitled to deference" under a *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[57] analysis.[58]

2. Decision

Although courts usually employ *Chevron* when an agency's interpretive regulations are challenged, the Tenth Circuit refused to apply *Chevron* until it resolved the constitutional challenge.[59] "[I]f we determine that the FCC's customer approval rule presents a serious or grave constitutional question, we will owe the FCC no deference, even if its CPNI regulations are otherwise reasonable, and will apply the rule of constitutional doubt."[60]

Having decided that the CPNI regulations raised a constitutional question, the Tenth Circuit first turned to the question of whether the CPNI regulations restricted protected speech.[61] The FCC argued that the CPNI regulations did not implicate speech at all.[62] Instead, the FCC contended, the regulations merely prohibit the manner in which a carrier uses CPNI to target its marketing scheme.[63]

The court rejected this argument, saying that a restriction on the ability of either component of speech – the speaker or the audience – was a

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56. U.S. West, Inc. v. FCC, 182 F.3d 1224, 1230 (10th Cir. 1999). The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. U.S. West also asserted a Fifth Amendment violation "because CPNI represents valuable property that belongs to the carriers and the regulations greatly diminish its value." *U.S. West*, 182 F.3d at 1230. However, the Tenth Circuit's discussion in this case focused primarily on the impact on commercial speech, and so the discussion in this Note shall be similarly limited in scope. *See id.* at 1239 n.14.

57. 467 U.S. 837 (1984).

58. *See U.S. West*, 182 F.3d at 1231. The *Chevron* doctrine essentially states that when Congress has expressly spoken to the precise question at issue, the court must give effect to the express intent. *Chevron*, 467 U.S. at 842-43. However, "if the statute is silent or ambiguous," the court must defer to the agency's interpretation if it is reasonable. *See id.* As a result, *Chevron* provides a nearly perfect defense for most federal agency regulation because the regulation must be unreasonable or unrelated to the statute for the court to overturn it.

59. *See U.S. West*, 182 F.3d at 1231.

60. *Id.*

61. *See id.* at 1232.

62. *See id.*

63. *See id.*

restriction on free speech.[64] "[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 . . . ."[65] The court further observed that the mere fact that U.S. West had "alternative channels of communication" did not eradicate the restrictions on speech imposed by the CPNI regulations.[66]

The Tenth Circuit next determined what type of speech the CPNI regulations implicated.[67] Because the speech targeted a carrier's customers for the purpose of soliciting those customers to purchase more or different telecommunications services, the court reasoned that use of CPNI concerned a commercial transaction.[68] As such, the CPNI regulations targeted commercial speech.[69]

Since non-misleading commercial speech is protected under the First Amendment, the court applied a *Central Hudson Gas & Electric Corp. v. Public Service Commission*[70] analysis.[71] In *Central Hudson*, the Supreme Court set forth the test to determine whether a government restriction on commercial speech violates the First Amendment.[72] First, it must be determined if the expression is entitled to First Amendment protection.[73] Next, it must be determined if "the asserted governmental interest is substantial . . . whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[74]

The FCC advanced two state interests, "protecting customer privacy and promoting competition."[75] While the Tenth Circuit conceded that these are legitimate and substantial interests "in the abstract," it nonetheless found that the FCC failed to build a record that adequately justified those interests as to the specific use of CPNI.[76] In particular, the

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64. *See id.*
65. *Id.*
66. *Id.*
67. *See id.* at 1232-33.
68. *See id.* at 1232.
69. *See id.* at 1233.
70. 447 U.S. 557 (1980).
71. *See U.S. West*, 182 F.3d at 1233-39.
72. *See* Central Hudson, Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).
73. *See Central Hudson*, 447 U.S. at 566. To be entitled to First Amendment protection, commercial speech "must concern lawful activity and not be misleading." *Id.*
74. *Id.*
75. *U.S. West*, 182 F.3d at 1234.
76. *Id.*

FCC failed to articulate the exact privacy interests served.[77] The court set forth the government's burden as follows:

> 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 desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity.[78]

A more "empirical explanation" was needed to justify the privacy interest.[79] In addition, the court rebuffed any other privacy reasons as being "[a] general level of discomfort from knowing that people can readily access information about us" and that this discomfort "does not necessarily rise to the level of a substantial state interest under *Central Hudson*."[80] Notwithstanding these reservations, however, the court assumed that the government's interest in preventing the dissemination of "sensitive and potentially embarrassing personal information" was sufficient to pass the first prong of *Central Hudson*.[81]

The Tenth Circuit expressed even more skepticism with the government's interest in promoting competition.[82] "While the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the telecommunications industry . . . . Congress did not intend for competition to be a significant purpose of § 222."[83] The Tenth Circuit's skepticism stemmed from three observations.[84] First, the court noted that "the plain language of the section deals almost exclusively with privacy. . . . [and] contains no explicit mention of competition."[85] Second, the

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77. *See id.* at 1235. Interestingly, the Tenth Circuit advances that privacy is not an "absolute good" because of the "real costs" it imposes on society. *Id.* Indeed, the court notes that "privacy 'facilitates the dissemination of false information, . . . protects the withholding of relevant true information, interferes with the collection, organization and storage of information' thus leading to 'reduced productivity and higher prices,' and even threatens physical safety by 'interfering with the public's ability to access information needed to protect themselves.'" *Id.* at 1235 n.7 (quoting FRED H. CATE, PRIVACY IN THE INFORMATION AGE 28-29 (1997)). One supposes, then, under the Tenth Circuit's ruminations, if everyone's life were splayed out for all to see, analyze, and capitalize upon, we could avoid all those pesky problems caused by people's annoying insistence at requiring the government to protect our privacy.

78. *Id.* at 1235.

79. *Id.*

80. *Id.*

81. *Id.* at 1235-36.

82. *See id.* at 1236.

83. *Id.*

84. *See id.*

85. *Id.* The Tenth Circuit admits that "§ 222(c)(3) and § 222(e) impose nondiscrimination requirements . . . which could be construed as pro-competition measures" but incredibly finds "that

CPNI restrictions applied to all carriers, "not just the dominant ones."[86] Third, full CPNI use was allowed with customer approval.[87] Nevertheless, the court decided that promoting competition, when combined with the privacy interest, was sufficient to pass the first prong of *Central Hudson* even though increasing competition would not alone justify the CPNI regulations.[88]

The Tenth Circuit then turned to the second prong of the *Central Hudson* test to determine whether the CPNI regulations would address the interests in any material way.[89] The court was unconvinced that the CPNI regulations would alleviate the government's concerns since any harm to privacy or competition absent the regulations was mere speculation.[90] The court further noted that it had "no indication of how [an invasion of privacy] may occur in reality with respect to CPNI" or "that the disclosure might actually occur."[91] Additionally, the court dismissed as "speculation" and "conjecture" the FCC's assertion that use of CPNI information would impede competition.[92] Thus, the court found that the FCC failed to satisfy *Central Hudson's* second prong.[93]

Although stating that the FCC's position was too deficient for a full *Central Hudson* analysis, the Tenth Circuit proceeded to the last prong of *Central Hudson* to further criticize the CPNI regulations for not being sufficiently narrowly tailored.[94] The court made much of the fact that the FCC chose the "opt-in" over the "opt-out" procedure for obtaining customer approval.[95] "[O]n this record, the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the CPNI regulations regarding customer approval."[96] As a result, the Tenth Circuit held that at the very least the CPNI regulations "raise a serious constitutional question" and thus violated the First Amendment.[97]

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these do not sufficiently indicate that increasing competition was a purpose of § 222." *Id.* at 1236-37. *See infra* Part C for a discussion of the court's misplaced dismissal of the competition argument.

86. *Id.* at 1237.
87. *See id.*
88. *See id.*
89. *See id.* (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)).
90. *See id.*
91. *Id.*
92. *Id.* at 1238.
93. *See id.* at 1237-38.
94. *See id.* at 1238.
95. *Id.* at 1238-39.
96. *Id.*
97. *Id.* at 1240.

In a vigorous dissent, Judge Briscoe advanced the position that the CPNI are a reasonable interpretation of section 222 and that "neither of the constitutional challenges asserted by U.S. West [are] serious enough to warrant abandoning the traditional deference we grant agency interpretations under *Chevron*."[98] Judge Briscoe condemned the majority's view as "frustratingly vague" and flawed by "stray[ing] from the narrow scope of the CPNI Order and effectively tak[ing] into account the statutory restrictions on CPNI usage."[99] In other words, the majority confused the FCC's role in promulgating interpretive regulation with the statute's requirements.[100] Had the majority properly narrowed the scope of its inquiry, it would have applied a *Chevron* inquiry and the regulations would be upheld.[101]

C. *Other Circuits*

The other circuits have not yet ruled on the constitutionality of the FCC's CPNI rules. However, the Tenth Circuit's holding in *U.S. West* is analogous to the First Amendment analysis used by other circuits in considering commercial broadcasting decisions.

In *Chesapeake and Potomac Telephone Company v. United States*,[102] the Fourth Circuit considered 47 U.S.C. § 533(b)(1) which prohibited a local telephone company from offering cable television services to its local telephone subscribers when the local telephone company retained editorial control over the television services.[103] Similar to the FCC's position in *U.S. West*, the governmental interest in *Chesapeake* was to remove the tempting incentive for local telephone companies to dominate the cable television medium in their respective local markets.[104]

In considering section 533, the Fourth Circuit acknowledged that a remedy "'need not be the least-restrictive or least-intrusive means'" and noted that the "requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[105] The Fourth Circuit, however, found that section 533 was not sufficiently tailored because the government failed to demonstrate why the Section did not "'burden substantially more speech than is necessary.'"[106] If there are alternative methods of communication available, those methods must be "suffi-

98. *Id.* at 1243.
99. *Id.* at 1244.
100. *See id.* at 1246-47.
101. *See id.*
102. 42 F.3d 181(4th Cir. 1994), *vacated*, 516 U.S. 415 (1996).
103. *See Chesapeake*, 42 F.3d at 185.
104. *See id.* at 198.
105. *Id.* at 199 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989)).
106. *Id.* at 202 (quoting *Ward*, 491 U.S. at 799).

ciently similar" to methods prohibited by the statute.[107] As a result, section 533 failed to pass constitutional muster since "[t]he statute bars absolutely the telephone companies from entering with [the ability to edit program content] the cable television market."[108]

The Fifth Circuit similarly scrutinized broadcasting regulations in *Greater New Orleans Broadcasting Association v. United States*.[109] Under fire in that case was 18 U.S.C. § 1304, which prohibited television stations from broadcasting advertisements for lotteries or gambling casinos.[110] Since the individual states could not effectively regulate the broadcasts, the Unites States asserted that it had an interest in reducing public participation in commercial lotteries and in protecting those states that chose not to permit casino gambling within their borders.[111] The Fifth Circuit struck the regulation outright and decided that "[l]ittle deference can be accorded to the state's legislative determination that a commercial speech restriction is no more onerous than necessary to serve the government's interests."[112]

The Ninth Circuit in *Valley Broadcasting Co. v. United States*[113] also addressed the advertising restrictions in 18 U.S.C. § 1304.[114] Unlike the Fifth Circuit, the court found the government's articulated interests to be "substantial"[115] and that the limitation on advertising appeared to directly advance those interests.[116] The court nonetheless struck the prohibition because the numerous exceptions contained in the statute "'directly undermine[d] and counteract[ed] its effects.'"[117]

Not all advertising or marketing regulations fail the test for restrictions on commercial speech. The Ninth Circuit addressed automated telemarketing regulations in *Moser v. FCC*.[118] Many companies had begun using automated telemarketing, which engaged a computer to call numbers sequentially on a list and played a pre-recorded advertisement upon answer.[119] Consumers would have to wait until the end of the taped

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107. *Id.* at 203.
108. *Id.*
109. 149 F.3d 334 (5th Cir. 1998), *rev'd*, 119 S. Ct. 1923 (1999).
110. *See Greater New Orleans Broad.*, 149 F.3d at 336.
111. *See id.* at 338.
112. *Id.*
113. 107 F.3d 1328 (9th Cir. 1997).
114. *See* Valley Broad. Co. v. United States, 107 F.3d 1328, 1329-30 (9th Cir. 1997).
115. *Valley Broad*, 107 F.3d at 1332.
116. *See id.* at 1334.
117. *Id.* at 1335, 1336 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995)).
118. 46 F.3d 970, 972 (9th Cir. 1995).
119. *See Moser*, 46 F.3d at 972.

messages in order to remove their names from the calling lists.[120] Although forty-one of the states had passed regulation limiting the use of such automated telemarketing, the states asked for federal legislation because they could not regulate interstate calls.[121] A provision of the Telephone Consumer Protection Act of 1991[122] banned prerecorded telemarketing calls because the volume of automated calls created a nuisance for consumers.[123] The federal statute permitted the use of prerecorded messages "only if a live operator introduce[d] the message or if the customer consent[ed]."[124]

The National Association of Telecomputer Operators ("NATO") brought suit alleging that the law violated the First Amendment because it was not "narrowly tailored to further a substantial government interest."[125] Here, the government's interest was "residential privacy."[126] NATO asserted that the "ban on automated, commercial calls [was] unjustified because there [was] no evidence that [commercial calls were] more intrusive than either 'live' or noncommercial calls."[127]

The Ninth Circuit disagreed and upheld the statute.[128] The court noted that Congress made extensive findings based upon "'significant evidence' before Congress of consumer concerns about telephone solicitation[s] in general and about automated calls in particular."[129] Notably, the court stated that

> [t]he restrictions in the Act leave open many alternative channels of communication, including the use of taped messages introduced by live speakers or taped messages to which consumers have consented, as well as all live solicitation calls. That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice.[130]

D. Analysis

As the broadcasting decisions from the Fourth and Fifth Circuits indicate, the Tenth Circuit applied the proper First Amendment analysis

120. *See id.*
121. *See id.*
122. *See* 47 U.S.C. § 227 (1994).
123. *See Moser*, 46 F.3d at 971-72.
124. *Id.* at 972.
125. *Id.* at 973.
126. *Id.* at 974.
127. *Id.*
128. *See id.* at 975.
129. *Id.* at 974.
130. *Id.* at 975.

with the appropriate scrutiny. However, the Tenth Circuit's decision in *U.S. West* is distinguishable from the other cases in several ways.

First, the Tenth Circuit appears to misapprehend CPNI. CPNI is not a medium through which a speaker communicates to its audience like television or radio broadcasting. CPNI is not a means of communication or a form of commercial speech and thus use of CPNI is distinguishable from the broadcasting cases above.[131] Seen in its simplest form, CPNI is a collection of highly complicated and detailed data about telecommunications usage. Telecommunications carriers manipulate this data into meaningful information in order to market services. In this respect, CPNI is more like the automatic calling methods used in *Moser*, and thus not deserving heightened scrutiny as commercial speech.[132]

The Tenth Circuit also appears to misunderstand the competitive import of CPNI as used by BOCs and other incumbent carriers. For a BOC, CPNI represents a customer base and data collected through decades of monopolistic power. A company like U.S. West need go no further than its own local service database to market long distance services or other ancillary services. As a result, U.S. West possesses a significant advantage over competitive carriers.

In this respect, CPNI is perhaps best understood as infrastructure, like poles or fiber optic cables. Carriers are required to share space on poles, cables and other facilities with competing carriers since it would difficult, if not impossible, for another carrier to compete without this infrastructure in place.[133]

Just like the poles or cables installed throughout its territory, U.S. West's CPNI creates a market already in place for services it may offer in addition to local service. A similar marketing effort would be extremely expensive for a carrier that lacked the same CPNI. If CPNI did not involve individual customer data, the FCC could have required sharing of CPNI just as it requires the sharing of facilities. For example, subscriber lists or directory information must be shared among carriers.

Unfortunately, the Tenth Circuit did not give proper weight to the competitive value of CPNI nor did the court consider the particular timing of U.S. West's suit. Under the Telecom Act, BOCs are temporarily restrained from offering long distance service until certain requirements

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131. *See* Greater New Orleans Broad. Ass'n v. United States, 149 F.3d 334, 335-36 (5th Cir. 1998) (discussing advertising of gambling and lotteries); Valley Broad. Co. v. United States, 107 F.3d 1328, 1330 (9th Cir. 1997) (discussing advertising of casino gambling); Chesapeake and Potomac Tel. Co. v. United States, 42 F.3d 181, 186 (4th Cir. 1994) (discussing a cable operating system).

132. *See Moser*, 46 F.3d at 972.

133. *See* 47 U.S.C. §§ 251, 252, 259 (Supp. III 1997).

are met.[134] On May 8, 1998, U.S. West became eligible under the Telecom Act to begin selling long distance services.[135] As a result of the Tenth Circuit's ruling, U.S. West may use its CPNI to market its long distance services to its broad, local service customer base. By striking down the FCC's regulations, the court permits U.S. West to enjoy a significant market advantage over its long distance rivals.

Additionally, in its *Central Hudson* analysis, the Tenth Circuit does not properly appreciate the asserted government's interests. First, the court misapprehends that the government's interest in promoting competition in telecommunications and its interest in protecting proprietary customer information are *competing* interests. Similar to access to other telecommunications facilities, unrestrained use of CPNI by all carriers would promote competition. However, this would severely curtail the government's ability to protect consumers. Once CPNI were in the stream of commerce, it would be very difficult, if not impossible, for a consumer to halt its use or dissemination. As a result, the FCC regulations tried to strike a balance between these interests by restraining carriers from using CPNI across categories while permitting its use without approval for related services.

III. CONCLUSION

The Tenth Circuit's decision in *U.S. West* struck the FCC's CPNI regulations promulgated pursuant to section 222 of the Telecom Act. However, the court improperly characterized CPNI as commercial speech. Moreover, even if characterized as commercial speech, CPNI regulations were constitutional because they were carefully crafted to further the government's interest in protecting customer privacy and promoting competition in the telecommunications industry.

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134. *See id.* § 271.

135. *See generally* Leyla Kokmen, *Telephone Alliance to Net 'U.S. Qwest'? Local Server Strikes Long-distance Deal*, DENVER POST, May 8, 1998, at A1.