



## **Telecom Alert: D.C. Circuit Court Upholds Customer “Opt-in” Requirement for CPNI Disclosure**

(February 16, 2009)

The U.S. Court of Appeals for the D.C. Circuit issued a decision on Friday, February 13, 2009, upholding the Federal Communication Commission’s (“FCC”) Order in *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ User of Customer Proprietary Network Information and Other Customer Information*, 22 F.C.C.R. 9627 (2007) (“2007 Order”) concerning the appropriate mechanism for obtaining customer approval for the release of customer proprietary network information (“CPNI”).

Section 222 of the Telecommunications Act of 1996 imposes on carriers a duty to protect the confidentiality of proprietary information of consumers. 47 U.S.C. § 222(a). CPNI consists of information relating to the quantity, technical configuration, type, destination, location, and amount of use of a service subscribed to by a customer and includes such information as customers’ particular calling plans, special features, pricing and terms, and details about when and to whom calls are made.

Carriers are prohibited from using, disclosing, or allowing access to CPNI excepted as required by law or unless they have the approval of the customer. 47 U.S.C. § 222(c)(1). It is this latter item – customer approval - which was at issue before the D.C. Circuit Court.

In its 2007 Order, the FCC required carriers to obtain “opt-in” consent from a customer before disclosing CPNI to a carrier’s joint venture partner or independent contractor for the purpose of marketing communications-related services to the customer. 2007 Order ¶ 37. The 2007 Order was aimed primarily at “data brokers” – organizations which, as telecom contractors or partners, obtain and then sell private information about telecom customers online.

Petitioner National Cable & Telecommunications Association, along with Intervenors Qwest Communications International Inc. and Verizon, called into question the validity of the FCC’s 2007 Order, challenging the “opt-in” requirement on First Amendment and/or Administrative Procedure Act grounds.

In its decision, the Court rejected Petitioner’s and Intervenors’ arguments and concluded that substantial record evidence supported the FCC’s 2007 Order. The Court found that there is a substantial governmental interest in protecting the privacy of customer information and that requiring customer approval advances that interest. The Court further determined that the FCC, in reaching its 2007 Order, adequately provided a “reasoned analysis” and gave sufficient reasons for departing from its previous “opt-out” approach with respect to customer approval.

As a result of the Court’s ruling, carriers must continue to comply with the “opt-in” requirement established by the 2007 Order and, therefore, must obtain express consent from its customer before sharing that customer’s information with a joint venture partner or independent contractor for the purpose of marketing communications-related services to that customer.