Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	WC Docket No. 16-106

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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INTRODUCTION

Level 3 Communications, LLC ("Level 3") is a premiere provider of non-mass-market internet access, telephone, and interconnected Voice over Internet Protocol ("VoIP") services.[1] It provides a vast array of enterprise voice and broadband services, as well as wholesale voice and broadband services to clients who then resell the service to end users.

In its Notice of Proposed Rulemaking in this proceeding, the Commission has asked, among other things, how it should regulate the privacy and data security practices of non-mass-market voice service providers, in light of the fact that non-mass-market broadband internet access service providers are not subject to similar FCC regulations.[2] In doing so, the Commission has recognized that wholesale and enterprise customers have fundamentally different privacy-related needs, expectations, and degrees of bargaining power than individual, mass-market consumers. The Commission should harmonize its voice and broadband privacy rules to reflect this fact, and decline to prescriptively regulate the privacy and data security practices of wholesale and enterprise voice service providers. Instead, it should exempt the provision of services to wholesale and enterprise customers from subpart U of the Commission's rules in order to give wholesale and enterprise service providers flexibility in how they meet their statutory obligations to protect customer privacy within the framework of the plain language of Section 222 of the Communications Act.[3]

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[1] For ease, we refer to telephone and interconnected VoIP services as "voice services" in these comments. We do not intend the term to cover non-interconnected VoIP.

[2] *Protecting the Privacy of Customers of Broadband & Other Telecommunications Servs.*, Notice of Proposed Rulemaking, FCC 16-39, WC Docket No. 16-106, ¶ 152 (rel. Apr. 1, 2016) ("NPRM").

[3] 47 U.S.C. § 222.

If the Commission nonetheless decides that specific privacy and data security regulations are appropriate in the wholesale and enterprise voice context, the current voice regulations should be updated to reflect the fact that the needs and expectations of mass market customers are fundamentally different from those of enterprise and wholesale customers. In particular, the FCC should not extend mass-market consumer-focused ex ante regulations related to customer proprietary information ("CPI") to wholesale and enterprise voice service providers, and should update the Commission's current voice customer proprietary network information ("CPNI") rules to account for the fundamental differences between customer expectations with respect to mass-market and non-mass-market voice services.

I. Section 222, Standing Alone, Protects Wholesale and Enterprise Customer Privacy

The plain language of Section 222 of the Communications Act provides a clearly articulated framework within which carriers are obligated to protect the privacy interests of their customers and other carriers. The Commission should not dictate *how* providers are to meet those obligations with respect to their wholesale and enterprise voice customers. Instead, it should exempt the provision of services to wholesale and enterprise customers from subpart U of the Commissions' rules in order to give these providers flexibility to determine, along with their customers, how they meet their statutory obligations to protect customer privacy. This approach would harmonize the regulatory treatment of broadband and voice services in the wholesale and enterprise contexts, ensure appropriate customer privacy, give effect to customer expectations, and promote a competitively neutral communications market.

A. Providers of Wholesale and Enterprise Voice and Broadband Service and Their Customers Should Have Flexibility to Design Their Own Privacy Solutions Within the Framework of Section 222

The Commission has acknowledged that it is appropriate to establish different regulatory regimes for mass-market customers on the one hand, and enterprise and wholesale customers on

the other. This idea is embedded in the very definition of BIAS, which includes only "mass-market retail service[s]," not the high-speed Internet access and transit services that Level 3 and others sell to enterprise and wholesale customers.[4]

It is appropriate to allow carriers greater flexibility in the context of their relationships with enterprise and wholesale customers in the context of *both* voice and broadband service. Enterprise and wholesale services are "typically offered to larger organizations through customized or individually-negotiated arrangements."[5] Enterprise and wholesale customers "tend to be sophisticated and knowledgeable."[6] They typically enter into contracts with communications providers that are "the result of RFPs," are "individually-negotiated," and/or are for "customized service packages."[7] These customers have the knowledge and bargaining power necessary to contract for privacy and data security protections that are tailored to meet their needs.[8]

Moreover, the privacy interests at stake in the wholesale and enterprise contexts are different than in the mass-market context. Wholesale and enterprise service providers have access to less granular personally identifiable information ("PII") than mass-market service providers do. For example, when providing wholesale service, Level 3 does not collect contact

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[4] *Protecting & Promoting the Open Internet*, Report & Order on Remand, 30 FCC Rcd. 5601, ¶¶ 187, 189 (2015) ("*Open Internet Order*").

[5] *Id.* ¶ 189.

[6] *Id.* at n.466 (quoting *AT&T and BellSouth Corp.*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶ 85 (2007) (alterations omitted)).

[7] *Id.*

[8] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information & Other Customer Information*, Report and Order, 22 FCC Rcd. 6927 ¶ 25 (2007) ("*2007 CPNI Order*") ("[B]usinesses are typically able to negotiate the appropriate protection of CPNI in their service agreements.").

or account information about any of the end users of the voice service.[9] When providing enterprise service, Level 3 does not gather a record of the individual employee assigned to a given extension or phone number, except where necessary to comply with regulatory obligations. And because enterprise service is, by definition, not personal service, end users in the enterprise context do not have the same expectation of privacy in the use of the service and are not expected to risk exposing private information the way individual, mass-market consumers using their personal phones might.[10]

B. Exempting Wholesale and Enterprise Voice Providers from Specific Privacy Regulations Will Promote Flexibility and Harmonization

As the Commission notes in its NPRM, providers of wholesale and enterprise broadband internet access services are not subject to specific privacy rules promulgated by the FCC.[11] Those providers therefore have the flexibility to work with their customers and develop contractual provisions that best meet their customers' privacy and data protection requirements. Carriers can and should be granted a comparable level of flexibility when providing *voice* services to wholesale and enterprise customers, while still following the letter and the spirit of Section 222.

Clarifying that the statutory obligations of Section 222 apply to providers of wholesale and enterprise voice services – while exempting these providers from the Commission's regulations that direct carriers on *how* to implement Section 222 – would achieve this result.

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[9] As discussed in more detail below, resellers who provide mass-market voice service to consumers will have their own obligations under the FCC's PII rules, which will ensure that the privacy interests of end-user consumers are adequately met.

[10] As the FCC has previously recognized, "the privacy concerns of telecommunications consumers are greatest when using personal telecommunications services," rather than business services. *2007 CPNI Order* ¶ 25.

[11] NPRM ¶ 152; *see also Open Internet Order* ¶¶ 187, 189.

Providers would still be required to protect customer information, limit their use of carrier information and protect its confidentiality, and obtain customer approval (or infer customer approval when it is clearly warranted under the circumstances) before using, disclosing, or permitting access to CPNI for any reason other than providing voice service, or services necessary to or used in the provision of voice service, unless a statutory exception applies.[12] And in the wholesale context, resellers who provide mass-market voice service to consumers would have their own obligations under the FCC's rules.[13] But wholesale and enterprise voice providers and their sophisticated customers would have an appropriate level of flexibility and choice in determining how to meet these statutory and regulatory obligations, rather than having their relationship governed by ex ante rules designed for the mass market – rules that would impose compliance burdens that greatly outweigh the few, if any, benefits they deliver to enterprise and wholesale customers.

The FCC would, of course, retain the power to evaluate providers' compliance with Section 222 and bring an enforcement action where necessary. However, this case-by-case approach would be in line with the privacy and data security regime applicable to wholesale and enterprise broadband providers.

C. Harmonization Will Promote Important Commission Goals

Harmonizing the regulatory treatment of wholesale and enterprise voice service with that of wholesale and enterprise broadband services would promote Commission goals beyond providing appropriate levels of flexibility to wholesale and enterprise voice providers and ensuring appropriate privacy protections for customers. The Commission's goal in harmonizing

[12] 47 U.S.C. § 222.

[13] This obligation will ensure that wholesale providers and resellers enter into contracts that contain sufficient privacy and data security protection for consumers.

the voice and broadband privacy rules is to protect communications customers' reasonable expectation that all providers will be subject to the same rules.[14] Like individual consumers, enterprise customers would benefit from knowing that their voice and internet providers are subject to the same regulatory treatment, and that including the same provisions related to privacy and data security in a contract for voice service will achieve the same result as including those provisions in a contract for internet service. This is especially true when an enterprise or wholesale customer buys both voice and broadband services from the same provider, potentially in a single service agreement.

Harmonizing the regulatory treatment for voice and Internet enterprise providers will also promote the Commission's goal of ensuring that its regulations "are competitively neutral, across all platforms."[15] Simply put, imposing stringent – and in the context of enterprise and wholesale customers, unnecessary – ex ante regulations on one type of service but not another does not promote a competitively neutral communications market.

II. In the Alternative, the Commission Should Refine Rather Than Expand the Current CPNI Regulations for Wholesale and Enterprise Voice Service Providers

If the Commission continues to impose specific regulatory requirements on wholesale and enterprise voice providers' treatment of CPNI – which it should not – the Commission should not expand those obligations. The Commission should not adopt rules governing wholesale and enterprise voice service providers' use of CPI, and should update the current voice CPNI rules to reflect the fundamentally different expectations and requirements of mass-market customers and enterprise and wholesale customers.

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[14] *See* NPRM ¶ 64 ("Do commenters agree that [harmonizing voice and broadband rules] is consistent with current customer expectations?").

[15] NPRM ¶ 152.

A. The Commission Should Not Regulate CPI in the Wholesale and Enterprise Voice Context

The Commission proposed promulgating specific rules regarding the treatment of CPI in the first instance because "*ISPs* are the most important and extensive conduits of consumer information"[16] and "are uniquely situated . . . 'in a position to develop highly detailed and comprehensive profiles of their customers.'"[17] But the Commission has implicitly determined that, in the wholesale context, even ISPs do not need to face specific ex ante regulations covering CPI. For the same reason, the less sensitive and comprehensive CPI that wholesale and enterprise voice providers collect should not be subject to any new CPI regulatory requirements.

If not exempted from regulations addressing CPI, wholesale and enterprise voice service providers would face unique and unworkable burdens. For example, service contracts that are currently in place were negotiated under the assumption that CPI was not subject to specific regulations. Consequently, Level 3, and likely all other providers, have language in their master service agreements and other contracts that govern the confidentiality provider and customer data. Layering on a new regulatory regime – one that is designed specifically to protect the privacy of mass-market customers rather than corporate entities – will require review of and likely revision of those agreements, which number in the tens of thousands and may have been entered into by multiple entities that Level 3 has acquired. Renegotiating these contracts would be impractical, costly, and without any benefit to outweigh the burden.

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[16] NPRM ¶ 2 (emphasis added).

[17] NPRM ¶ 265 (quoting FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES & POLICYMAKERS at 55-56 (2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-tradecommission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf).

Such burdens are particularly unwarranted given the reduced privacy interests at stake in the wholesale and enterprise contexts and the ability of customers to negotiate protections for CPI. Indeed, there is no evidence that enterprise and wholesale customers are dissatisfied with their existing, negotiated privacy protections, and thus there is no reason to saddle providers or their customers with the cost and uncertainty that comes with disrupting their existing arrangements.

Moreover, placing new regulatory requirements on wholesale and enterprise voice providers will thwart the Commissions' stated goal of harmonizing the regulatory treatment of voice and broadband services. If wholesale and enterprise providers are subject to specific regulatory obligations with respect to voice service but not broadband service, their customers could include the same provisions related to privacy and data security in their agreements for broadband and voice services, only to receive different treatment for the two types of data. Such a result would be confusing and inconsistent with customer expectations.[18] To avoid this, the Commission should expressly exempt wholesale and enterprise voice providers from any rules it ultimately adopts that cover CPI in the voice context.

B. The Commission's Current Voice CPNI Rules Should Be Updated to Reflect the Different Needs and Expectations of Wholesale and Enterprise Customers

If the Commission continues to impose specific regulatory requirements on carrier use of wholesale and enterprise voice customers' proprietary network information, those requirements should be tailored to reflect wholesale and enterprise customers' expectations. In the wholesale and enterprise contexts, the Commission should abandon the total service approach, allow

[18] *See, e.g.*, NPRM ¶ 111 (noting the Commission's goal of promoting privacy practices that are "consistent with customer expectations").

service agreements to definitively settle how providers use CPNI internally, and clarify that providers do not need customer consent to share CPNI with indirect sellers for the limited purpose of facilitating compensation for indirect sales. These modifications to the current rules would facilitate the tech transition, promote competition, and better protect CPNI in the wholesale and enterprise contexts.

1. The Commission Should Abandon the Total Service Approach in the Wholesale and Enterprise Contexts

Wholesale and enterprise services buyers are sophisticated customers who reasonably expect their providers to offer tailored marketing across service offerings, but the current CPNI rules create unnecessary and outdated obstacles to their receiving it. In today's marketplace, the lines between local, long distance, and information services are increasingly blurred, particularly for wholesale and enterprise customers. Some of Level 3's most popular products are unified communications and collaboration ("UCC") platforms that bundle local and long distance, or local, long distance, and information services. Under the Commission's current total service approach, Level 3 is prohibited from using the CPNI of single-product customers that could benefit from moving to unified communications platforms if they previously opted out.[19] But because a customer's prior disapproval must "remain in effect until the customer revokes or limits" it,[20] the current rules prevent Level 3 from providing tailored marketing that can improve the quality and value of services the customer receives.

Of even greater concern, the total service approach is standing in the way of the tech transition. Level 3 has a vested interest in speeding up that transition by marketing interconnected VoIP, non-interconnected VoIP, IP-based integrated communications products,

[19] *See* 47 C.F.R. § 64.2007(b).

[20] *Id.* § 64.2007(a)(2).

and other information services to its current enterprise clients. However, under the current rules, Level 3 cannot use CPNI to market these services to enterprise customers who subscribe to telephone service (and other non-information service customers) without first obtaining customer consent – even in the context of a discontinuance of service, where Level 3 is discontinuing legacy TDM products that would be logically replaced by UCC or other services that cross the legacy and outdated boundaries established by the total service approach.[21] As the Commission has previously recognized, transitioning wholesale and enterprise customers away from legacy networks toward alternative platforms will facilitate the tech transition.[22] Moreover, the Commission has noted the importance of giving wholesale providers access to IP-based service as a means of maintaining retail customer choice, during and after the tech transition.[23] It is in the public interest to allow wholesale and enterprise voice service providers to educate their customers about the benefits of transitioning to IP (which frequently includes cost savings, quality of service benefits, and other improvements) and to provide them with opportunities to make that transition. The CPNI rules should encourage, not impede, that education. The Commission should, therefore, abandon the total service approach in the enterprise and wholesale contexts in order to eliminate the unnecessary burdens created by the legacy and outdated service category boundaries.

[21] *Id.* § 64.2007(b).

[22] *See Technology Transitions*, Report & Order, 30 FCC Rcd. 9372, ¶ 29 (2015).

[23] *See id.* ¶ 70 (noting that, without increased access to IP resources, "copper retirements . . . have the potential to reduce wholesale . . . access, thereby reducing retail customer choice" (internal citations omitted)).

2. The Commission Should Provide the Opportunity for All Authorizations for (and Limits to) a Providers' Internal Use of CPNI to Be Settled by Contract

The Commission already has recognized that business customers may wish to negotiate CPNI protections that differ from the baseline established by its rules in the context of customer authentication.[24] Carriers and business customers should further be allowed to settle at the time of contract how the carrier will use CPNI for its own internal purposes. Under the current rule, providers must give wholesale and enterprise customers a notification "specify[ing] the types of information that constitute CPNI . . . [and] the purposes for which CPNI will be used" – and seek a new consent for any additional sharing of CPNI that goes beyond the scope of a prior notice.[25] This is inefficient, creates customer frustration, and imposes an unnecessary administrative burden on Level 3 and other providers of non-mass-market voice services.

Level 3 commonly receives complaints from customers when they receive opt-in or opt-out notices after having informed Level 3 that they broadly consent to the sharing and use of CPNI. Most wholesale or enterprise customers have an ongoing relationship with their voice service providers, and may wish to be able to negotiate alternatives to the default privacy rules.[26] And even where parties have negotiated alternatives, wholesale and enterprise voice providers are subject to data security obligations under Section 222 and any implementing rules the Commission applies to providers. Under these circumstances, there is no good reason for the Commission to continue to prevent private parties to a wholesale or enterprise service agreement

[24] *See* 47 C.F.R. § 64.2010(g).

[25] 47 C.F.R. § 64.2008(c)(2).

[26] *See 2007 CPNI Order* ¶ 25.

from providing all authorizations for (and limits to) a provider's internal use of CPNI as part of their service contract.

3. The Commission Should Clarify the Rules Surrounding Sharing Limited Amounts of CPNI with Indirect Sales Partners for Billing Purposes

Wholesale and enterprise voice providers commonly use indirect sellers, or channel partners, to sell packages of communications services. These sellers frequently work with multiple communications providers, and can offer mix-and-match packages of services from different providers that allow customers to benefit from competition in price, quality of service, and technical characteristics. Importantly, when a channel partner acts as an indirect seller, the enterprise or wholesale customer will enter into a contract directly with Level 3 and other communications providers, rather than with the channel partner. Channel partners are generally paid on commission, and therefore seek limited amounts of CPNI from the service providers so that they can verify they are being paid correctly.

Properly understood, the limited sharing of CPNI with channel partners for billing purposes is a routine part of providing and billing for wholesale and enterprise services. Under Section 222, providers are entitled to share CPNI without obtaining prior customer consent for the purposes of providing or billing for service.[27] However, the Commission has not directly addressed whether providers can share CPNI under these circumstances without first obtaining customer consent. In its 2007 CPNI Order, the Commission established that telecommunications carriers must receive opt-out consent before disclosing CPNI to joint venture partners and independent contractors for the purposes of marketing communications-related services to

[27] 47 U.S.C. § 222(c)(1), (d)(1).

customers[28] – and channel partners undeniably play a role in the marketing of wholesale and enterprise voice services. As a result, carriers taking a conservative regulatory approach currently seek opt-in consent before sharing CPNI with channel partners who are independent, indirect sellers.

The Commission should clarify that wholesale and enterprise providers can share CPNI with their channel partners without customer consent for the limited purpose of facilitating compensation arrangements in order to encourage the use of channel partners as independent, indirect sellers. The current lack of clarity in the rules encourages providers to stop using *independent* channel partners, and instead turn channel partners into agents to avoid having to seek opt-in consent to share CPNI with them.[29] Agency relationships may hamper channel partners' ability to offer mix-and-match services from different carriers and impede competition, due to the fiduciary duties an agent owes to a principal.[30] This, in turn, artificially limits competition.

The lack of clarity also encourages providers to stop using channel partners as *indirect* sellers, and instead require channel partners to acquire CPNI by entering into a contractual relationship with the end customer and becoming a reseller. Under this scenario, the channel partner will be entitled to access *all* of the customer's CPNI, rather than just the limited subset of CPNI that would be necessary for channel partner billing purposes. So, counterintuitively,

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[28] *2007 CPNI Order* ¶ 8.

[29] *See* 47 C.F.R. § 64.2007(b) ("A telecommunications carrier may, subject to opt-out approval or opt-in approval, disclose its customer's individually identifiable CPNI, for the purpose of marketing communications-related services to that customer, to its agents . . . .").

[30] *See, e.g.*, Restatement (Third) Of Agency § 8.02 (2006) ("An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position.").

loosening the restrictions on providers' ability to share limited CPNI with channel partners will result in less information being available to channel partners.

In the alternative, if the FCC determines that customer consent is required in this context, it should adopt a rule providing that opt-out consent is sufficient. The Commission began requiring opt-in consent for sharing with independent contractors because opt-out notices about independent contractors were "not comprehensible to an average customer" and consumers did not "accept and understand" that carriers would share information with anyone other than its affiliates and agents.[31] The same cannot be said of enterprise and wholesale customers, who are sophisticated buyers and expect that their indirect seller will have access to information about the products they buy.

CONCLUSION

The Commission should embrace this opportunity to harmonize the regulatory treatment of non-mass-market broadband and voice services by giving voice providers the flexibility to meet their statutory obligations to protect customer privacy within the framework of the plain language of Section 222 of the Communications Act.[32] This approach would harmonize the regulatory treatment of broadband and voice services in the wholesale and enterprise contexts while providing appropriate customer privacy protections, giving effect to customer expectations, and promoting competition. If it declines to do so, the FCC should update the

[31] *2007 CPNI Order* ¶ 40.

[32] 47 U.S.C. § 222.

CPNI rules in a way that recognizes the needs and expectations of mass-market customers are fundamentally different from those of enterprise and wholesale customers.

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Respectfully submitted,

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