

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Chapter 480-120 WAC)	
Telecommunications - Operations)	Docket No. UT-990146
)	

COMMENTS OF ALLEGIANCE TELECOM OF WASHINGTON, INC.
ON PROPOSED TELECOMMUNICATIONS - OPERATIONS RULES
CHAPTER 480-120 WAC

In response to the Notice of Opportunity to Comment dated April 5, 2002, Allegiance Telecom of Washington, Inc. ("Allegiance") submits the following in connection with the proposed Customer Information rules in the above docket.

I. Introduction

Allegiance is a facilities-based competitive local exchange carrier ("CLEC") providing service in the State of Washington. Allegiance appreciates the efforts being made by the Washington Utilities And Transportation Commission ("Commission") to adopt new Customer Information rules, which are designed to protect consumer privacy in the State of Washington. However, Allegiance believes that Commission should not adopt rules that will cause customer confusion. The current proposal, which limits the opt-in method of approval to certain types of information (call detail) while permitting the opt-out method for other types of information (private account information) will be very confusing to carriers and consumers alike. Such confusion may very well outweigh any benefits that may arise from the consumer privacy rules.

Allegiance respectfully suggests that the Commission postpone any action on its own CPNI rules until the FCC has completed finished its pending CPNI rulemaking ("FCC Rulemaking").¹ The FCC is examining many aspects of the federal CPNI rules on remand from the Tenth Circuit decision vacating the CPNI rules with

¹ See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 16506 (2001).

respect to approval methods and may very well resolve the privacy issues which are the subject of this proceeding.

In the interim, the Commission should allow parties to use both the “opt-in” and the “opt-out” methods of customer approval for the use of CPNI consistent with current FCC rules until the FCC changes those rules. Also, the requirement that a carrier provide six methods by which a customer can submit an opt-out directive is overly burdensome. Finally, the Commission should eliminate its proposed requirement that a carrier send a confirmation each time it receives an opt-in or an opt-out directive from a customer. In support whereof, the following is submitted.

II. The Commission Should Wait For the Conclusion of the FCC’s Ongoing CPNI Proceeding

In the FCC Rulemaking, the FCC requested comments seeking on ways in which customers may convey their consent to a carrier's use of their CPNI. The Tenth Circuit's opinion, *U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (Jun. 5, 2000), rejected the FCC’s rule prohibiting the use of the opt-out method. Until it concludes the rulemaking, the FCC currently allows carriers to use either the opt-in or the opt-out method to obtain customer consent and has requested comment on whether permitting the use of only the opt-in method can be reconciled with the Tenth Circuit decision.

Allegiance submits that the Commission should withhold action on revising the current CPNI rules until the FCC’s proceeding has concluded. The FCC proceeding will address the First Amendment issues raised by the Tenth Circuit which are critical to this Commission’s proper course of action. The Commission should have this record available to it before finalizing the revised Washington rules.

III. The Commission Should Allow both the Opt-in and Opt-out Methods for All CPNI

The Commission’s proposed rules limit carriers to using the opt-in method of approval for certain types of information, call detail, while permitting use of the opt-out method for other types of information, private account information. This approach is problematic for several reasons. First, the rules appear to be inconsistent with the holding in *US WEST v. FCC* above, where the Court determined that restricting carriers to the use of the opt-in method only must pass muster under the constitutional standards applicable to regulation of commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447, U.S. 557 (1980). The Commission’s proposed CPNI rules are subject to the same standard. Even assuming that the

Commission's rules did not run afoul of the First Amendment, there does not appear to be any evidence to support a requirement that the opt-in method be used for call detail and the opt-out method for private account information. Without a demonstration that the interest in protecting consumer privacy in call detail information is somehow different than the interest in protecting privacy in private account information, there appears to be no legal justification for treating the two categories of CPNI disparately.

In addition, the potential for customer confusion is enormous. The distinction between call detail CPNI and private account information CPNI will not be easily understood by many customers and perhaps by some carriers. Inadvertent use of the incorrect approval notification, which could easily happen in many cases under the proposed rules, may raise many more issues as consumers and carriers try to sort out whether the approval was legally effective or not. In addition, the regulatory burden on the Commission may increase as a result of complaint and/or inquiries concerning the new rules. Consumer privacy can be protected without unnecessarily increasing the regulatory burden on carriers and the Commission. In sum, the potential for customer confusion counsels against adopting rules that require the use of different approval methods depending on the type of CPNI that will be accessed.

IV. The Commission Should Eliminate the Notification and "Opt-Out" Submission Requirements

Section 480-120-211 of the Commission's proposed rules requires that each time a carrier receives a customer's "opt-out" directive or explicit "opt-in" approval, the company must confirm in writing the change in approval status to the customer within thirty days. The proposed opt-out option, however, is really the same as the opt-in option. Both require the customer to take affirmative action to notify the carrier of its decision to allow use or not allow use of CPNI. This requirement imposes a heavier burden than the FCC's current rules, which simply requires a waiting period of 30 days for the opt-out approval method. With respect to either approval method, the detailed notification provided to the customer prior to any approval should provide sufficient notice of a consumer's rights so that subsequent notification of the receipt of the opt-in or opt-out approval is simply redundant.

In addition, Section 480-120-208 of the Commission's proposed rules requires that, at a minimum, companies must allow customers to opt-out using the following mechanisms, all of which must be provided by the company:

(a) Calling a dedicated, toll-free telephone number that provides access to a live or automated operator at all times

(b) Calling any telephone number that the company provides for billing or customer service inquiries.

(c) Marking a box or blank on the notice and returning it to a stated address;

(d) Returning a postage-paid card included with the notice;

(e) Electronic mail, if the company otherwise receives or sends electronic mail messages to its customers; and

f) Submitting an opt-out form found on the company's web site.

Requiring carriers to offer all six methods is overly burdensome. The use of either of the two written methods would be a more effective way to administer the opt-out process, without requiring resort to any other method, let alone five other methods. Mandating the use of six different methods will require carriers to incur costs that simply are not necessary. This requirement substantially exceeds the FCC's current requirements for even opt-in approvals as well.

V. Conclusion.

The Commission should withhold action on the proposed rules until the FCC concludes its CPNI rulemaking. In the alternative, the Commission should revise the proposed rules as discussed.

Respectfully submitted,

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