BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Rule-Making Proceeding Related to the Telecommunications Companies Chapter 480-120 WAC	)	DOCKET NO. UT-990146

Comments of Public Counsel
Attorney General of Washington

May 22, 2002

I. INTRODUCTION

Public Counsel files these comments in response to the Commission's April 5, 2002, Notice of Opportunity to Comment on Proposed Rules. In general, Public Counsel is concerned that the April 5, 2002 CR102 proposed rules weaken customer privacy regulations as compared to earlier versions of the rules. Public Counsel has continually advocated before the Commission for adoption of a comprehensive "opt-in" regime for telecommunications companies use of customer information to properly safeguard Washington residents' legitimate expectations of privacy. The evidence is persuasive that only opt-in regimes adequately protect the public interest.

Public Counsel has a number of specific concerns with the proposed rule. We are concerned with the manner in which "call detail" is defined in the proposed rule so as to exclude some call detail information associated with a specific customer from the opt-in requirements. Additionally, the creation of a dual system of opt-in and opt-out for different types of personal customer information is confusing and cumbersome. Finally, in the event that any type of opt-

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out regime is finally adopted, Public Counsel wishes to reiterate its concern that public notices and the process of opting-out be made as transparent and seamless as possible. These comments will provide an overview of the rationale for Public Counsel's comments on the proposed rules, as well as suggestions for changes.

II. COMMENTS

A. "Opt-Out" vs. "Opt-In"

The proposed rules distinguish different kinds of customer information and create a dual system of "opt-out" and "opt-in" regulations depending on the customer information at issue. Public Counsel supports the Commission's efforts to protect customer account information by restricting its use to situations where a customer has expressly given approval through opt-in. However, the proposed opt-in regulations do not go far enough. In order to adequately protect customer privacy and prevent use of customer information for improper or intrusive purposes, Public Counsel supports adopting a comprehensive opt-in regime to cover all types of customer account information, including information currently classified as "not call detail" and other private account information. Furthermore, the proposed dual system is unnecessarily complicated and may make it more difficult for the customer to understand that any action is needed to prevent use and dissemination of their private account information in light of opt-in requirement for call detail.

An opt-in regime is preferable to opt-out for several reasons:

(A) Federal law and regulations require customer 'approval' and silence should not be construed as 'approval' unless explicit approval to use the information is provided.[1]

[1] *See* Telecommunications Act of 1996 §702(c)(1), 47 U.S.C. §222(c)(1).

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(B) Requiring carriers to receive approval prior to using customer account information properly allocates the cost and burden of approval on the carrier, as the carrier has both the incentive and the means to make any opt-in regime as easy and beneficial as possible. Opt-out regimes only create more incentives for a carrier to obfuscate and hide the privacy notices.

(C) Comprehensive opt-in is the only approval method that adequately protects a customer's privacy as a customer's information is only subject to marketing use and disclosure if the customer decides that is their preference.

1. Customer silence does not constitute approval to use customer information.

Silence following customer receipt of a privacy notice should not be regarded as customer 'approval' for use and dissemination of private customer information. One major reason for this is the general inaccessibility of the notices to the average consumer. This conclusion is borne out by the results of a survey conducted by Harris Interactive in late 2001 regarding "Consumer Privacy Attitudes and Behaviors."[2] The survey was part of a Federal Trade Commission workshop on consumer privacy issues. The results of that survey revealed that customers are not ambivalent about sharing their private information, but rather they have been unable to understand how to properly respond to the notices that they have received. The report on this survey stated:

> "However, this research also shows that privacy notices are missing the mark with consumers. A majority of consumers find privacy notices to be inaccessible and wish they were shorter – nearly eight out of ten say they would prefer to read a shorter policy, rather than have all the details spelled out. Consumers would also prefer to see comparability or consistency from one notice to another – seven out of ten consumers

[2] Interagency Public Workshop, "Consumer Privacy Attitudes and Behaviors Survey Wave III, Harris Interactive," <http://www.ftc.gov/bcp/workshops/glb/> (last accessed May 21, 2002). (Attachment A)

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would like all companies to use the same summary or checklist, rather than the unique, customized policies that now exist."[3]

Currently, few consumers spend much time reading notices. The two main reasons cited by consumers for why they do not read notices demonstrate the general problem with the companies' formatting and design of the notices: (1) consumers lack the necessary time or interest and/or; (2) consumers find notices difficult to read and understand.[4] Many customers fail to even see the notice because it may be sent along with several advertisements or other bill inserts, and some customers have a tendency to throw away all bill inserts because they assume that they are advertisements.

2. Carriers have no incentive to create customer-friendly notices under an opt-out regime.

Regulations requiring customers to opt-out of having their private information used do not meet the basic needs of consumers. Experience with the financial services privacy notices in 2001 under the Gramm Leach Blilely Act (GLB) has shown that notices are drafted and designed to favor the perspective of the business sending the notice and were not comprehensible to the average consumer.[5] They often are intended to make it difficult to understand how information will be used. More troubling, notices are often drafted to make it hard to tell how customers can actually prevent private information from being used. Many privacy notices were written simply to assure compliance with regulations rather than to inform the customer of their rights and responsibilities in safeguarding their privacy. Finally, carriers may profit from the use of customer's personal information—the opt-out regime actually creates economic incentives for

[3] *Id.*
[4] *Id.*
[5] "Lost in the Fine Print: Readability of Financial Privacy Notices," Mark Hochhauser, Ph.D, <http://www.privacyrights.org/ar/GLB-Reading.htm> (last accessed May 21, 2002).

businesses to make it as difficult as possible for customers to exercise their preference not to have their personal information disclosed.

Unless a comprehensive opt-in regime is adopted in Washington, telecommunications customers will face threats to their privacy. Under the GLB Act, few customers recall seeing notices even when these notices were required to be clear and conspicuous; this suggests that when businesses do not want to draw a customer's attention to a notice, they will not do so.[6] It also reflects that, even if notices are well drafted, normal customer inattention to "bill stuffers" makes opt-out ineffective as notice. These practices demonstrate the harm in designing a system to protect private customer information that places the burden of protecting that information on the party in the weaker bargaining position. If opt-in consent was required and businesses desired to use the information, they would have every incentive to make the opt-in system as user-friendly and trustworthy as possible.

3. Opt-in is the only mechanism that adequately protects customers.

A salient weakness of the opt-out approach is that customers simply capitulate when faced with notices deliberately designed to confuse them, due in part to the unequal bargaining power of the parties. The Culnan-Milne Survey on Consumers & Online Privacy Notices addressed this point and further illuminated consumer sentiments regarding privacy notices.[7] This survey was published in December 2001 by Professor Mary J. Culnan, of Bentley College

[6] "How Consumers Responded to Financial Privacy Notices – Comments to FTC," Privacy Rights Clearinghouse, <http://www.privacyrights.org/ar/fp-glb-ftc.htm> (last accessed May 22, 2002).

[7] Interagency Public Workshop, "The Culnan-Milne Survey on Consumers & Online Privacy Notices: Summary of Responses, Mary J. Culnan & George R. Milne," <http://www.ftc.gov/bcp/workshops/glb/> (last accessed May 21, 2002). (Attachment B)

and George R. Milne of the University of Massachusetts at Amherst.[8] Customers' survey comments reflected customer feelings of being powerless when interacting with large corporations, and identified that as a reason why they did not respond to privacy act notices. One survey respondent stated, "Why bother, they are too long and often leave enough loop holes so they can do whatever they want. And they have!"[9] Another customer characterized privacy notices as legalese, and stated that the notices, "essentially permit themselves unrestricted use of personally identifiable information with a few feel-good red herrings to distract you from that fact."[10]

The recent experiences of consumers with the GLB Act illustrate an additional problem with an opt-out regime. While the law required that the privacy notices be written in a clear and conspicuous style, opt-out notices mailed out by the financial institutions were unintelligible and couched in language several grade levels above the reading capacity of the majority of Americans.[11] Experts reviewing the notices calculated that they averaged a 3rd or 4th year college reading level rather than the junior high level comprehensible to the general public.[12]

4. Making Washington telecommunications privacy notices effective.

In the event the Commission does decide to adopt the proposed dual opt-in and opt-out scheme, Public Counsel urges the Commission to make a customer's right to opt-out real and effective by requiring carriers to provide clear and consistent information about their opportunity to protect customer information from marketers and misuse. Opt-out should be as easy for the

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] "Lost in the Fine Print: Readability of Financial Privacy Notices," Mark Hochhauser, Ph.D, <http://www.privacyrights.org/ar/GLB-Reading.htm> (last accessed May 21, 2002).
[12] *Id.*

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customer as updating an address or billing record. Postage-paid reply cards should be provided with each initial and annual opt-out notice. Additionally, each billing statement should have a box to check-off if the customer desires to opt-out. Companies should be required to provide a dedicated opt-out telephone numbers with operators available at all times, as well as functional website links.

Aside from creating multiple opt-out opportunities, it is important that the notices be written in plain language that is comprehensible to customers with an average reading level. Additionally, the typeface of the opt-out procedures needs to be in a larger font than the rest of the text in the notice. Finally, Public Counsel recommends that the Commission consider requiring that carriers utilize standardized short-form opt-out notices created through scientific research of consumer responses to other privacy notices.

B. Call Detail

Public Counsel recognizes that the proposed rule makes a distinction between "call detail information" and other types of CPNI. The proposed rule places the greatest protection around "call detail" information. We agree that "call detail" information is generally the most sensitive type of CPNI. However, we believe the proposed definition of call detail is too narrow and that it creates an overly complicated framework that is not transparent to customers.

Public Counsel objects to the language in the proposed rules that unduly restricts the definition of "call detail." Public Counsel is concerned with the deliberate exclusion of certain types of individual aggregate call detail information from the definition. The difference between call detail and information classified as "not call detail" is somewhat arbitrary, with the apparent distinction being that information about an individual collected for a time period of a month or more fits into the definition of "not call detail." Public Counsel also believes that by creating a

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separate category of information classified as "not call detail" and excluding it from the definition of CPNI, the proposed definition of CPNI is inconsistent with the federal definition of CPNI.

The harm from defining information associated with a particular customer as "not call detail" and excluding it from the opt-in requirement proposed in 480-120-203 is also more acute in the telecommunications industry than in other sectors, such as financial services, online transactions or grocery store 'club-card' tracking of customers. Using the telecommunications network is a fact of modern life and most Washington residents have phone service. However, in both online transactions and grocery store club card tracking, the customer has choices. The customer can choose to use a false identity, or can choose not to make online purchases or not to participate in a promotion if the customer does not want their private information used and collected. In the financial services sector, customers have fewer options for avoiding collection of their private data, but there are generally more financial institutions to choose from, and customers can set up accounts with institutions that have favorable privacy policies. In the telecommunications industry, simply by virtue of having a pre-existing phone account, a customer may have information collected without having any choice to opt-in. This is no choice at all.

The ambiguous and overly complicated framework of the call detail definition is illuminated when reviewing the "Examples of Call Detail" worksheet. The information considered "not call detail" is only vaguely less specific than that considered "call detail." For example, the fact that a customer made 34 minutes of weekend long distance calls in April is considered "not call detail," while the fact that the customer made 34 minutes of long distance

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calls on Saturdays in April is considered "call detail" and may not be disseminated without a customer approval through opt-in. Thus, substantially similar information receives different protection under the proposed rules. Some information collected from a customer's calls requires a customer to opt-out of having it used while very similar information collected by the carrier about a customer requires customer approval through opt-in. This only adds to customer confusion in an area not well understood.

III. PROPOSED CHANGES TO APRIL 5, 2002 PROPOSED RULES

Public Counsel submits the following changes to the proposed rules based upon its belief that opt-in is the only system that adequately protects customer privacy.

480-120-201 Definitions, "Call Detail"

Public Counsel's position is that all call detail information should be covered by the opt-in rule. However, if the Commission pursues adopting the proposed dual opt-in and opt-out system, Public Counsel recommends redrafting the proposed definition to cover any call detail information that can be traced to a particular customer account, either based upon a specific call, or an aggregation of a customer's call detail information.

480-120-202 Use of Customer Proprietary Network Information Permitted

Public Counsel objects to the basic structure of 480-120-202. The rule should be structured to reflect the premise that personal information belongs to the customer and is only made available to the carrier for the purpose of receiving service. Public Counsel recommends amending this section to prohibit use of Customer Proprietary Network Information except as otherwise provided in federal regulations or 480-120-202 through 216. A suggested revision to

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the language would read as follows:

Customer proprietary network information may not be used, except as permitted by 47 USC Section 222, ~~except~~ or where authorized by sections 480-120-202 through 216 ~~require otherwise~~.

480-120-203 Using a customer's call detail information

Public Counsel supports requiring carriers to obtain their customer's explicit approval through opt-in measures prior to using or distributing a customer's private information. Public Counsel's position is that all customer call detail information should be covered by opt-in. At minimum, the definition of call detail should be broadened so that any information that can be traced back to an individual customer would be considered "call detail" and would be subject to opt-in protections.

480-120-206 Using private account information for marketing telecommunications-related products and services and other products and services

Public Counsel objects to the basic structure of 480-120-206 for two reasons. First, it does not adequately protect Washington customers' private information by adopting an "opt-out" scheme for dissemination of private account information. Second, it serves no legitimate purpose within the company-customer relationship. Permitting a customer's private account information to be used by "any entity under common control of a telecommunications company" to offer or market "products and services" that are not related to telecommunications products or services of the company is overbroad. There are no limits on the nature of business relationships that can be established under the common control of a telecommunications company as corporate affiliates. Corporate affiliates can be involved in widely disparate activities that have nothing to do with the provision of telecommunications products and services. This subjects customers to a risk of broad dissemination of their private information beyond what they would reasonably expect from their relationship with the telecommunications company.

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Public Counsel recommends amending this section as follows:

(1) Unless the customer has given explicit written ("opt-in") approval under 480-120-209, ~~directs otherwise~~, a telecommunications company and any entity under common control of or with the telecommunications company, may not use a customer's private account information or call detail, ~~with the exception of call detail~~ to offer or market telecommunications-related services and other products and services. Additionally, such company or entity may not disclose or permit access to private account information outside the company or entity unless a company has obtained approval under WAC 480-120-209, except that it may provide information to agents that are contractually bound to use the information only for the purposes permitted by this rule and to make no other use, or disclose, or permit access to the private account information.
~~(2) A company may not use a customer's private account information as provided for in subsection (1) of this section unless it has provided notice to each customer pursuant to WAC 480-120-207 and provides the customer with reasonable opportunity to direct the company not to use the information ("opt-out") pursuant to WAC 480-120-208.~~

480-120-207 Notice when use of private account information is permitted unless a customer directs otherwise ("opt-out")

If the Commission adopts an opt-out regime, Public Counsel encourages making the opt-out procedures as transparent and seamless as possible. Public Counsel commends some of the recent changes to the notice procedures that should curtail misleading statements by carriers when notifying customers of their ability to opt-out, including requirements that notices include prominent statements with specific instructions and a dedicated bold-type telephone number for opt-out.

However, in addition to these required procedures, customers should be provided with all necessary information to make a decision whether it is in their best interests to opt-out. The 2001 Harris Interactive nationwide survey revealed that 44% of respondents considered it "very important" that privacy notices detail what, if any personal information is collected, and 53% considered it "very important" that they know if and how personal information is used by the company for marketing purposes.[13] Thus, carriers should be required to disclose to customers

[13] Interagency Public Workshop, "Consumer Privacy Attitudes and Behaviors Survey Wave III, Harris Interactive," <http://www.ftc.gov/bcp/workshops/glb/> (last accessed May 21, 2002). (Attachment A)

detailed information regarding how their information is going to be used by the carrier and to whom it may be disseminated.

Public Counsel recommends the following changes to 480-120-207(5)(b):

(5) Any opt-out notice must include the following items:
(b) A statement that (1) describes each purpose for which private account information may be used; (2) whether the information will be used to market to the customer (i) telecommunications-related products and services, or (ii) other products and services, or both (i) and (ii), whichever applies.

408-120-208 Mechanisms for opting out of use of private customer account information

Public Counsel supports making mechanisms for opting out as easy as possible and recommends re-instating the following proposed provision for opt-out under 480-120-208:

(g) Marking a box or blank that the company must include on the face of every payment coupon provided to the customer for the customer's regular bill payment.

408-120-209 Notice when explicit ("opt-in") approval is required and mechanisms for explicit approval.

Public Counsel supports an opt-in approach to all private customer information. If the Commission adopts an opt-out approach for some private customer information, the carriers should be required to provide a copy of the chart included as part of subpart (5) in any notice detailing when a customer will be required to opt-out to prevent use of their private information.

IV. NATIONWIDE RESPONSE TO TELECOMMUNICATIONS PRIVACY NOTICE CONCERNS

A. Actions by Washington Attorney General and National Association of Attorneys General to respond to CPNI marketing by telecommunications carriers

The Washington Attorney General's Office is concerned with the harm facing Washington customers if they are not able to properly prevent distribution of private information by telecommunications carriers to marketing partners, other affiliates, or third parties. As a

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result, on December 21, 2001, the Washington Attorney General joined 38 other Attorneys General in submitting joint comments in response to the proposed FCC rules regarding telecommunications carriers use of CPNI and other customer information. The comments from the National Association of Attorneys General articulated some of the scenarios threatening the privacy of citizens.

> "For instance, carriers could enter into joint marketing arrangements with providers of certain types of medical products and send solicitations to the homes of customers who call certain types of doctors or other health care providers. Similarly, carriers could enter into contractual arrangements with telemarketers to sell the telemarketers the names of customers who call certain retailers, or who access the web for a certain period of time or at a certain time of day. The type of information that telemarketers and joint marketing partners would find useful, and therefore be willing to pay for, is limitless."[14]

Furthermore, the Washington Attorney General actively sought to protect customer's telecommunications privacy by urging Qwest Communications in January 2002 to abandon its plans to disseminate CPNI in contravention of existing Washington law.[15] In the letter to Qwest, Attorney General Christine Gregoire stated that she has "long been a proponent of giving consumers the power to decide how their personal information is used by companies with which they do business."[16] Additionally, Attorney General Gregoire voiced concern that privacy notices distributed by Qwest seemed to have been written in legalese and were not designed to alert customers to the important decision they had to make, and that the notices had failed to capture the attention of the vast majority of customers.[17]

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[14] Letter dated December 21, 2001, from 39 Attorneys General, to Federal Communications Commission, In matter of Telecommunications Carriers' Use of Customer Proprietary Network Information, CC Docket No. 96-115 and 96-149.
[15] Letter dated January 11, 2002, from Christine O. Gregoire, Attorney General, to Kirk R. Nelson, Vice-President – Washington, Qwest Communications.
[16] *Id.*
[17] *Id.*

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B. Actions by other States to respond to CPNI marketing by telecommunications carriers

Arizona and Michigan have also been at the forefront of challenging the ability of telecommunications companies such as Qwest to use private customer information for profit without customer consent.

The Arizona Attorney General, Janet Napolitano, submitted *Ex Parte* Comments to the Federal Communications Commission in January regarding the "real life problems that are unleashed when carriers are allowed to adopt an opt-out approach."[18] Attorney General Napolitano submitted her comments following Qwest Communications' notification to customers that it planned to implement an opt-out procedure for dealing with CPNI. Attorney General Napolitano reported that Arizona residents were deeply concerned about protecting sensitive, private information, and that a poll of Arizona residents revealed that "ninety-four percent of Arizona telephone customers believe Qwest should be required to get their permission before selling their customer records to third parties."[19]

Indeed, results of the January 2002, Rocky Mountain Poll in Arizona revealed that only 3.7 percent of polled adults believed that Qwest was on the right track when it announced it would sell customer records unless customers took the initiative to contact the company and object within a specific period of time.[20] The survey was conducted by the Behavior Research Center and a press release further reported that this was the "most lopsided poll result we have

[18] *Ex Parte* Comments dated January 25, 2002, from Janet Napolitano, Attorney General, to Federal Communications Commission, In matter of Telecommunications Carriers' Use of Customer Proprietary Network Information, CC Docket No. 96-115 and 96-149. (Attachment D)
[19] *Id.*
[20] New Release dated January 21, 2002, from Earl de Berge, Rocky Mountain Poll. (Attachment E)

registered in more than three decades and underscores growing consumer concerns about information privacy in today's modern telecommunications environment."[21]

The Director of Arizona's Residential Utility Consumer Office, Lindy Funkhouser, submitted a March 29, 2002, letter to the Utilities Division of the Arizona Corporation Commission, expressing concern over the potential harm facing customers with an opt-out regime:

> " A consumer desiring a phone number must give personal information to the phone company. Information thereafter is developed from the consumer's phone patterns, such as whether the individual makes calls during the workday or calls certain phone numbers, like pizza delivery, on certain days and times of the week. Certain repetitive calls, such as regular calls out-of-state, can give clues as to the location and behavior patterns of family members. The frequency and duration of telephone calls to health care or insurance providers can give important clues about a family's health concerns. An observer can run consumer's call pattern through computerized screens to find consumers with "desirable" behavior patterns. Only the observer's ethic will limit the ends and means for using the information. More importantly, a company can secretly target the consumer without revealing how extensively these phone patterns made the consumer's personal life an open book."[22]

Michigan has raised similar concerns with the manner in which privacy notices have been issued by telecommunications companies. On January 15, 2002, the Michigan Attorney General, Jennifer Granholm, sent a letter to Ameritech-Michigan raising concerns over the opt-out notice SBC/Ameritech sent to Michigan customers.[23] Attorney General Granholm stated that notice raised more questions than it answered about "how and under what circumstances Ameritech is planning to use consumers' personal information for marketing purposes.[24] Furthermore, she

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[21] *Id.*

[22] Letter dated March 29, 2002, from Lindy Funkhouser, Director, Residential Utility Consumer Office, to Ernest G. Johnson, Director, Utilities Division, Arizona Corporation Commission.

[23] Letter dated January 15, 2002, from Jennifer M. Granholm, Attorney General, to Gail Torreano, President, Ameritech-Michigan.

[24] *Id.*

stated that the notice was "unclear and confusing and, because it was not titled, the notice may have been ignored or disregarded by consumers."[25]

C. Nationwide Efforts to Create Functional Privacy Notices

Consumers' experiences with the GLB Act privacy notices have also resulted in a National Association of Attorneys General action and letter of comment. In a February 15, 2002 letter to the Secretary of the Federal Trade Commission, forty-four Attorneys General urged regulatory agencies to require financial institutions to issue uniform, standard notices in a brief format and to develop the new notice requirement based upon scientific expertise.[26] Comments in the letter noted that the States "believe that the current GLB and FCRA notices are woefully inadequate."[27] The letter further reported that consumers have been greatly confused by dense information in notices that require a high educational level to comprehend, and that as a result, consumers have not been adequately informed about their rights to opt-out of sharing of their private financial information.[28] The solution proposed by the States for addressing the problems with privacy notices is to require that companies send out a standardized short form privacy notice, as the short form would provide consumers with the information they need, in a format they prefer and can understand.[29] Furthermore, the States suggested that in order to create a functional short form, extensive testing should be conducted of formats best suited to result in consumer comprehension.[30]

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[25] *Id.*
[26] Letter dated February 15, 2002, from 44 Attorneys General, to Secretary, Federal Trade Commission, Re: GLB Act Notice Workshop – Comment PO14814.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

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V. CONCLUSION

Public Counsel urges the Commission to make the suggested changes to the language of the rules in order to adequately protect the privacy of Washington residents. Customers can only adequately protect their private telecommunications information with a comprehensive opt-in system. Tangible evidence of the harm that can be wreaked as a result of the convergence of information systems and sharing of account information has been documented in the financial services industry. It is only a matter of time before these same harms reach telecommunications customers if the Commission fails to properly protect customers. The Commission should take this opportunity to take a strong stand for consumer privacy by adopting a comprehensive opt-in regime in its final rules.

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