BEFORE THE
WASHINGTON UTILITIES & TRANSPORTATION COMMISSION

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

COMMENTS OF VERIZON NORTHWEST INC., BELL ATLANTIC COMMUNICATIONS, INC. d/b/a VERIZON LONG DISTANCE AND VERIZON SELECT SERVICES INC.

Verizon Northwest Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance and Verizon Select Services Inc. (collectively "Verizon") hereby file these supplemental comments on the proposed Customer Information rules in Docket No. UT-990146, Chapter 480-120 WAC, Telecommunications – Operations.

Introduction

Verizon understands and respects the Washington Utilities and Transportation Commission's (Commission) desire to protect the privacy interests of consumers in Washington. Verizon is equally committed to identifying and responding to its customers' privacy concerns. For example, absent explicit customer consent, Verizon does not release Customer Proprietary Network Information (CPNI) to non-affiliated third parties, unless required by law or to protect against fraud.

Verizon's support of an opt-out approach to CPNI regulation does not change its policies regarding privacy and disclosure to third parties. Rather, Verizon, like any company, wants to use its resources, including CPNI, to insure that it is efficiently developing and providing the products and services its customers want and need. The sharing of CPNI within the Verizon

family of companies helps Verizon understand its customers' needs and allows Verizon to have meaningful communications with its customers regarding products and services that may be of benefit to those customers. Verizon has shared CPNI among its business units, affiliates and authorized agents pursuant to applicable laws nationally and in Washington, for years without any demonstrations of abuse or consumer harm. Verizon's record is unblemished in this area.

While the proposed "opt-in" rules might be understandable with regard to making CPNI publicly available, and/or selling it to non-affiliated third parties, the draft rules are clearly not necessary or reasonable in regard to limiting a carrier's internal use of CPNI and its ability to communicate with its customers.[1] Other laws already protect customers from unwanted telemarketing (i.e., do-not-call lists), and no compelling public purpose would be served by the overly restrictive draft rules.

Companies' right to use their resources to communicate with their customers is protected by the First Amendment of the United States Constitution and federal law. Also, as the Federal Communications Commission (FCC) recognized in its 1998 CPNI order,

> "the sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive competitive offerings"[2]

Thus, the draft rules would clearly be unconstitutional and inconsistent with Section 222 of the federal 1996 Telecommunications Act and the FCC's implementing rules. Because the proposed rules are inconsistent with the FCC's rules, Verizon would need to immediately suspend its

[1] However, in light of the Tenth Circuit's vacatur, the constitutional principles of Central Hudson Gas and Elec. Corp v. Public Service Comm'n, 447 U.S. 557 (1980) ("Central Hudson") would need to be applied to any legal analysis involving the use of CPNI, including the disclosure of CPNI to non-affiliated third parties.

[2] 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 Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, released February 26, 1998, fn. 203 (FCC 1998 CPNI Order).

outbound marketing and sales activities once the rules became effective in Washington, even though Verizon has not implemented opt-out in Washington.

For all these reasons, Verizon respectfully requests that the Commission recognize that the FCC's interim opt-out rules[3] are an appropriate interim mechanism to obtain customer consent in Washington and delay any state action relating to implementing its own CPNI rules until the FCC completes its work on its rulemaking.

Disclosure v. Communication

While Verizon understands the Commission's concern with regard to disclosures of customer information to third parties, the draft rules would unnecessarily and inappropriately restrict communications with customers.

Several months ago when the Commission began to consider changing its CPNI rules, the public was understandably alarmed by media statements such as "How would you like your private telephone information to be sold to the highest bidder"[4], "Privacy for profit -- first Qwest and now Verizon"[5], and "Every phone customer could soon find their information on the marketing block"[6], plus numerous references to the "sharing" of personal information. However, these forwarnings are pure speculation and ignore the fact that, despite decades of carrier use of CPNI, there is virtually no evidence of carrier abuse. As far as Verizon is aware, there has never

[3] 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 Section 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, released September 7, 2001 paras 7-11 (FCC CPNI Clarification Order).
[4] KIRO radio, January 5, 2002.
[5] KIRO television, January 15, 2002.
[6] KOMO television, March 19, 2002.

been a problem with any telecommunications company in Washington relative to a carrier's handling of CPNI, so there is no need for new rules on this point.

In any event, the Commission's draft rules mix restrictions on such sales, sharing and disclosure of CPNI with restrictions on telecommunications companies using their own records to communicate with their own customers. Verizon is aware that some customer comments to the Commission earlier this year included a concern with intrusive telemarketing. But the Washington legislature and the Commission have separately addressed this type of privacy interest.[7] Thus, it is neither necessary nor appropriate for the Commission to attempt to limit unwanted marketing contacts by new rules restricting communications that use or are based on CPNI. Moreover, the draft rules would restrict not only telemarketing, but also written and electronic communications - - even communications during in-person meetings.

The Law Is Clear

The Commission proposes to require an "opt-in" mechanism to restrict communications using call detail CPNI and to place additional restrictions on the use of CPNI beyond what is required by Section 222 and the FCC's implementing rules. Such rules would be unconstitutional and subject to FCC preemption.

As the Commission is aware, the use of CPNI is governed by Section 222 of the federal Telecommunications Act.[8] In 1996, the FCC opened a proceeding to implement Section 222, and in the course of that proceeding the FCC asked whether it should adopt an opt-in or opt-out

[7] See RCW 80.36.390, 480-120-087 WAC and 480-120-144 WAC.
[8] The Commission has not identified any state law that purports to empower it to impose additional restrictions on the use of CPNI.

approach to CPNI relative to Section 222(c)(1). The FCC received many comments on this subject spanning hundreds of pages. Indeed, several state commissions, including the Washington Commission, filed comments stating that the FCC must impose an opt-in process to provide "superior protection for privacy interests." The FCC did just that – in its *Second Report and Order* in CC Docket No. 96-115, the FCC adopted an opt-in approach "to ensure that customers' privacy rights are protected against unknowing and unintended CPNI disclosure."[9]

On appeal, the Tenth Circuit carefully reviewed the FCC's ruling (as well as the voluminous record the FCC claimed supported its ruling) and held that (a) companies' use of CPNI involves "commercial speech" that is protected by the First Amendment and (b) the FCC failed to demonstrate that its opt-in rule was narrowly tailored to directly and materially advance its interests in protecting privacy and promoting competition. The court also held that the FCC failed to adequately consider an opt-out approach, and noted that such a provision is inherently less restrictive of speech. *U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). In response to the court's ruling, the FCC adopted its opt-out rule while it conducts a further rulemaking on CPNI.[10]

Thus, the FCC's previous opt-in requirement is unconstitutional and a carrier may presently use opt-out pursuant to the FCC's rules outlined in its Clarification Order. Therefore, any existing[11] or proposed Commission opt-in rule based on the FCC's rules is also unconstitutional.[12]

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[9] FCC 1998 CPNI Order at para 94.
[10] FCC CPNI Clarification Order paras 7-11.
[11] The Commission adopted its current CPNI rules in 1999 and, as noted in the Commission's implementing order, these rules were intended to mirror the FCC's rules. *In the Matter of Amending WAC 480-120-139 and Adopting WAC 480-120-144, -151, -152, -153 and -154*, Docket UT-971514, General Order No. R-459, February 2, 1999.
[12] The Commission must recognize that the Tenth Circuit's decision applies to Washington. Under federal statute, appeals from the FCC go to only one circuit court, and that court's decision is binding everywhere. 47 U.S.C. §§ 2341, 2342.

In addition, any CPNI rule that would be more restrictive than the FCC's original CPNI rules relative to sharing and using CPNI within a corporate enterprise would also be unlawful. As discussed in more detail below, certain of the proposed rules would do just that and place additional restrictions beyond the FCC's CPNI rules that permit the sharing of CPNI without customer consent in certain circumstances.

Finally, the FCC has clearly stated its intention to preempt any state rule that would appear to conflict with the intent of Congress as put forth in Section 222 of the 1996 Telecommunications Act.[13] There is, therefore, no legal basis for the Commission to move forward with its proposed rules.

An Opt-Out Policy Is In The Public Interest

Each time the FCC has examined its CPNI policy, the record has shown conclusively that the overwhelming majority of the public – both consumers and business customers – expect that a single firm will be able to use information on a customer's product and service purchases from that company to offer products and services to the customer. This extensive record from past proceedings is echoed in testimony by noted privacy experts presented just this last year in Congressional hearings on the public's privacy expectations, as well as in other studies placed on the record.[14]

The FCC used opt-out as its principal CPNI policy for well over a decade before the current (pre-10th Circuit decision) CPNI rules were adopted. Under Computer Inquiry II and III, the former Bell operating companies and (for a time) AT&T were permitted to use CPNI to market customer premises equipment (CPE) and enhanced services to all but their very largest

[13] FCC 1998 CPNI Order at para 18.
[14] See Verizon Comments filed with the FCC on the Second Further NPRM on November 1, 2001.

customers after giving customers notice and an opportunity to opt out of such use. During that period, not only were there no complaints that privacy was being undermined or customers' wishes not followed, but the competitive CPE and enhanced services markets thrived.

Also, under the FCC's "total services approach" rules established in 1998, carriers have been permitted to share customer data across affiliates without customer consent if customers already subscribed to services offered by the affiliate.[15] For nearly four years carriers have operated under these rules with no record of abuse or competitive harm. These are the same affiliates with which a carrier would share CPNI under an opt-out arrangement and do currently share customer data under opt-in consents. As noted above, the FCC has also specifically found that the sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive improved product and service offerings.[16]

There is, therefore, an unbroken record - - developed in each phase of the FCC's proceedings, supported by privacy experts today, and consistent with the FCC's own previous policies-- that the public is best served by allowing a company to use information about a

[15] FCC 1998 CPNI Order at para 51 "We also agree with a number of parties that there should be no restriction on the sharing of CPNI among a carrier's various telecommunications-related entities that provide different service offerings to the same customer. By its terms, section 222(c)(1)(A) generally limits "a telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service" to use, disclose, or permit access to CPNI only in "its provision of the telecommunications service from which such information is derived." This language does not limit the exception for use or disclosure of CPNI to the corporate parent. Rather, we believe the language reasonably permits our view that the CPNI limitations should relate to the nature of the service provided and not the nature of the entity providing the service. In particular, under the total service approach, we interpret the scope of section 222(c)(1)(A) to permit carriers to use or disclose CPNI based on the customer's implied approval to market related offerings within the customer's existing service relationship. To the extent a carrier chooses to (or must) arrange its corporate structure so that different affiliates provide different telecommunications service offerings, and a customer subscribes to more than one offering from the carrier, the total service approach permits the sharing of CPNI among the affiliated entities without customer approval. In contrast, if a customer subscribes to less than all of the telecommunications service offered by these affiliated entities, then CPNI sharing among the affiliates would be restricted under the total service approach. In this circumstance, the restriction is not based on the corporate structure, but rather on the scope of the service subscribed to by the customer."

[16] See FCC 1998 CPNI Order fn. 203.

customer's prior purchases of goods and services to design and target-market services and products to that customer. Under the opt-out approach, the majority of customers who expect a single company to use information for target marketing can receive the benefits of that marketing, while those who choose otherwise will have their desires honored.

Also, use of CPNI within a single corporate structure allows efficient marketing to those customers who, by their prior purchases, are more likely to be interested in a particular product or service. Without targeted solicitations, consumers would receive more unsolicited mail, e-mail, and telephone calls, because businesses could not market services and products only to those who are likely to be interested. The ability to target-market and intelligently communicate with customers reduces prices and expands services. The ever-expanding selection of wireless products and services is evidence of the benefits of sharing CPNI across product lines.[17]

In sum, there is no public policy need for the Commission to move forward with its proposed rules.

Verizon's Concerns With Specific Proposed Rules

The following identifies specific concerns with the Commission's proposed CPNI rules.

Sections 480-120-201, -203 and -206 – Distinction between "Call Detail" CPNI and all other CPNI.

- Section 222 does not make such a distinction between "call detail" CPNI and "non-call detail" CPNI. Carriers have been using CPNI, including "call detail" information, for marketing purposes for decades without any demonstrable harm to consumers. Other than pure speculation as to how carriers may somehow abuse their use of CPNI at the expense of

[17] Under the FCC's rules, wireless carriers may use their CPNI from providing wireless services to offer local, long distance, wireless equipment, and information services without customer consent. 47 C.F.R. § 64.2005(a) and (b)(1).

consumers privacy interests, absolutely nothing in the way of evidence has been put on the record to justify the need to create separate rules or protections for call detail CPNI. Rather, as discussed above, the record as established before the FCC and reflected in Section 222 as the intent of Congress has clearly shown that consumers benefit from carriers using their customer information for marketing purposes and carriers have been responsible in their treatment of CPNI. Besides being unconstitutional, these rules are inconsistent with Section 222 of the Telecommunications Act and the FCC's implementing rules and are subject to preemption as noted above.

- The latest version of the Commission's proposed rules show increased awareness of the legitimate uses to which a company can put "call detail" CPNI in developing products and services and communicating them to the customer most likely to benefit. Nevertheless, the draft rules would still restrict appropriate uses of "call detail" by the companies for these purposes[18]. Among others, offerings based on calling patterns would be impacted. For example, the draft rules' restriction on the use of the called party's name or location or the complete called telephone number would affect toll plans such as a company that provides flat rated calling between the company's customers. It would restrict the company's ability to use CPNI to tell a customer that since she makes most of her long distance calls to other customers from that company, she would benefit from the plan.
- The broad, complex "call detail" restrictions invented by the draft rules would restrict not only current product and service innovations, but unknown future creativity, as well.

[18] Some of the components of "call detail" specified in the draft rules seem to be related to concerns with outside disclosure rather than use by the company to communicate with its customers, such as when calls are not answered.

Sections 480-120-203 and -206 – Same type service restrictions

These proposed rules require that a carrier obtain either opt-in or opt-out approval before using CPNI to offer telecommunications services of the same type to which the customer already subscribes and to offer products and services necessary to or used in the provision of those telecommunication services. These rules are inconsistent with the FCC's CPNI rules, which do not require such approval, and as such, are inconsistent with Verizon's current marketing and sales activities in Washington. As noted above, customers anticipate that the companies they do business with will use the information that they obtain in providing one product to them to offer additional products that the customer may be interested in. Carriers have been operating under the FCC's implementing rules since 1998, and there is no record of abuse or identification of any privacy issue. Besides being subject to preemption, these rules would be unconstitutional because they are intended to further restrict information flow between a carrier and its customers. To comply with the proposed rules, Verizon would have to take steps to immediately suspend certain internal sharing of CPNI and most all outbound marketing activities in Washington or take legal action to delay their implementation.

Section 480-120-207(2) – Annual Notice Requirement

- As the record demonstrates, the overwhelming majority of customers are not concerned when a company that they do business with shares customer information with a single corporate enterprise. As such, an annual notice requirement would be unnecessarily intrusive to consumers and increase operating costs in Washington with no appreciable benefit.

- Customers would also become confused, because the original notice would have advised (as required by the FCC's rules)[19] that the customer's decision to opt-out or not opt-out would remain valid until revoked by the customer. Customers who already opted-out may feel that somehow they would need to opt-out again, and those who did not opt-out (the overwhelming majority of consumers) will again have to review and interpret the notice. There is no reason to believe that the relatively small number of customers who chose to opt out (less than 2 percent nationally for Verizon) would not have opted-out when they received the first notice. Nothing can be gained by year after year sending a notice to the over whelming majority of customers (in Verizon's case the remaining 98% of customers) who will year after year not consider the matter to raise any significant privacy issue.

Section 480-120-211 – Written Confirmation

- A requirement to provide a customer with written confirmation that they have successfully opted-out is unnecessary. There is no confirmation process for PIC freeze, and there is nothing in the record that suggests that there is a need here.
- There are other less costly alternatives. For example, Verizon has established an automated 800 number for customers to register their opt-out request. At the end of the process, customers are advised that they have successfully completed the process. For customers that call into their customer service center, the Verizon service representative advises that the customer's opt-out request is confirmed. In both cases, strict internal controls were established to insure that the opt-out requests were processed through the appropriate systems. There is simply no need for the additional costly step of mailing a written confirmation to the customer.

[19] 47 C.F.R. § 64.2007 (f)(2)(ix).

- Out of the thousands of customers that have used Verizon's 800 number process to opt out, only a handful have called to ask for confirmation beyond what was provided by the automated system. To respond to customers that do call, Verizon has established a process for the Verizon service representative to confirm that the customer's opt-out request has been processed. The proposed rule would have the effect of increasing operating costs in Washington without any appreciable benefit. Carriers should only be required to provide oral or written confirmation upon specific customer request.

Section 480-120-208(2) – Multiple Mechanisms

- This rule appears to require that in addition to establishing an 800 number opt-out option [Section 480-120-208(2)(a)], a customer care opt-out option [Section 480-120-208(2)(b)], a mail-back opt-out option [Section 480-120-208(2)(c)], an electronic mail opt-out option [Section 480-120-208(2)(e)], and a web site opt-out option [Section 480-120-208(2)(f)], carriers must also give customers a postage-paid card opt-out option [Section 480-120-208(2)(d)]. Each one of these mechanisms requires a carrier to establish internal processes and procedures and incur costs. Again, these requirements go far beyond what is necessary to care for those customers that choose to opt-out.
- The postage-paid option is the most expensive and totally inappropriate given the anticipated low response and the costs involved. First of all, the overwhelming majority of customers will simply discard the postage-paid card as only a relatively small number of customers have historically opted-out (as noted above only 2% in Verizon have opted-out nationally). Also, the postage-paid card option (as well as option (c)) would require that a carrier establish a process to manually handle the returned cards.

- Verizon used an automated 800 process that was available 24 hours a day and seven days a week. The process worked flawlessly with almost no customer complaints and only a relatively few customers deciding to call their Verizon service representative to opt-out.
- Rather than requiring carriers to establish all the proposed mechanisms, carriers should be required to establish at a minimum (a) a live or automated 800 service to cover the period of an initial mailing,[20] (b) the capability to call their service representative, and (c) establish a permanent Web based option to opt-out.

480-120-207 (3) – Use of Billing Envelopes

This draft rule would decrease efficiency and increase costs by prohibiting use of a customer's bill to provide the CPNI notice if the envelope also contains any advertising or promotional material. Using the bill envelope is a cost-effective way to communicate with customers. The Commission should make clear that it is permissible to use the customer's bill regardless of whether there is advertising or promotional material included with in the bill.

480- 120-211(2) – Delaying Communication after Opting In

This draft rule would require that customers who explicitly have provided their desire to have a carrier use their CPNI wait a minimum of three weeks and up to two months before the carrier may act on the customer's request. It has been Verizon's experience that customers -- especially business customers -- who opt-in want the carrier to immediately respond to their request. While the FCC recognized that a 30 day waiting period may be appropriate for an opt-out process to insure that customers have the opportunity to read and respond to an opt-

[20] It is Verizon's experience that after the initial mailing the number of calls to opt-out drop down dramatically to the point where, similar to handling pic changes and do-not-call lists, the customer service representative would be the best point of contact to process an opt-out request.

out notice, it has never required any waiting period for opt-in, and there is nothing in the Washington or FCC CPNI record indicating that this has been a problem. The Commission should remove this rule and permit a carrier to immediately respond to an opt-in request. This would be consistent with the Commission rule (480-120-214) which requires that a carrier release CPNI to any person designated by the customer and does not have a similar time requirement.

Conclusion

Given the reasons outlined above, Verizon respectively requests that the Commission delay any state action relating to implementing its own CPNI rules until the FCC completes its further rulemaking on CPNI issues.