Before the
Washington Utilities and Transportation Commission
Olympia, Washington

In Re:	)	Telecommunications - Operations
	)	Chapter 480-120 WAC – Consumer Rules
Telecommunications	)	
Rulemaking	)	Docket No. UT-990146

REPLY COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION AND CENTER AND THE WASHINGTON PUBLIC INTEREST RESEARCH GROUP
July 8, 2002

Pursuant to the notice and request for public comment published by the Washington Utilities and Transportation Commission (the Commission) on April 5, 2002,[1] requesting comment on the proposed rules concerning telecommunications carriers' use of consumer information, the Electronic Privacy Information Center (EPIC) and the Washington Public Interest Research Group (WashPIRG) submit the following comments.

EPIC and WashPIRG again urge the Commission to protect the privacy rights of American citizens by implementing an opt-in approach towards telecommunications carriers' use of all Customer Proprietary Network Information (CPNI), call detail information, subscriber list information, and private account information. Such an approach is constitutional, and the only adequate method for assuring that customer privacy interests are protected. Further, evidence suggests that only opt-in systems adequately protect the public. 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-out regime is finally adopted, we wish to note that we believe public notices and the process of opting-out be made as transparent and seamless as possible.

I. Privacy is a Substantial Government Interest

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The 10th Circuit Court of Appeals in *U.S. West* v. *FCC* recognized that Congress clearly contemplated, by the separation of language of 47 U.S.C. § 222(f)(1)(A)-(B), that certain types of personal information or personal information in certain contexts should be accorded greater sensitivity. In particular, CPNI attracted the highest privacy protection.

[1] Washington Utilities and Transportation Commission, Notice of Opportunity to Comment on Proposed Rule (Apr. 5, 2002).

Congress did this because it recognized *specific* privacy interests attached to CPNI data.[2] In fact, this is the primary purpose that Congress' placed restrictions in the on telecommunications carriers with respect to use, disclosure of, and access to certain customer information was concern for customer privacy.
Qwest Communications, in their reply comments in this proceeding, charge that privacy is not a substantial government interest sufficient to support imposition of an opt-in process. This accusation fails to account for the very real, specific privacy interest of consumers in the information contained within CPNI. Call records "reveal the most intimate details of a person's life." [3]

The *U.S. West* opinion provides that to survive First Amendment scrutiny, a "specific privacy interest my be substantial, demonstrating that the state has considered proper balancing of the benefits and harms of privacy." [4] Despite its reservations, upon balance the court assumed that the government's interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information was a substantial state interest.[5] The 10th Circuit vacated the initial opt-in rulemaking because there was no showing of specific harm that would result to customers upon implementation of the less speech-restrictive opt-out approach. However, three years later and following the unsuccessful implementation of an opt-out regime in a similar context,[6] there is significant evidence that sufficient harms result from implementation of opt-out systems to justify the more protective opt-in approach.

B. Privacy Harms Caused by Opt-Out are Real and Substantial, and Outweigh the Burden on the Telecommunications Carriers Use of Such Information

Qwest asserts that "existing record evidence shows that individuals understand opt-out approval models," and are "pleasantly engaged" by these processes.[7] This customer enjoyment of the opt-out process was not reflected by the consumer response to the opt-out regime implemented under the Gramm-Leach-Bliley Act, referenced in detail in EPIC's original comments in this rulemaking.[8] In addition, the recent referendum in North Dakota, in which 72 percent of the voters chose an opt-in vs. an opt-out system, highlights the consumer disdain (rather than pleasant enjoyment) for opt-out systems and supports the contention that, given the opportunity, citizens overwhelmingly support opt-in instead of opt-out. The vast majority of North Dakota voters in favor of opt-in might

[2] 182 F.3d 1234, "one can apply the moniker of a privacy interest to several understandings of privacy, such as the right to have sufficient moral freedom to exercise full individual autonomy, the right of an individual to define who he or she is by controlling access to information about him or herself, and the right of an individual to solitude, secrecy and anonymity."
[3] Smith v. Maryland, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).
[4] *U.S. West v. FCC*, 182 F. 3d 1224, 1234-35 (10th Cir. 1999).
[5] *Id.* at 1236.
[6] *See* Comments of the Electronic Privacy Information Center Before the Washington Utilities and Transportation Commission 4-6 (EPIC Comments) (May 22, 2002).
[7] *See* Reply Comments of Qwest Corporation in Docket No. UT-990146 Proposed Rules WAS 480-120-201 to 209&211 to 216 Customer Information at 5 (June 19, 2002).
[8] *See* EPIC Comments 5-6 (May 22, 2002).

be surprised to discover that Qwest considers them "uneducated, inattentive adults,"[9] rather than educated voters attempting to prevent unwanted or misuse of their private information. Finally, the consumer reaction to Qwest's opt-out approach to CPNI data, implemented in January, most clearly illustrates that consumers are not "engaged" by the opt-out system. The Seattle Times printed the following, just days after Qwest implemented their opt-out system:

> Irked that they could not get through to a toll-free number set up by Qwest to "opt out" of a customer-information-sharing plan, scores of Puget Sound area consumers complained yesterday.
>
> Again.
>
> It marked the third day of frustration, with some consumers questioning Qwest's sincerity about its offer to protect privacy.[10]

Following increased customer complaints and dissatisfaction, Qwest decided in January to withdraw their opt-out plan and cited customer privacy concerns as the impetus.[11] Qwest Chairman and CEO Joseph P. Nacchio stated "When many of our customers tell us that they're concerned or don't understand what we're doing, it's time to stop the process and make a change."[12] This is at odds with the tone of Qwest's reply comments, which dismiss confused customers as uneducated and inattentive.[13]

Also, Qwest's determination that the costs imposed by an opt-in system outweigh the privacy protections[14] again fails to account for the economic mischaracterizations inherent within the data upon which Qwest relies. As stated in EPIC's comments in this proceeding, because opt-out systems do not require businesses to create inducements for consumers to choose affirmatively to disclose personal information, these systems encourage firms to engage in strategic behavior and thus inflate consumer transaction costs.[15] Furthermore, when accounting for the costs of such a system, opt-out proponents fail to account for the increased transaction costs incurred by the customer in seeking to exercise a statutorily granted right.

While an opt-in system may burden whatever First Amendment rights a telecommunications carrier claims in its customer information, this burden is consistent

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[9] Qwest Reply Comments at 6.

[10] Peter Lewis, *Qwest users upset by opt-out hang-ups*, SEATTLE TIMES, Jan. 9, 2001.

[11] Press Release: Qwest Communications Withdraws Plan to Share Private Customer Account Information Within Company, *at* http://www.epic.org/privacy/cpni/qwest_press_release.html (Jan. 28, 2002).

[12] *Id.*

[13] Qwest Reply Comments at 6.

[14] "EPIC makes no attempt to balance any 'privacy harms' against the burden imposed on speakers and interested audiences, not to mention legitimate commercial activity (e.g., efficiency, productivity, financial stability). Qwest Reply Comments at 3.

[15] *See* Jeff Sovern, "Opting in, Opting Out, or No Options at All: The Fight for Control of Personal Information," 74 WASH. L. REV. 1033, 1082-83 (1999).

with the First Amendment commercial speech jurisprudence, which permits government regulation of commercial speech that is neither misleading nor unlawful if: (1) there is substantial interest in support of its regulation; (2) the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly drawn.[16]

Despite all of Qwest's repeated insistence that opt-out must be implemented because it is, for their commercial purposes, a less-restrictive alternative, the Supreme Court has carefully detailed the difference between the "narrowly tailored" fit required under strict scrutiny, and that required under intermediate scrutiny:

> With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In Fox, we made clear that the "least restrictive means" test has no role in the commercial speech context. "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective."[17]

Therefore, because the CPNI regulations are subject to intermediate scrutiny, the Commission need not prove that an opt-in regime is the least restrictive alternative.[18] Because the Commission's decision to promulgate an opt-in regime was the result of careful calculation and assessment of both approaches before the Commission chose to favor the more protective opt-in approach—and because there is substantial evidence that opt-out regimes implemented in other circumstances or by other state or federal agencies have failed to protect the customer privacy that was the impetus of the regulation, there is adequate evidence that opt-in is a narrowly tailored approach.

The burden under *Central Hudson* intermediate scrutiny of restrictions on commercial speech of demonstrating that challenged regulation advances government's interest in direct and material way is not satisfied by mere speculation and conjecture.[19]
EPIC submits that polling data,[20] Qwest's own customer relations experience,[21] and the recent result in the North Dakota referendum on the 'opt-in' question[22] stands for the empirical justification the 10th Circuit Court sought in *U.S. West*.

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[16] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564-65 (1980).
[17] Florida Bar v. Went For It, Inc, 515 U.S. 618, 632 (1995).
[18] *Id.*
[19] *Cf. Went For It*, 515 U.S. at 630 (describing the record provided by the Florida Bar cataloguing citizen outrage at being solicited just after injury or family tragedy).
[20] *See* S. Fox, Trust and Privacy Online: Why Americans Want to Rewrite the Rules, The Pew Internet & American Life Project, Aug. 20, 2000, at 1.
[21] Press Release, Qwest Communications Withdraws Plan to Share Private Customer Account Information Within Company, (Jan 28, 2002) (available at http://www.epic.org/privacy/cpni/qwest_press_release.html)
[22] A. Clymer, "North Dakotans Vote on Bank Privacy Rules" *The New York Times*, June 10, 2002.

II. Conclusion

Commercial speech jurisprudence recognizes that the government has a valid reason for regulating speech where the impetus for the speech is commercial gain. Therefore, commercial speech is subject to a lower level of constitutional scrutiny. In this context, the government's determination to impose an opt-in approach to sensitive customer calling data meets its First Amendment burden of providing a substantial government interest and narrowly tailored means.

There is substantial evidence that opt-out, specifically in the context of CPNI, fails to sufficiently protect customer privacy interests. In light of this evidence, an opt-in regime meets the obligations of the Commission to protect customer privacy while also balancing the First Amendment rights of the telecommunications carriers to survive Constitutional scrutiny. Customers can only adequately protect their private telecommunications information with a comprehensive opt-in system.

For all the reasons set forth above and contained within the comments of the signing organizations, the Commission should adopt a comprehensive opt-in regime to cover all types of customer account information, including information it currently classifies as "not call detail" and other private account information.

Respectfully submitted,

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