

**BEFORE THE
WASHINGTON UTILITIES & TRANSPORTATION COMMISSION**

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| 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, NYNEX LONG DISTANCE d/b/a VERIZON ENTERPRISE
SOLUTIONS AND VERIZON SELECT SERVICES INC.
ON THE WUTC’S PROPOSED CUSTOMER INFORMATION RULES**

August 12, 2002

Verizon Northwest Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, NYNEX Long Distance d/b/a Verizon Enterprise Solutions, and Verizon Select Services Inc. (collectively "Verizon") submit these comments as requested by the Washington Utilities and Transportation Commission ("WUTC") for its August 20, 2002 hearing on its proposed customer proprietary network information ("CPNI") rules.

INTRODUCTION

The Federal Communications Commission ("FCC") has issued new CPNI rules based on a detailed analysis of an extensive public record and the relevant statutory and constitutional provisions. These rules address the WUTC's concerns by providing strong protections for customers while allowing continued development of new telecommunications services and company-customer

communications protected by the First Amendment. By contrast, the new state rules presently proposed by the WUTC should not be adopted as they contain provisions that are unlawful, would conflict with FCC rules, and would create unnecessary complexity and cost.

Verizon urges the WUTC to not adopt state CPNI rules, or if such rules are adopted, to mirror the FCC's rules. If the WUTC intends to adopt regulations that go beyond the FCC's new rules, it should first publish for comment a mark-up of the FCC rules that clearly shows the additional state requirements the WUTC would be imposing.

DISCUSSION

The FCC's Rules Address the WUTC's Concerns.

The new FCC rules address the WUTC's concerns about the use and disclosure of CPNI for purposes not related to the development and provision of telecommunications services. Carriers are required to obtain "opt-in" customer consent for the use of CPNI for non-communications-related services, including for disclosure to third parties and for joint ventures. *In the Matter of 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*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-115, CC Docket No. 96-149, ¶¶ 50-52 (July 2002) (Third Report & Order). Opt-in

consent is also required for internal use of CPNI for non-communications related services. *Id.* ¶ 52.

Indeed, none of the comments submitted by the public supports opt-in for anything other than the sharing of CPNI with third parties. The public's principal concerns are telemarketing and identity theft, which are addressed in other rules and can be addressed by mechanisms other than restricting the carriers' right to speak with their customers.

Additional State Rules Would Violate the First Amendment.

On appeal, the United States Court of Appeals for the Tenth Circuit invalidated the FCC's original opt-in regime for CPNI because it impermissibly burdened carriers' and consumers' speech, in violation of the First Amendment. Third Report & Order ¶ 26; *U.S. West v. FCC*, 182 F.3d 1224, 1239 (10th Cir. 1999). On remand, the FCC considered whether a "narrowly tailored" and "less restrictive means," such as an opt-out regime, would satisfy FCC concerns about consumer privacy without impermissibly burdening carriers' First Amendment rights. Third Report & Order ¶ 26-30. Using that analysis, the FCC concluded that "an opt-in rule for intra-company use cannot be justified by the record we have before us." *Id.* ¶ 31.

The FCC concluded "that carriers have provided evidence that their commercial speech interest in using a customer's CPNI for tailored telecommunications

marketing is real and significant, and that an opt-out regime is a less burdensome means of obtaining a customer's 'approval' under Section 222(c)(1) than is an opt-in regime." Third Report & Order ¶ 40. Further, the FCC ruled that "an opt-out regime for use of CPNI to market communications-related services directly and materially advances Congress' interest in ensuring that customers' personal information is not used in unexpected ways without their permission, while at the same time avoiding unnecessary and improper burdens on commercial speech." *Id.* ¶ 44.

Any additional state CPNI rules must follow the FCC's analytical framework. Third Report & Order ¶ 72. In particular, when applying the First Amendment standard, more restrictive state rules must be supported and justified by a state record that goes beyond the FCC's record. See *id.* ¶ 71. To impose an opt-in requirement, under the difficult First Amendment standard, a state must be able to demonstrate empirically that the dissemination of CPNI under an opt-out regime would "inflict specific and significant harm on individuals." *Id.* ¶ 28. The record before the WUTC does not meet this standard because it lacks any evidence of real harm to a consumer by a carriers' use of CPNI to target-market telecommunications services.

Violation of Commerce Clause

The WUTC's proposed rules also would violate the Commerce Clause, which prevents states from enacting regulations that impermissibly burden interstate

commerce.¹ Here, the WUTC's proposed regulations would impermissibly burden interstate commerce by forcing Verizon to have a separate marketing system for the State of Washington; this would be costly and ineffective. See, e.g., *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 582 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970).

Even if actual, conflicting duties do not exist currently, the possibility of such conflicts arising from inconsistent state regulations likely will suffice to support the conclusion that the WUTC's rules violate the Commerce Clause. See *TLX v. The Telex Corp.*, 679 F. Supp. 1022, 1031 (W.D. Okla. 1987) (striking down Oklahoma's attempt to regulate corporate voting rights). Moreover, in addition to the burden on carriers imposed in complying with varying state regulations, inconsistent state regulation of CPNI will create customer confusion such that uniform regulation is not only beneficial but necessary. "Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation." *Morgan v Virginia*, 328 U.S. 373, 377 (1946). Because uniformity here is necessary for all carriers with multi-state and interstate operations, inconsistent, individual state regulations will impose unconstitutional burdens on these carriers.

¹ The Commerce Clause, Article I, Section 8, clause 3, of the United States Constitution, states that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." The Commerce Clause also prevents states from enacting laws and regulations that impose excessive burdens on interstate commerce in relation to local putative benefits.

Several of the WUTC's Current Proposed Rules Are Inconsistent With the FCC's Rules.²

The WUTC should not adopt CPNI rules that are inconsistent with the FCC's rules for the reasons set forth above. Nevertheless, in several material ways, the proposed rules conflict with the FCC's rules, imposing unreasonable burdens on carriers.

Call Detail -- Section 480-120-203

As noted by the FCC, Section 222 of the Telecommunications Act of 1996 makes no distinction between "call detail" type CPNI and other types of CPNI. Third Report & Order ¶ 121 & n. 279. Although, the FCC appropriately makes a distinction between communications and non-communications related services in determining whether or not to use the opt-out or opt-in approach, the FCC, declined to "differentiate[] among types of CPNI for the purpose of applying the opt-in/opt-out methodology or other requirements of Section 222." *Id.* ¶ 121.

The FCC reasoned that such a proposal

runs counter to Congress' unambiguous intent in defining all types of customer proprietary network information under one definition of CPNI in Section 222. ***In addition, we are not convinced that carriers would be able to implement such a distinction in their existing customer service, operations support, and billing systems, where facilities information and call detail may reside without distinction.***

Id. ¶ 121 n. 279 (emphasis added). To avoid carrier and customer confusion and to be consistent with federal law, the WUTC should follow the

² See attached chart, which shows how the WUTC and the FCC rules conflict.

same regulatory framework. Hence the WUTC should reconsider differentiating between types of CPNI.

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

These proposed rules are inconsistent with the FCC's rules and its "total services approach," which do not require opt-out approvals for the offering of telecommunications services within the same category (local, long distance and wireless). See Attachment. Besides being subject to preemption, as noted by the FCC, (Third Report & Order ¶ 74), these proposed WUTC rules would be unconstitutional because they would restrict information flow between a carrier and its customers.³ To comply with the proposed rules, Verizon would have to take steps to immediately suspend certain internal uses of CPNI and nearly all outbound marketing activities in Washington, or take legal action to delay the rules' implementation.⁴

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

The FCC has satisfied the WUTC's concerns by implementing a new requirement that carriers notify their customers of their CPNI rights every two years. A state-required annual notice would be unnecessarily intrusive to consumers and would increase operating costs in Washington with no appreciable benefit.

³ Given the lack of evidence in the record, the WUTC cannot prove the state has a substantial interest in protecting privacy by adopting opt-in regulations or an opt-out rule for "in-bucket" marketing.

⁴ The FCC's rules permit the use of CPNI without consent for CPE, voice messaging services and inside wire. §64.2005(b)(1) and (c)(1).

Written Confirmation -- Section 480-120-211

A requirement to provide a customer with written confirmation that he has successfully opted-out is unnecessary. The FCC found that written confirmations are not a beneficial and necessary safeguard. Specifically, the FCC held that it was not going to require “written evidence” of the customer’s approval because there was nothing in the record to suggest that, “carriers are failing to obtain customers’ approval and then claiming to have such approval.” Third Report & Order ¶ 119. (discussing evidence of approval for opt-in and opt-out consent.) Because the carriers bear the burden of demonstrating that approval was given, written confirmation is unnecessary. *Id.* It follows then that if the carrier has the burden of demonstrating consent should an issue arise, there is no need to provide written confirmation to provide the customer with any proof.

Multiple Mechanisms -- Section 480-120-280(2) and 480-120-207(3)

These proposed rules appear to require establishing an 800 number opt-out option, a customer care opt-out option, a mail-back opt-out option, an electronic mail opt-out option, *and* a web site opt-out option, *plus* a postage-paid card opt-out option. And it would prohibit the use of billing envelopes for these purposes if they also contain advertising and promotional material. Each one of these mechanisms requires a carrier to establish internal processes and procedures and to incur costs. These requirements go far beyond what is necessary to care for those customers that choose to opt-out. The FCC’s new rules are sufficient.

Carriers must make available to every customer a method to opt-out that is of no additional cost to the customer and that is available 24 hours a day, seven days a week. Carriers may satisfy this requirement through a combination of methods. This sensible approach should be followed in Washington.

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

This draft rule would require that customers who explicitly authorize their carrier to use their CPNI wait a minimum of three weeks and up to two months before the carrier may act on the authorization. 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 has affirmed that a 30-day waiting period is appropriate for an opt-out process to insure that customers have the opportunity to read and respond to an opt-out notice, it does not require any waiting period for opt-in. The WUTC should not adopt this proposed rule, but should permit a carrier to immediately respond to an opt-in request. This would be consistent with the WUTC's draft rule (480-120-214), which would require that a carrier release CPNI to any person designated by the customer and does not have a time delay requirement.

CONCLUSION

Verizon strongly urges the WUTC not to adopt state CPNI rules, or if such rules are adopted, then to mirror the FCC's rules. Should the WUTC continue to adopt

regulations that go beyond the FCC's new rules, it should first publish for comment a mark-up of the FCC rules that clearly shows the additional state requirements the WUTC would be imposing.

ATTACHMENT

Customer Approval Method Depends on the Type of Information and How the Company Will Use It

| Type of Activity | Type of Information | | |
|---|--|---|--|
| | Call Detail (identifies specific calls) | Other Private Account Information | Current FCC Rules For All CPNI |
| Activities necessary to provide service or to comply with the law | No approval required. | No approval required. | No Approval Required. |
| Inbound customer service and marketing | Oral opt-in, good for duration of call. | Oral opt-in, good for duration of call. | Oral opt-in, good for duration of call. |
| Market new versions of existing services | Opt-in. | Opt-out. | Permitted for "in-bucket" Marketing. |
| Market telecom and telecom-related services | Opt-in. | Opt-out. | Opt-out for "out of bucket." |
| Market non-telecom-related services | Opt-in. | Opt-out. | Opt-in except for CPE and VMS (wireline) and all ISs (wireless) where no approval is required. |